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THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS

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Time was when the students of the physical sciences sought to judge the truth or correctness of any particular statement about a particular physical thing,—plant, heavenly body, or case of chemical change—by assuming that they had already in hand “a general truth with which to compare the particular empirical occurrence.” The assumption was, as John Dewey, from whom I am quoting, puts it, that the human “mind was already in possession of fixed truths, universal principles, pre-ordained axioms” and that “only by their means could contingent, varying particular events be truly known.”¹ So long as this assumption maintained its hold upon men’s minds no real advance in physical science was possible. Modern science really began only when “men trusted themselves to embarking upon the uncertain sea of events and were willing to be instructed by changes in the concrete. Then antecedent principles were tentatively employed as methods for conducting observations and experiments, and for organizing special facts: as hypotheses.”² In the field of the physical sciences, therefore, the deductive method of ascertaining the truth about nature has given way to what is called—perhaps with not entire accuracy—the inductive³ method of modern science, in which the so-called “laws of nature” are reached by collecting data, i.e. by observing concrete phenomena, and then forming, by a process of “trial and error,” generalizations which are merely useful tools by means of which we describe in mental shorthand

¹ John Dewey, *Human Nature and Conduct* (1922) 242.

² *Ibid.* 243.

³ Schuppe, *Erkenntnistheorie* (1894) 52 ff; Montague, *On the Nature of Induction* (1906) 3 *JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD*, 281 ff; Morris R. Cohen, *The Subject Matter of Formal Logic* (1918) 15 *JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD*, 686-687.

as wide a range as possible of the observed physical phenomena, choosing that form of description which on the whole works most simply in the way of enabling us to describe past observations and to predict future observations.⁴

Upon the basis of this second, or experimental,⁵ method the imposing structure of modern physical science has been erected; and the attempt to arrive at the truth about particular events by pure deduction from general principles assumed to be true has been definitely and finally abandoned.

In the field of the social sciences, the same development has more recently been going on. Much of the classical political economy began with the assumption that we were already in the possession of general truths about the nature of man. Starting with the economic man, motivated by a supposed "instinct of acquisitiveness" or desire for "gain" or to realize the "greatest pleasure," the "science" was developed deductively. As in other fields, the results were of little if any value. In recent times the method has been giving way to the experimental one of collecting economic facts and formulating general statements which will describe those facts as accurately and simply as possible.

It is interesting to note that in the field of law we find the same rivalry between the two methods of working, and that this is especially true in the conflict of laws. If we open Dicey's great work, we find that he tells us that the subject has been treated by two methods, which he describes respectively as the "theoretical method" and the "positive method"—which turn out upon examination to correspond exactly to the two methods described above. The "theoretical method," which has been followed chiefly by continental writers, maintains (I quote from Dicey) that "the fundamental principles of private international law can be ascertained by study and reflection, and that the soundness of the rules of law maintained, say in England, as to the extra-territorial recognition of rights, can be tested by their conformity to, or deviation from, such general principles." It follows that "the object of a writer on the conflict of laws is to discover the principles" of the subject, and "starting with some one principle . . . to show how in accordance with the fundamental principle assumed by the writer as the basis of his system"⁶ the specific rules for the decision of concrete cases are or should be reached by all countries.

⁴Karl Pearson, *The Grammar of Science* (1900) 112; Morris R. Cohen, *Mechanism and Causality in Physics* (1918) 15 JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD, 365. On the possibility of different ways of formulating "natural laws," each accurate but differing as to simplicity, see F. R. Moulton, *M. Henri Poincaré* (1912) 20 POPULAR ASTRONOMY, 11-12; and current works upon relativity theories, such as A. S. Eddington, *Space, Time and Gravitation* (1920).

⁵As to the meaning of "experimental" here, see John Dewey (1916) *Essays in Experimental Logic*, *passim*.

⁶Dicey, *The Conflict of Laws* (3d ed. 1922) 18.

As contrasted with this, the "positive method starts" (again I quote from Dicey) "from the fact that the rules for determining the conflict of laws are themselves 'laws' in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced."⁷ As Dicey points out, this is the method followed by Story, and it is the one Dicey himself chose as the basis of his work. Its merit is that (to quote once again from Dicey) "it constantly impresses upon the minds both of writers and of readers the truth of the all-important doctrine that no maxim is a law unless it be part of the municipal law of some given country."⁸

It must however be noted that the writers of neither school have succeeded in adhering consistently to their main point of view. Thus, both Story and Dicey do at times, without being fully conscious of it, revert to the theoretical method which professedly they had abandoned; and on the other hand, no writer of the theoretical school has actually failed to spend a great deal of his time in examining the actual decisions of the country in which he lived and wrote.

So far as the theoretical method has influenced Anglo-American writers, it has done so chiefly in the form of "territorial" theories about law and legal rights. Such writers begin with reflecting upon and establishing to their own satisfaction the general or essential nature of law and legal rights. This leads them to certain general or fundamental principles, supposed to flow from the nature of law and legal rights as thus established. These fundamental principles take the form of general statements as to what,—in view of the essential nature of law and legal rights,—a state or country "can" and "cannot" do in the way of creating rights, duties, and other legal relations. They thus come to think that the conflict of laws "deals with the recognition and enforcement of foreign-created rights,"⁹ or that it has to do with the application of law in space—back of which statements seems to be the assumption (also deduced from the nature of law and legal rights) that for every situation dealt with in the conflict of laws there is always some one and only one "law" which has "jurisdiction," i.e. power, to determine what legal consequences shall be attached to the given situation. They then proceed to determine on this basis what "law" has "jurisdiction" in each group of cases—torts, contracts, property, etc.—and take the position that no other "law" than this appropriate¹⁰ or "proper" law¹¹

⁷ *Ibid.* 19.

⁸ *Ibid.* 20.

⁹ Beale, *Summary of the Conflict of Laws*, in 3 *Cases on the Conflict of Laws* (1902) 501.

¹⁰ Beale, *op. cit. supra* note 9, sec. 41, p. 515:

"Rights being created by law alone, it is necessary in every case to determine the law by which a right is created. The creation of a personal obligation, which has no situs and results from some act of the party bound, is a matter for the law which has to do with those acts. A personal obligation, then, is created by the law of the place where the acts are done out of which the obligation arises. Where acts are done in one State by the procurement of a party who remains

has "jurisdiction." They also draw the conclusion that when a given right or other legal relation has been validly created by the appropriate law, its validity "cannot" be called into question anywhere.¹²

In the present discussion it is proposed, instead of following the *a priori* method, to adopt the procedure which has proved so fruitful in other fields of science, viz. to observe concrete phenomena first and to form generalizations afterwards. We shall therefore undertake to formulate general statements as to what the "law" of a given country "can" or "cannot" do in the way of attaching legal consequences to situations and transactions by observing what has actually been done. In making our observations we shall, however, find it necessary to focus our attention upon what courts have *done*, rather than upon the description they have given of the reasons for their action. Whatever generalizations we reach will therefore purport to be nothing more than an attempt to describe in as simple a way as possible the concrete judicial phenomena observed, and their "validity" will be measured by their effectiveness in accomplishing that purpose. In other words, they will be true in so far as they enable us to handle effectively the concrete materials with which we must deal.

For convenience, I shall start with so-called "jurisdiction" over crime, for here we find some striking illustrations of results of *a priori* thinking. We are told—the accuracy of the statement is not entirely clear—that at one period in the development of English law, a murderer could not be punished unless both the blow and the death took place in the county in which the prosecution was brought.¹³ The difficulty seems

in another State, the acts being actually performed by an agent, the obligation is created by the law of the place where the agent acts."

Sec. 47, p. 517:

"A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere. And a right to land which has accrued will be recognized as valid though the territory is afterwards annexed to a country where the right could not be created. And so a body created as a corporation in one State must be recognized as such in another State. This is true even though the right so created is absolutely illegal in the other State. Thus, a polygamous or incestuous marriage contracted in a State where it is valid must be recognized as a legal status of that kind even in a State where it is illegal; though it need not be treated as a so-called "Christian" marriage would be. It is merely recognizing a foreign fact (sec. 4). This doctrine, though obvious, has not been universally recognized. And there is good authority for the doctrine that if the marriage is against universal notions of decency because between very near relatives it will not be recognized as a possibly legal marriage anywhere. A slave for the same reason must be recognized as such even in a free State. It is true that if a slave comes into a free State he cannot be restrained by his master; not because he ceases to be a slave, but because in such a State there is no right in a master to restrain a slave." Cf. Beale, *Treatise on the Conflict of Laws* (1916) 168-169.

¹² Minor, *Treatise on Conflict of Laws* (1901) seeks to find the "proper law" for each transaction, this being deemed to depend upon the "situs" of the "transaction."

¹³ See passage quoted from Beale, *op. cit. supra* note 10.

¹⁴ See discussion of the old law in *Commonwealth v. Macloon*, cited *infra*, note 16.

to have been connected with the fact that the early triers of fact answered of their own knowledge and without testimony of witnesses, and therefore could not know both who struck the blow and that the death had happened unless both events occurred in the county.¹⁴ This rule was changed, or at least the doubt as to the law settled, by statute in the reign of Edward VI¹⁵ so as to give jurisdiction to the county in which the death occurred. It is interesting to find this common-law rule, introduced originally apparently for purely practical reasons, later erected into an immutable "principle" of "jurisdiction," based on arguments as to the territorial nature of law. In *State v. Carter* (1859, N. J. Sup. Ct.) 3 Dutcher, 499, the blow was struck in New York; the death occurred in New Jersey. The decision of the New Jersey court was that that state had no jurisdiction, and could have none. The argument was that as no "act" of the accused took place in New Jersey, that state could not attach any legal consequences to the accused's conduct; that that must from the nature of things be done only by the state where the "act" took place. The court said:

"Here no act is done in this state by the defendant. He sent no missile, or letter, or message, that operated as an act within this state. The coming of the party injured into this state afterwards was his own voluntary act, and in no way the act of the defendant. If the defendant is liable here at all, it must be solely because the deceased came and died here after he was injured. Can that, in the nature of things, make the defendant guilty of murder or manslaughter here? . . . An act, to be criminal, must be alleged to be an offence against the sovereignty of the government. This is of the very essence of crime punishable by human law. How can an act done in one jurisdiction be an offence against the sovereignty of another? All the cases turn upon the question where the act was done. The person who does it may, when he does it, be within or without the jurisdiction, as by shooting or sending a letter across the border; but the act is not the less done within the jurisdiction because the person who does it stands without."

The thing which to the New Jersey court seemed impossible was accomplished by the Supreme Court of Massachusetts in *Commonwealth v. Macloon*,¹⁶ where Massachusetts law was applied to a murderer where the death had occurred in Massachusetts although the blow was struck on a British merchant ship on the high seas. So far as I can discover, the validity, as distinguished from the expediency, of the action taken by the Massachusetts court has never been successfully challenged, either as a violation of international law or of the constitutional law of

¹⁴ It seems that it was supposed the difficulty was surmounted by taking the dead body back into the county in which the blow was struck. See opinion in *Commonwealth v. Macloon*, cited, *infra*, note 16.

¹⁵ (1548) 2 & 3 Edw. VI, c. 24.

¹⁶ *Commonwealth v. Macloon* (1869) 101 Mass. 1. The fact that the decision in this case is based on a statute does not affect the argument as to the "power" of the state.

the state or nation.¹⁷ If then, we base our generalizations as to the "jurisdiction,"—the power of a state or country to attach legal consequences to groups of fact—upon observations of what has been and is being done, we may, I think, conclude that a state or country, if it deems it wise to do so, can punish people on whom it can lay its hands for "acts" done in other states or countries, at least where some "result" of the act takes place within the state or country in which the prosecution is had.¹⁸

In the developed system of the criminal law in this country, it became the orthodox rule to deny "jurisdiction" to punish crime to the courts of the state in which the physical motion of the accused's body took place, unless also that motion "took effect" within the same state, i.e. unless the force set in motion by the actor came into contact with the person injured within the state. "Jurisdiction" to punish was given, on the other hand, to the state in which the actor's bodily movements "took effect," even though the physical motion, the "act" in that sense, of the accused, occurred in another state.¹⁹ This result was sometimes expressed by the statement that the "act" was "in contemplation of law, done" in the state where it "took effect." The rule of law applied to define the crime was accordingly that of the state thus given "jurisdiction," for in the field of criminal law no one has ever supposed that a state or country ever enforced any law but its own.

The use of the word "jurisdiction" in stating this rule, coupled with notions previously referred to—as to the inherent nature of law and its territorial operations—similar to those expressed in *State v. Carter*,²⁰ are likely to lead a writer or judge who, consciously or unconsciously, is following the theoretical or *a priori* method, to the conclusion that only the state where the force comes into contact with the person injured can from the "nature of things" have "jurisdiction." They therefore proceed to deny "jurisdiction" to apply its law to the state in which the bodily movements of the actor took place.²¹ If all that is meant by such statements is that according to existing rules of positive law the courts of the state in which the actor's bodily movements take place are not authorized to deal with the situation, well and good. But if, as is sometimes the case, this rule of positive law is interpreted as expressing some inherent or immutable principle limiting the "jurisdiction," i.e. the power, of the state concerned to authorize its courts to deal with the situation and apply its law to the offender, so that any attempt of the

¹⁷ A number of the cases are collected in *State v. Hall*, cited *infra*, note 22.

¹⁸ The word *power* as applied to a "sovereign" cannot mean *legal power*, for the sovereign is the law-giver and by hypothesis not subject to law. If international law exists as *law*, it necessarily means that states (in the international sense) are not really "sovereign" in the full sense of that term.

¹⁹ May, *Criminal Law* (3d ed. 1905) secs. 79-80.

²⁰ (1859, N. J. Sup. Ct.) 3 Dutcher, 499.

²¹ *United States v. Davis* (1837, C. C. D. Mass.) 2 Sumn. 482, Fed. Cas. No. 14, 932; and other cases cited by May, *op. cit. supra* note 19, at p. 82, note 3.

state so to do is necessarily void, I for one cannot follow the argument. The reason why I cannot is that I find states actually doing the supposedly impossible thing, and doing it without successful challenge by anyone.

Before examining cases in which the impossible has been accomplished, let us note the practical reasons why it has been attempted. In *State v. Hall*²² the accused had stood on the North Carolina side of the state line and shot into Tennessee. The bullet struck and killed the deceased in Tennessee. It was held that in the absence of a statute the accused could not be punished in North Carolina, since "in legal contemplation" the "killing" took place in Tennessee. The court quoted with approval the following passage from an opinion in a Georgia case:²³

"Of course, the presence of the accused within this State is essential to make his act one which is done in this State; but the presence need not be actual. It may be constructive. The well established theory of the law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. Thus, a burglary may be committed by inserting into a building a hook, or other contrivance, by means of which goods are withdrawn therefrom; and there can be no doubt that, under these circumstances, the burglar, in legal contemplation, enters the building. So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes."²³

But in *State v. Hall*²⁴ the same court held that although Hall had been "constructively" absent from North Carolina and "present" in Tennessee at the time of the "killing,"—and, I am tempted to add, had "constructively returned" to North Carolina as soon as he had accomplished the purpose for which he constructively accompanied the bullet into Tennessee,—such constructive conduct did not make him a fugitive from justice so as to authorize his surrender to the authorities of Tennessee, as that required actual and not merely constructive presence and flight.

Fortunately courts have recognized that the absurd and socially bad result reached in these cases is not due to inherent lack of power on the part of our states, but merely to the operation of certain rules of positive law. They have therefore never, so far as I am aware, doubted the validity of legislation giving authority to punish to the courts of the state in which the accused was and in which he actually moved his body, even though the results of such bodily action take place beyond the territorial limits. As we all know, statutes are common which provide—I am quoting the substance of the New York law—that the courts of the state shall have power to punish anyone who "within the state commits any crime, *in whole or in part.*" This was held in *People v.*

²² (1894) 114 N. C. 909, 19 S. E. 602.

²³ *Simpson v. State* (1893) 92 Ga. 41, 43, 17 S. E. 984, 985.

²⁴ (1894) 115 N. C. 811, 20 S. E. 729.

*Zayas*²⁵ to authorize the punishment in New York of any who in that state made false pretenses but obtained the property in Pennsylvania. Speaking for the court, Mr. Justice Seabury said:

"The reversal could be sustained upon either of two grounds, viz., first, that the acts alleged constitute a crime under the law of this state, or, second, that the acts alleged considered in connection with the law of the state where the crime was consummated, constitute a crime We are now called upon to determine upon which of these grounds our decision should rest, and I think that we should place our judgment in this case on the ground that the acts alleged constitute a crime under the law of this state without regard to the law prevailing in the state where the crime was consummated."²⁶

For our present purposes, it is not material which view is taken. It is clear from the case, and from similar cases which can be cited,²⁷ that the state in which the human action takes place can if it so wishes authorize its courts to apply its criminal law to the situation, even though the results of the action in the way of injury to others occur outside the territorial limits. It is equally clear from our preceding discussion, that the state where the act takes effect can apply its law.

On the basis of actual observation of what courts have done and are doing, then, I think we may safely make the following generalization: Where A in state X sets a force in motion which injures B in state Y, and B goes to and as a result of the injury dies in state Z, either X, Y, or Z, if it can get its hands on A, can apply its own criminal law to the case. What each will do will depend solely upon its own positive law, common or statutory—and not upon any inherent principles of "jurisdiction" limiting its powers. Its choice therefore will have to be purely pragmatic—as to what, all things considered, it is desirable to do.

If we assume that none of the facts which go to make up the alleged crime—human action and results—took place in the state or country seeking to punish the actor, does that state or country necessarily, i.e. because of territorial limitations to which all "law" is subject, lack "jurisdiction"? Note that the question is not whether, according to the existing positive law in the state or country concerned, its *courts* are authorized to punish, but the broader one of the "jurisdiction" of the so-called "sovereign," the law-giver, to authorize its judicial and other officers to deal with the situation. It is perhaps a common notion in the Anglo-American countries that such inherent limitations do exist, and it may well be that some of the rules of our existing positive law have taken their present shape under the influence of such ideas.²⁸

²⁵ (1916) 217 N. Y. 78, 111 N. E. 465.

²⁶ Cuddeback, J., concurred in the result but not in the reasoning.

²⁷ *People v. Botkin* (1901) 132 Calif. 231, 64 Pac. 286, is an example.

²⁸ See discussion in such cases as *State v. Knight* (1799, N. C.) 2 Haywood, 109; *Hanks v. State* (1882) 13 Tex. App. 208; and the quotations in the opinion in the latter case from Cooley, *Constitutional Limitations* (4th ed. 1883) 154-155. This was the view asserted by the United States in *Cutting's Case*, 2 Moore, *International Law Digest* (1906) 228.

Nevertheless, there seems to be no logical foundation for such a limitation. Suppose England were to enact a law providing that all persons who anywhere in the world commit what would if done in England amount to unlawful homicide, shall, if found in England, after due trial and conviction be separated from the rest of the community by being sent to jail; what—aside from some positive rule of international law, recognized as binding by the civilized nations—would interfere to prevent the carrying out of the law? Whether laws of this kind would be desirable or practicable is not the question—although much can be said and is being said by a number of continental writers in favor of such a system.²⁹ Aside from questions of practicability in execution, it seems to be in keeping with the idea that the object of the criminal law is not to satisfy the thirst for revenge but rather to protect society from persons whose overt conduct reveals dangerous and anti-social tendencies.³⁰ If, with Holmes, we say that “the prophecies of what courts will do in fact, and nothing more pretentious” are what we “mean by law,”³¹ and, given a statute like that suggested above, we can prophecy that if X kills Y in China or anywhere else on the planet certain English officials—judges and others—will, if they can get hold of him, deal with him just as though he had done the killing in England, must we not say that English “law” applies to determine for England and English officials the legal consequences of acts and results, all of which happen abroad? Whether existing international law forbids such action by England is, I repeat, another question. I venture to suggest that a study of continental law and legal writing will reveal that there exists no consensus of opinion among the civilized nations of the world which forbids laws of the kind under discussion, and that very possibly when the matter does come up internationally, the rule will probably be settled in favor of recognizing the jurisdiction of countries to do this very thing if they so wish. It would seem that only a clinging to the crude and primitive idea that the sole object of the criminal law is “punishment” for an “offence” against the “sovereign” could lead to the opposite conclusion.³² It seems also that

²⁹ See 2 Travers, *Le Droit Pénal International* (1920) 199 ff. The “cosmopolitan” principle has been accepted farthest by Austria, Italy, Norway and Russia, according to Meili, *Lehrbuch des Internationalen Strafrechts und Strafprozessrechts* (1910) 183. Grotius apparently was the first to advocate the principle. 2 *De Jure Belli et Pacis*, c. 20, sec. 40. Consult also 1 Binding, *Handbuch des Strafrechts* (1885) 379, note; 2 Carrara, *Programma del Corso di Diritto Criminale* (8th ed. 1897) 1040 ff.

³⁰ The protection may consist simply in segregating the “offender,” or, where that seems practicable, in “reforming” him.

³¹ Holmes, *Collected Legal Papers* (1920) 173. The word “courts” should include some other more or less similar officials.

³² Cf. Holmes, *op. cit. supra* note 31, at p. 189, citing Havelock Ellis, *The Criminal* (1890) 41.

as a matter of fact some continental systems already go a long way toward embodying in their criminal jurisprudence this "cosmopolitan" theory of criminal justice.³³ Whether similar laws passed by American states would violate the "due process" clause is of course a still different question, upon which also no opinion is offered at this place, other than to say that apparently only a blind following of unsound territorial notions would lead to the conclusion of unconstitutionality as distinguished from social desirability.

Suppose now we put the same case of wrongful death, involving the three states X, Y, and Z and inquire first as to the powers of X, Y, and Z respectively to determine the legal consequences of the situation in the way of an action for wrongful death on behalf of B's dependents. Can there be any rational doubt that either X, Y, or Z can if it so wishes apply its law in determining the civil as well as the criminal liability of A? It would seem not. If this conclusion is sound, it becomes obvious that there is no universal or inherent principle of "jurisdiction" which can be used in testing the "validity," "soundness," or "correctness" of decisions by courts in X, Y, or Z, in which they choose one "law" rather than another as the basis for deciding a case of the kind under consideration. It is of course common to say that the "common-law" rule is, to apply the "law" of the place where the "act claimed to be a tort was committed."³⁴ This is usually interpreted to mean, the place where the force set in motion by the actor "took effect," i.e. first came into contact with the person or property injured, or "where the injury happened."³⁵ Note that the first form of statement gives to the word "act" an arbitrary and unnatural meaning, for it excludes as part of the "act" the physical motion of the actor's body and includes only a certain limited portion of the results of such action. In our hypothetical case of wrongful death involving the three states, the "act" would, according to this way of stating the rule, consist solely of the contact of the bullet with B's person in state Y and would not include A's bodily motion in X or the resulting death in Z. If we note that the alleged tort consists of the totality of all these physical events—a com-

³³ See note 29, *supra*.

³⁴ 3 Beale, *op. cit. supra* note 9, sec. 86. The language in the cases is not at all clear-cut. See *LeForest v. Tolman* (1875) 117 Mass. 109, one of the two cases cited by Professor Beale for his statement, in which "the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts." Gray, C. J., said: "The act which is the cause of the injury . . . must be actionable or punishable by the law of the place in which it is done The wrong done consists not in the act of the master in owning or keeping or neglecting to restrain the dog, but in the act of the dog for which the master is responsible The injury for which the plaintiff seeks to recover having taken place in New Hampshire" [the New Hampshire law applies]. Note that nowhere does Gray, C. J., say expressly that the master's act took place in New Hampshire.

³⁵ *LeForest v. Tolman*, *supra* note 34.

plete statement would doubtless include A's state of mind when he acted in X—we see clearly and at once the arbitrary nature of the attempt to give "jurisdiction" solely to Y and to deny to X or Z *power* to determine whether or not this group of events shall as a whole give rise to a duty to compensate B's dependents. The "common-law" rule, however convenient it may be, thus appears for just what it is—simply a rule of positive law, having had its origin possibly, in part at least, in grounds of supposed logic, but to be defended to-day entirely on the basis of social convenience and practical expediency. Perhaps all that can be said for it is that it is at least as good as any other, and that as we already have it, we should stick to it.³⁶

Suppose, in order to make our problem somewhat more concrete, we assume that state X has no wrongful death statute; that Y has a "penal" statute like that in Massachusetts;³⁷ and that Z has a compensatory statute like that in many states.³⁸ Suppose farther that the action—B's dependents against A—is brought in the courts of X. If our conclusions down to this point are sound, X has "jurisdiction" to apply its own "law" to the case, and is not bound to apply any other state's law. This does not mean, however, that it will necessarily apply the same rule that it would have applied to a purely domestic case, i.e. one in which all the facts—actions of A and resulting injury to and death of B—had occurred in X. For the court in X is confronted with a problem in the conflict of laws, and it may well choose the rule found in Y's law, or that found in Z's law. In fact, in cases of the kind under consideration, involving wrongful death, there is some authority for choosing the rule of the place where the death occurs, rather than where the bullet struck the deceased, the argument perhaps being that the "injury" to B's dependents, as distinguished from B, arises only upon the death.³⁹ Other cases apply the rule of the place where B receives the injury.⁴⁰ As either result is equally possible, so far as "jurisdic-

³⁶ Holmes, *op. cit. supra* note 31, at p. 239:

"Indeed precisely because I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle, I am slow to consent to overruling a precedent, and think that our important duty is to see that the judicial duel shall be fought out in the accustomed way."

³⁷ By that statute damages are to be "assessed with reference to the degree of . . . culpability," in amount not less than \$500 and not more than \$10,000. Mass. Rev. Laws, 1902, ch. 171, sec. 2, as amended by Laws, 1907, ch. 375, reprinted in *Loucks v. Standard Oil Co. of New York* (1918) 224 N. Y. 99, 120 N. E. 198.

³⁸ That is, damages are to be estimated according to actual loss inflicted on the dependents of the party killed.

³⁹ *Hoodmacher v. Lehigh Valley R. R.* (1907) 218 Pa. 21, 66 Atl. 975, criticized in (1907) 21 HARV. L. REV. 143, as "unsound" because "the real cause of action is the infliction of the injury"—whatever that may mean.

⁴⁰ *Rudiger v. Chicago, St. P. M. & O. Ry.* (1898) 94 Wis. 191, 68 N. W. 661, and (1907) 21 HARV. L. REV. 143.

tion" is concerned, we shall have to choose on some basis other than that of "power."

Suppose now that in our hypothetical case of the wrongful death, the action is not brought in X, Y, or Z, but in the courts of a fourth state, Q. The writers of the theoretical school have, as I have indicated, sought to answer this by picking out the one state having, according to their notions, power to deal with the case, and arguing that Q must "enforce" the "foreign right" created by the "law" of the state so chosen. If the views here set out are sound, Q's task is not so simple, for all three states, X, Y, and Z, have "jurisdiction." Which one shall Q choose, and why? Suppose in investigating the actual decisions we were to find that Q has chosen Y's rule, and that R has chosen Z's rule:⁴¹ which decision would "on principle" be erroneous? Obviously, we can no longer turn the crank of the logical machine and produce the answer ready-made, for no single state has exclusive jurisdiction; there is no single foreign right to recognize and enforce.

Before proceeding farther, we must take note of an ambiguity in the word "law" involved in the question as usually asked: Shall Q apply X's "law," or Y's "law," or Z's "law"? This ambiguity is often overlooked. If, for example, we say that Q is to "apply the law of Z," do we mean that Q is to decide the case, with its factual elements involving X, Y, and Z, in exactly the same way that the courts of Z would decide it? That is, do we mean that the court in Q is to find out whether or not the courts of Z would give *these plaintiffs* (B's dependents) a judgment against *this defendant* (A) if the action had been brought there? That is of course just what some territorialists have said, for they deny to Q any "jurisdiction" to determine the legal consequences of events all of which have occurred beyond the territorial limits. To carry out their theory, they therefore are compelled to give to "law" the suggested meaning. Note the consequences of doing so: the court in Q is compelled to study the decisions of the courts in Z upon the conflict of laws, for, be it noted, a suit by B's dependents against A in the case supposed will wherever it is brought present a problem in the conflict of laws. If the court in Q were to examine Z's decisions on the conflict of laws—assuming Q had decided to apply Z's "law" applicable to this very case—it might well find that those decisions would say, "This case is governed by the 'law' of Y, since the injury and not the death is the cause of action." Q would therefore find itself sent on to Y. If now the word "law," in the statement quoted from the hypothetical opinion of the court in Z, again means that Z would decide the very case exactly as Y's courts would, it is logically conceiv-

⁴¹ The word *rule* is substituted for the word *law* in the above statements, for, as I attempt to show more at length later, it is believed that the rule thus adopted by the forum from the foreign system of law is "enforced" as a rule of the "law" of the forum and not as foreign "law."

able that Q would find itself sent back by Y to Z, on the ground that the death happened there and that therefore Z's law should govern.

This of course is not what happens. The reason is that, probably without being fully conscious of the logic involved, Anglo-American courts have refused to adopt the "*renvoi*." The escape is actually due to a refusal to give to "law" the meaning that leads to these difficulties, i.e., a refusal to mean by it that Q is to decide the case exactly as Z would. Do courts really so refuse? If we examine carefully into judicial phenomena, I think we shall find that (except in a few cases to be noted later) they do, even if their loose language belies their action. What do they do? It seems that actually they content themselves with finding out what decision would be rendered by some foreign court (with whose state or country the facts are in part connected) in a suit similar to the one under consideration, but differing in one, for our purposes vitally important, respect, viz. that it involves for the foreign court a situation purely domestic, with no foreign element.

If this is what really happens, note the result: the court in Q would not, in the case supposed, inquire into the conflict of laws cases of X, or Y, or Z, but would content itself with finding out how each one of these states would decide a case involving a similar but (for it) purely domestic group of facts. Moreover, the court in Q as the result of such an inquiry would not know how X, or Y, or Z, would decide this case now before it, of B's dependents against A, i.e. it would be totally ignorant of whether there were or were not foreign-created rights for it to recognize and enforce. If it nevertheless gives the plaintiffs a judgment, can we accurately describe that action otherwise than by saying that the right so enforced is a right created by the law of Q and not a foreign-created right?

The view outlined may be stated as follows: 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 some 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 decision which the given foreign state or country would apply, not to this very group of facts now before court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element*. The rule thus incorporated into the law of the forum may for convenience be called the "domestic rule" of the foreign state, as distinguished from its rule applicable to cases involving foreign elements. The forum thus enforces not a foreign right but a right created by its own law.

The exceptions to the foregoing statement seem to fall into two classes. The first includes those cases in which the facts involved are all, from the point of view of the foreign state, purely domestic facts. Here the

rule of decision adopted into its law by the forum is normally identical in scope with, or at least highly similar to, the rule of decision which the foreign state would apply to the very case before the forum. A simple example is an action in state X for an alleged tort committed wholly in state Y, the parties concerned being all citizens of and domiciled in state Y. The second class includes cases in which on grounds of practical expediency the forum decides to apply as its rule of decision the rule which the foreign court would have applied, not to a (for it) purely domestic case, but to this very case if it had been brought there. Obviously the rule so selected is the one indicated by the rules of the conflict of laws in force in the foreign state. An example is the case of *Ball v. Cross*.⁴² Note, however, that even in these exceptional cases it is not the foreign "law" or "right" that is enforced, but that the law of the forum adopts as its law a rule of decision reaching the same, or at least a highly similar, result to that reached by the foreign law.

Professor Beale enunciates in the first part of his *Treatise on the Conflict of Laws* a territorial theory of law which, if I understand it, furnishes the logical basis for this position. He says:

"If by the national law the validity of a contract depends upon the law of the place where the contract was made, then that law is applied for determining the validity of a contract made abroad, not because the foreign law has any force in the nation, nor because of any constraint exercised by an international principle, but because the national law determines the question of the validity of a contract by the *lex loci contractus*. If it were really a case of conflicting laws, and the foreign law prevailed in the case in question, the decision would be handed over bodily to the foreign law. By the national doctrine, the national law provides for a decision according to certain provisions of the foreign law; in the case considered, according to the foreign contract law. The provisions of this law having been proved as a fact, the question is solved by the national law, the foreign factor in the solution—i.e. the foreign contract law—being present as mere fact, one of the facts upon which the decision is to be based. To explain the territorial theory in other terms, all that has happened outside the territory, including the foreign laws which have in some way or other become involved in the problem, is regarded merely as fact to be considered by the national law in arriving at its decision, and to be given such weight in determining the decision as the national law may choose to give it."⁴³

If I am right in my interpretation of this passage, the territorial theory set forth in it seems to be a thoroughly sound one, by which I mean merely that it is an accurate general description of what courts have done and are doing in dealing with cases in the conflict of laws.

The distinction between the commonly accepted view and that here set forth may be made clearer if we examine a case from the field of

⁴² (1921) 231 N. Y. 329, 132 N. E. 106. See COMMENTS (1921) 31 YALE LAW JOURNAL, 191, for discussion of that case.

⁴³ Beale, *Treatise on the Conflict of Laws* (1916) 106.

contract law. From the abundance of illustrative material, let us select the familiar case of *Milliken v. Pratt*.⁴⁴ W, a married woman, domiciled in Massachusetts, in that state signed and gave to H, her husband, an offer addressed to P, offering to guarantee payment by H for goods to be sold by P to H. The offer was for a unilateral contract, the acceptance to be the shipment of the goods from Maine. H sent the latter by mail to P in Maine, who there received it and accepted by shipping the goods from that state. W was sued by P in Massachusetts. The usual way of stating the problem is, that by the "law" of Massachusetts W lacked capacity to bind herself by such an agreement, but that by the "law" of Maine she had capacity; and the result is usually stated in the same terms, viz. that the Massachusetts court held that as the contract was made in Maine, the "law" of Maine was to be applied in determining W's capacity to bind herself. That this is the usual way in which courts and writers describe such cases cannot be denied, and it will perhaps do well enough if we do not misinterpret it, although personally I hope some day to see a more accurate terminology come into general use. If I am right about it, properly interpreted this does not mean that Massachusetts recognized and enforced a "right created by the law of Maine." Statements that it did so of course are not wanting.⁴⁵

First let us notice that the usual way of stating the problem cannot be taken literally. If the statement that "by the law of Massachusetts W lacked capacity to bind herself" means that by that law *this married woman W* lacked capacity to bind herself *by this transaction to this P in Maine*, we need go no farther; the case is decided for a Massachusetts court. The statement thus literally interpreted means that under Massachusetts law this defendant W is not bound to this plaintiff P; but that is just what we are trying to find out and by hypothesis do not know. If the statement means anything, it must therefore not be taken literally. *What we really start with is a knowledge of the Massachusetts law applicable not to this W but to another W, in a hypothetical case similar to this but differing in that all the facts are, so to speak, Massachusetts facts.* In other words, all we know is the Massachusetts "domestic rule," using that phrase in the sense already defined.

Is the statement—made, be it noted, in stating the problem raised by the case—that "by Maine law W had capacity to bind herself," to be interpreted differently? We may give it a literal meaning, but I venture to think that that is wrong, in the sense that it does not describe accurately what the Massachusetts court knew. Let us look at the facts. Did the Massachusetts court really know at the outset—when stating the problem for solution—what rights this plaintiff would have been recognized by the Maine courts as having against this defendant? Note

⁴⁴ (1878) 125 Mass. 374.

⁴⁵ Cf. 3 Beale, *op. cit. supra* note 9, at p. 540, sec. 87.

that for the Maine court as well as for the Massachusetts court this case presents a problem in the conflict of laws. Note also that merely by knowing that Maine has a statute "removing the disabilities of married women" we do not know how a Maine court would deal with a Massachusetts woman all of whose acts⁴⁶ took place in Massachusetts, even though her letter was read and acted upon by a Maine plaintiff in Maine. To know how a Maine court would decide *this very case* involves necessarily a study of the Maine rules as to the conflict of laws. I find no evidence that the Massachusetts court had such knowledge *either when it stated the problem before it or later when it decided the case*. I find no evidence that it ever tried to get it. The evidence as found in the opinion is collected in the note below.⁴⁷ Had the Massachusetts court embarked upon this arduous and perilous adventure (of trying to learn how the Maine court would treat this married woman domiciled in Massachusetts, and whose only actions were done there), it might have found—treating Maine for the moment as a name standing for any other state than Massachusetts—that the supreme court of the other state would say that its statute removing the disabilities of married women applied only to married women domiciled in its own state⁴⁸ or to married women entering into agreements while actually within the state, or that the capacity of a married

⁴⁶ "Acts" here means *actions* as distinguished from consequences or *results* of action.

⁴⁷ All that the report of the case gives is a statement of the Maine statute ("the contracts of any married woman, made for any lawful purpose, shall be valid and binding, and may be enforced in the same manner as if she were sole"), and the following: "The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person," at p. 376. The Massachusetts court then cites as authority for these statements one and only one Maine case—*Mayo v. Hutchinson* (1869) 57 Me. 546. *That case was a purely domestic one*, raising no question of the applicability of the statute to cases involving foreign elements. It therefore furnishes no basis for a conclusion as to the Maine law applicable to W in the principal case. Similarly, in supporting its statement that the Massachusetts law did not at the time W acted allow "a married woman" to make a suretyship contract, the Massachusetts court cites a single case—*Nourse v. Henshaw* (1877) 123 Mass. 96. That also involved a purely domestic (Massachusetts) group of facts.

⁴⁸ The real question would be, shall the Maine statute be construed to cover: (1) only Maine married women (women domiciled in Maine); or (2) any woman actually acting in Maine; or (3) any woman so acting or who sends an agent (in the ordinary sense of that term) into Maine to act for her—see *Freeman's Appeal* (1897) 68 Conn. 533, 37 Atl. 420; or (4) all such and married women actually acting in other states who by post send offers to Maine which are received and read there and acted upon there? This list of possible interpretations is not exhaustive, but merely suggestive. Compare, for example, the variety of views as to the construction of statutes requiring the filing of chattel mortgages and conditional sale contracts and their application to contracts made in other states.

woman to contract is governed by the "law" of her domicile,⁴⁹ or some other "law."⁵⁰ Note that if, on finding that the cases in the other state said that the capacity of W was to be settled by the "law" of her domicile, the Massachusetts court were to interpret "law" to mean the rule which W's domicile (Massachusetts) would apply to *the very case*, it would become involved in a discussion of the interesting game of international lawn tennis known as the "*renvoi*."

If, as seems clearly to be the case, the Massachusetts court in fact contented itself with ascertaining the Maine "domestic rule," applicable to a purely Maine group of facts, it could not of course know whether by the law of Maine this defendant W was under a contractual duty to this plaintiff P or not, and so could not know whether there was a Maine-created right for it to enforce. What the Massachusetts court did in *Milliken v. Pratt*, what other courts have done in other cases in the conflict of laws, is of course purely a question of fact, to be ascertained, like any other fact, by observation. My observations lead me to believe that—except in the cases previously referred to—Anglo-American courts have contented themselves with ascertaining the "domestic rule" of the foreign country, and that they are likely to continue to do so for the reason that any other course will as a rule land them in endless difficulties. If my observations of fact have been accurate, must we not say that in *Milliken v. Pratt* all that the Massachusetts court did was to adopt as the Massachusetts law a rule of decision identical in scope with the Maine "domestic rule"? If so, it follows that we must say that it neither applied Maine "law" nor "recognized and enforced a Maine-created right," as such, and that what it did do was to apply to the case before it the Massachusetts law and so to enforce a Massachusetts-created right.

The difference between the two views is not merely one of words, as some perhaps may suppose. The two ways of stating the matter lead

⁴⁹ *First National Bank v. Shaw* (1902) 109 Tenn. 237, 70 S. W. 807, and cases cited in Lorenzen, *Cases on the Conflict of Laws* (1909) 231, note 2. In this Tennessee case the Tennessee married woman signed negotiable notes in that state, but they were negotiated and delivered in Ohio and payable in Ohio. The Tennessee court held that although the contract was "made" (consummated) in Ohio, the defendant's capacity was governed by the Tennessee "law." It is quite probable that the Massachusetts court would have decided *Milliken v. Pratt* the same way, had it not been for the fact that before the suit was brought the Massachusetts legislature had changed the Massachusetts "law" so that it was the same as the Maine "law." This change in the Massachusetts law was mentioned in the opinion and obviously played a large part in the actual decision.

⁵⁰ In *Poole v. Perkins* (1919) 126 Va. 331, 101 S. E. 240, the note in question was signed in Tennessee by a married woman domiciled there, but payable in Virginia. The forum was Virginia and all parties were domiciled there at the time of the action. Held, that the Virginia "law" (rule) governed, as that was the law which the "parties presumably intended to govern." Cf. *Burr v. Beckler* (1914) 264 Ill. 230, 106 N. E. 206; Ann. Cas. 1915 D, 1132; and see note on the general question in L. R. A. 1916 A, 1054.

to differences of result in the actual decision of cases. This is strikingly illustrated by the very recent case of *Guinness v. Miller* (1923, S. D. N. Y.) 291 Fed. 769, in which Judge Learned Hand adopted a view like that here advocated. The plaintiff in that case was a citizen suing to recover a debt owed by a German on a stated account payable in Germany in marks. The sole question was, whether the decree should be for the value in dollars of the marks when the account was stated, December 16, 1917, or for their value as of the date of the decree. In a remarkably illuminating opinion Judge Hand said:

"In the case of tort committed in a foreign jurisdiction it is pretty clear that the judgment should be based on the exchange at the time of the loss inflicted. In such cases we are familiar with the idea that his wrong imposes on the tort-feasor an obligation to indemnify his victim in money. A court of the sovereign where the tort occurs enforces this obligation in the money of that sovereign, regardless of its change in value, merely because those are the terms in which it is cast. When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. And, if this were true, it would seem to follow that the obligation should be discharged in the money of the sovereign in whose territory the tort occurred, and that the proper rule would be to adopt the rate of exchange as of the time of the judgment.

"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. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But since, apart from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose; that is, when the loss occurred. Hence a foreign court is as little concerned with the changes in the value of money in the territory where the tort arose as are the courts of that territory itself. Each court is enforcing a different obligation, imposed by different sovereigns, necessarily defined in the terms of its own money. . . . There is, in my judgment, no sound basis for distinction between torts and contracts to pay fixed sums of money. The confusion arises from the assumption that payment after the due date is performance. But that appears to be untrue. A promise to pay a sum at a given day is not a promise to pay then or later. When the promisor defaults, he fails to perform the only promise he has made, and his liability is as much a new creation of the law as though he had failed to deliver a chattel; or, if it be insisted that his liability is an alternative performance, still that performance is not to pay at any later time, but generally to indemnify the promisee, subject, of course, to the limitations imposed by law. That liability is, as it seems to me, quite analogous to the obligation to indemnify raised upon a tort, and the same reasoning should apply to it. A foreign sovereign will raise an equivalent obligation, but couched in terms of its own money, because that alone it has the power to secure.

"A different rule it is true might be applicable if specific performance

were possible in such cases. No doubt a sovereign might insist upon the delivery of foreign money, if the occasion were proper. On obligations to pay money, this remedy does not, however, lie. All that can be done is to seize the promisor's property, and sell it, a procedure which can result only in domestic money. To take the exchange as of the period of the judgment or decree is, therefore, to adopt a rule applicable only to specific performance, in a case where specific performance is not exacted. Since the loss is to be indemnified in the money of the sovereign where the court sits, it has no alternative but to calculate it in terms of that money when the loss occurred, and to enforce its judgment, regardless of variations in its value between that time and the date of collection."

In quoting from Judge Hand's opinion it is not meant to endorse all that is said. The present writer does not believe that the conclusion he reached follows by some inevitable logic from the premise that the forum is enforcing a right created by its law and not a foreign right. It would be conceivable that the forum might on grounds of policy so mould its right that it would contract or expand as the rate of exchange varied. That would, however, be a less natural view. But if the forum is conceived to be enforcing a foreign right, it is believed that this means that the amount of the judgment in dollars *must* at all times correspond to the amount of marks which at the moment of entering judgment would be recovered in the courts of the foreign country whose "right" is being enforced. Otherwise, the so-called "foreign right" enforced by the forum differs in scope from the "right" enforced by the foreign court—and so could not be really a "foreign right."

In the conclusion that a court never enforces foreign rights but only rights created by its own law, I see nothing extraordinary. Indeed, if we examine into the meaning of the terms "law" and "right" as they are used by judges and lawyers, I think we shall conclude that this way of stating the matter is the only satisfactory way. For we as lawyers, like the physical scientists, are engaged in the study of objective physical phenomena. Instead of the behavior of electrons, atoms, or planets, however, we are dealing with the behavior of human beings.⁵¹ As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we may make a prediction of their probable behavior in the future. Our statements of the "law" of a given country are therefore "true"

⁵¹ That if we deal with individual atoms instead of with vast numbers of them, it may conceivably turn out to be just as difficult to predict the behavior of any particular atom as it is to prophesy how any given human being is going to act, see Morris R. Cohen, *Mechanism and Casuality in Physics* (1918) 15 JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD, 365, 378-379. Now that scientists are looking inside the atom, they find that the so-called "laws of physics" do not apply to the electron, and that it may be that the "old laws of nature" are merely "statistical averages." Bertrand Russell (1923) *The A B C of Atoms, passim*; and review of Russell's book in 37 THE NEW REPUBLIC, 209 (Jan. 16, 1924).

if they accurately and as simply as possible describe the past behavior and predict the future behavior of these societal agents. A statement, for example, that a certain "rule of law" is the "law of England" is therefore merely a more or less convenient shorthand way of saying that, on the basis of certain observations of past phenomena,⁵² we predict certain future behavior of the appropriate English officials. 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.⁵³ "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.⁵⁴ We must, therefore, constantly resist the tendency to which we are all subject to reify, "thingify" or hypostatize "rights" and other "legal relations." If, as we are told by an eminent philosopher, "the tendency to think of relations and operations as *things* is one of the most common sources of philosophic error,"⁵⁵ it is equally true that the tendency to reify legal "rights" has been a fruitful source of confusion in the law. We must never forget, as Mr. Justice Holmes told us long ago, that,⁵⁶ "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who are said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it."

⁵² Decisions by judges; passage of statutes by legislators; etc. These phenomena may include past reactions of the particular judges to social, industrial, economic or ethical problems, not part of their activity in deciding cases.

⁵³ By "serving a summons and complaint" on B, bringing the case to trial, etc.

⁵⁴ To be entirely accurate we must add that the assertion that A has a "right" and B is under a "duty" is an assertion that not only the officials but also the members of the given political community are in the habit of reacting in certain ways to certain stimuli. It is because these habit-patterns exist that we can safely predict; and the total prediction must be as to the reaction of the vast majority of the inhabitants of the country as well as of the judges, or we cannot speak of law as "existing." If, for example, a majority of the community were not in the habit of acquiescing in the acts of the officials, there would be not law but the absence of law. This conduct of the rest of the community is commonly assumed and we devote our attention to the probable action of the officials. Cf. Underhill Moore, *The Rational Basis of Legal Institutions* (1923) 23 COL. L. REV. 609.

⁵⁵ Morris R. Cohen, *Communal Ghosts and Other Perils of Social Philosophers* (1919) 16 JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD, 673, 682.

⁵⁶ *Op. cit. supra* note 31, at p. 313.

Concretely, the assertion that in such a case as *Milliken v. Pratt* P has against A a "Maine right" to damages is merely a conventional way of prophesying that if P sues W in Maine and follows the correct procedure, the court there will give him a judgment, i.e. it is a prophecy that certain Maine officials will behave in a certain way. So the assertion that a Maine court "has enforced a Maine right" is merely a shorthand way of stating that the Maine officials have acted in the way predicted.⁵⁷ If now we say that a Massachusetts court will enforce a Maine right, the only meaning that can be given to the statement seems to be that we prophesy that the Massachusetts judicial officials will act in precisely the same way that the Maine officials would act if the case were presented to them. However, as we are prophesying what Massachusetts officials are going to do, the meaning we have given to "right" compels us to say that a Massachusetts right exists, identical in scope with the Maine right, and that the Massachusetts court is going to "enforce" this Massachusetts right. If so, do we not express what we mean in a simpler and more accurate way by saying that there is a Massachusetts right identical in scope with a Maine right, which statement on being translated means simply that we predict action by the Massachusetts officials precisely like that which would be taken by the Maine officials if the case were presented to them? Are we not justified in concluding, therefore, that the statement that the forum enforces a foreign right arises out of a failure to give the word right a definite meaning, and that when we do fix upon a meaning, we find the statement misleading and confusing?

Our conclusion then is, that if we say that in *Milliken v. Pratt* the Massachusetts court "enforced a Maine right," we mean, if indeed we mean anything definite, that the Massachusetts officials have acted *precisely* as the Maine officials would have acted had *the precise case* been presented to them. Note now the italicized words in the last sentence. Is it not true that in such cases as *Milliken v. Pratt*, and in the vast majority of conflict of laws cases, as I have tried to show above, we do not obtain or try to obtain the information necessary to make such a statement, and that the reason we do not is, that it would (except in cases where the facts involved were from the point of view of the foreign court purely domestic) compel us to ascertain the "law" of the foreign jurisdiction on the conflict of laws, and so would lead to endless difficulties? To this question it is believed there can be but one answer.⁵⁸

⁵⁷ Where we cannot predict with any certainty, e.g., whenever we have a really new case, we say that the law is unsettled, or that whether there is or is not a right is doubtful. When the court later decides the new case, the court is said to have "made law." This means that it has given us new data upon the basis of which we believe that we are able to predict action in another case like the case just decided.

⁵⁸ *In re Tallmadge* (1919, Surro. Ct.) 109 Misc. 696, 181 N. Y. Supp. 336, rejects the "*renvoi*" theory in construing the provisions of the New York Decedent

It may perhaps be asked, is not the statement that a foreign right is enforced sufficiently accurate in the relatively simple cases where all the operative facts involved are connected with some one foreign state or country? It is from cases of this kind that the usual statement derives whatever plausibility it has. To test the matter, consider a tort wholly committed in Germany, the forum being New York. If we say New York is going to enforce a German right, this means at most that we predict that the New York officials are going to act *precisely* as the German officials would. If so, the New York officials at the time of entering the judgment ought to find out how many marks the plaintiff would at that moment recover if judgment were to be entered in a German court. Indeed, if we were to take our statement at its face, it might be argued that the New York judgment ought to be in marks! As we already know, this is not what the New York courts would do in such a case; it is not what other courts would do. The real problem is, what action may we expect the New York officials to take? Will they take any, and if so, how great will be the similarity of that action to that which the German officials would take? Our prediction about these things ought therefore to be cast in terms of New York and not of German "rights." The most practical and simple statement thus appears to be that the forum always "enforces rights" created by its own "law" and never "foreign law" or "foreign rights." Even in making this statement we must as always guard ourselves against thinking of our assertion that "rights" and other legal relations "exist" or have been "enforced" as more than a conventional way of describing past and predicting future behavior of human beings—officials and others.

Shall we, must we, say that there are as many "rights," all growing out of the one group of facts under consideration, as there are jurisdictions which will give the plaintiff relief? Since such an assertion is merely a shorthand way of making the prophecy that the appropriate persons, the officials, in each of these jurisdictions would re-act to the situation, if it were presented to them, so as to "give relief" to the plaintiff, there seems to be no other statement to make. Thus interpreted, the statement is not only not startling but plain common sense. To those accustomed to the more common way of putting the matter, this view doubtless will not at first commend itself, and will seem to be needlessly complex. Its validity, I must emphasize, will depend upon its value as a reasonably accurate, understandable and workable description of judicial phenomena as they have occurred in the past and as they are likely to occur again. To the holders of the traditional view that the earth was flat and that the sun went round the earth, the assertion that the earth was round and that it went round the sun seemed needlessly complex, but it won its way because it worked better and, all

Estate law, and properly so; and in doing so gives to "law" the meaning contended for in the present discussion.

things considered, really was the simpler view. So to-day, to one who has not carefully observed and attempted to piece together into a coherent whole the totality of observed phenomena in the field of physics and astronomy, the current theories of relativity seem unnecessarily artificial and complex; but, so far as I can discover, they are coming to be recognized as the best and on the whole the simplest way to organize the totality of our experiences with the physical world into a working system of concepts which accomplish the purpose for which they are created. The same thing is true of the modern conception of the atom as a complex structure of units of positive and negative electricity, as complicated at least as the solar system. On the fact of it this is a far more complex conception than that of the indivisible, indestructible atom of the older chemical theory, but in fact it is far simpler when the attempt is made to piece the chemists' universe together into a consistent whole. So in our problem, it is believed that the seemingly simple way of describing things which has been current proves upon consideration to lead to inconsistencies and complexities, and that what seems at first sight a more complex and less natural approach turns out in the end to bring us to the only true simplicity—an adequate description of observed phenomena in language as clear and accurate as possible.

Returning to the consideration of concrete cases: in the well-known case of *Slater v. Mexican National Railway*⁵⁹ it was held that no recovery could be had in the federal court for a wrongful death in a case where all the operative facts took place in Mexico, and by Mexican law the dependents of the deceased were to be compensated in an unusual way in a series of installments. In accounting for the decision, Mr. Justice Holmes, who wrote the prevailing opinion, said:⁶⁰

"But when such a liability [for wrongful death] 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. (Ind.) 71; *Dennick v. Railroad Co.*, 103 U. S. 11, 18. 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

⁵⁹ (1904) 194 U. S. 120, 126, 24 Sup. Ct. 581, 582.

⁶⁰ The logic of the *obligatio* theory led Mr. Justice Holmes to dissent in *Atchison, T. & S. F. Ry. v. Sowers* (1909) 213 U. S. 55, 29 Sup. Ct. 397, a case which is a striking illustration of the practical importance of clarity in fundamental legal conceptions. Very possibly Mr. Justice Holmes' dissent in that case may have back of it a pragmatic basis which is obscured by the abstract *obligatio* theory. Adopting a different theory would have compelled him to bring that basis, if it existed, into the foreground of the discussion.

the existence of the obligation, *Smith v. Condry*, 1 How. 28, 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."

This way of stating the matter was followed by Judge Cardozo in *Loucks v. Standard Oil Co.*⁶¹

I do not mean to quarrel with the decision in either case, but the reasoning seems to me unsatisfactory. While Mr. Justice Holmes in the *Slater* case seems to be arguing deductively from his *obligatio* theory to the conclusion that the plaintiff can have no relief, it is believed that the real reason for the decision is contained in the statement that "it seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of the case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." In other words, the result in the case is reached if we say that the forum has no judicial machinery to enforce a right identical, or even similar, to the Mexican right, and that it would be unjust for the forum to create a right of a very different character. The decision thus appears not as an inevitable outcome from fixed premises (that the forum is enforcing an *obligatio* created by foreign law, and *must* inevitably take it or leave it, just as it is), but for what it is, and for what Mr. Justice Holmes undoubtedly knew it was—a practical result based upon the reasons of policy established in prior cases. This policy limits the creation of rights in cases of foreign torts to those which are if not identical with, at least highly similar to, the rights created by the foreign laws where the torts were committed.

In this connection I cannot forbear to quote Mr. Justice Holmes against himself, by recalling his statement already quoted, that "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it." According to this, the statement that by the law of Mexico an *obligatio* has arisen is merely a mode of making a prophecy of the action of the appropriate Mexican tribunal. If so, we are talking figuratively when we reify or hypostatize the *obligatio* and say that it "accompanies the person," or say, as did Judge Cardozo in the *Loucks* case, that

⁶¹*Supra* note 37. The case involved an action in New York for wrongful death in Massachusetts. The Massachusetts "law" was held to govern. Cardozo, J., writing the opinion of the court, said: "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.' . . . '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.' . . . The plaintiff owns something, and we help him to get it. . . . We do this unless some sound reason of public policy makes it unwise for us to lend our aid." At p. 110, 120 N. E. at p. 201.

"the plaintiff owns *something* and we give *it* to him." The figurative language may or may not be a convenient way of stating a result; it cannot be the reason for the result. Moreover, in many cases we refuse to give relief although the foreign *obligatio* exists—witness the orthodox rule that an action for trespass to land is not transitory but local. Our refusal to do so is to be defended purely on grounds of practical expediency, and the rule in trespass is being broken down by statute⁶² or judicial legislation for the reason that under the changed conditions of modern life judges and legislators seem to be coming to think that the opposite rule will give better social results. The statement that certain causes of action are "transitory" is therefore merely a shorthand way of stating that courts in other jurisdictions enforce similar rights created by their own systems of law, and nothing more.

It seems difficult to reconcile the result reached in *Jacobus v. Colgate*⁶³ with the *obligatio* theory. Here also the opinion was written by Judge Cardozo. The New York legislature had passed an act allowing actions in New York for trespass to foreign land. Did the act apply to actions brought after its passage but for trespasses committed before its passage, or only to future trespasses? It was contended that the statute merely changed the procedure for the enforcement of a right which already existed and so should be construed retroactively. Not so, said Judge Cardozo, for no "right of action" existed under New York law until the passage of the statute. The result seems sound, but I have difficulty with the learned judge's attempt to harmonize this result with the *obligatio* theory. He argues that:

"Out of the foreign tort there once grew a right of action territorial and local, which our courts would not enforce. Out of the same tort there now grows a transitory right of action which our courts will enforce. The right of action has not merely been changed; so far as our law is concerned, it has been created. But the wrong, the violation of the primary right, which it redresses, is defined by the foreign law."

If we recall what we mean by "right," this way of stating it is hardly satisfactory. To assert that a foreign primary right exists (to have a person refrain from trespassing on land in the foreign state) is but a way to predict what courts in the given foreign state would do if the person asserted to be under the primary duty correlative to the right were to act in a certain way. When that person has acted in the way described, we can make the prophecy without the "if," at least so far as respects the trespasser.⁶⁴ This we do by saying that the one whose land

⁶² The New York statute is given in *Jacobus v. Colgate*, cited *infra*, note 63.

⁶³ (1916) 217 N. Y. 235, 243, 111 N. E. 837, 840.

⁶⁴ There are other "ifs," e.g. if the injured party gets a summons properly served, and if he takes the other appropriate steps, etc., all of which must happen before we can expect action by the court called "entering a judgment." Of course the court will already have acted in conducting the trial, etc., all of which is a part of the predicted conduct.

has been trespassed upon has a (secondary) right to damages.⁶⁵ Clearly, if we know that a New York (secondary) right to damages is going to "come into existence" or be "created" if someone trespasses on foreign land, this means that we can before the trespass is committed make a prophecy with an "if" in it as to the probable action of the New York courts. If so, a New York primary right exists, for that is all we mean by that phrase.

On the *obligatio* theory, however, it seems that the plaintiff in *Jacobus v. Colgate* already owned "something," only previously New York had refused to give "it" to him; now because of the statute it is willing to do so; nothing has been created by New York law except a procedural method for enforcing the "foreign-created right." It is not surprising, therefore, to find the decision criticized as erroneous by a writer who is following the theory that courts recognize and enforce foreign-created rights, on the ground that the statute merely "gave a remedy for a right already existing."⁶⁶ Here again the two theories logically followed out give contrary results in the decisions of concrete cases. That they did not in the actual case is because Judge Cardozo's sound judicial instinct led him actually to refuse to follow the *obligatio* theory to its logical outcome.

Mr. Justice Holmes seems to have been led to his view by the notion, which I imagine is a common one, that a state or country cannot impose a duty on a person outside its territory, except perhaps in exceptional cases, such as where the person is a citizen of or domiciled in the state concerned. For example, in *Mulhall v. Fallon*⁶⁷ he says: "It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another State." It is hoped that the preceding discussion has shown how erroneous this idea is. Only the slightest observation is needed to disclose the truth. A negligently fires a gun in New York and the bullet hits a man in New Jersey. Clearly New Jersey law can and does impose on A, no matter where he lives and of what state or country he is a citizen, a duty to pay damages to the injured person. This we have already discussed. A statement that A "constructively accompanied" the bullet on its flight into New Jersey is at most a clumsy and purely fictitious way of asserting this very power of New Jersey to subject A to a legal duty

⁶⁵ At one time the present writer indicated a doubt whether the conception that there was a duty to pay damages was a useful one. See Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV. 36, 45. This doubt was long since dispelled. Here as elsewhere there is, of course, no absolute right or wrong about the matter, but purely a practical question of so forming our concept of duty as to have the most helpful mental tool to work with in handling our material.

⁶⁶ (1916) 29 HARV. L. REV. 875. The note suggests that possibly the actual result in *Jacobus v. Colgate*, *supra* note 63, might be supported on some other ground.

⁶⁷ (1900) 176 Mass. 266, 268, 57 N. E. 386, 387.

and nothing more. Some other relevant phenomena are collected in a note.⁶⁸

The error of all such views lies, it seems, in confusing the "creation" of the right-duty relation with the problem of its "enforcement." Even though the party upon whom the duty is imposed is not within the territorial limits, we may be able, on the basis of past phenomena, to make a prediction as to how the officials will act if the one said to be under a duty is later "personally served" in the jurisdiction, or "property" belonging to him is "attached," or some other condition is satisfied. As by definition a duty exists when we can make the prediction, even with "ifs" in it, we may and I think do express this by saying that the duty "exists" but cannot or will not be "enforced" until "proper service" is had.⁶⁹ Much of the confusion in Anglo-American legal thinking goes back to Story's treatise. An examination of all that Story said will, it is believed, reveal that he at times sensed the actualities of the situation.⁷⁰

I may be told that by sending the bullet into New Jersey A "submits" himself to the law of that state. This also seems to me a pure fiction. If we assume that the injured person goes to some other state and dies there, shall we say that the law of that third state can impose a duty on A to compensate the deceased person's dependents because A "submitted" to its laws? Does he "submit" to the laws of any state or

⁶⁸ The Massachusetts-New Hampshire dog case, cited note 34 *supra*, is another illustration; also, cases in which a person in one jurisdiction starts a fire which burns a building in a second jurisdiction, as in *Connecticut Valley Lumber Co. v. Maine Central R. R.* (1918) 78 N. H. 553, 103 Atl. 263. Consider also: X owns land in New York. By deed, in proper form, executed and delivered in New Jersey X conveys the land to Y. At the time, A is in Massachusetts; B in New Jersey; C in New York. A, B, and C are later sued by Y in New York for trespass to the land. Here the *situs* of the land is New York; all the "acts of conveyance," i.e. all the operative facts necessary to pass title to Y, take place in New Jersey. The forum is New York. Obviously New York law attached to the operative facts occurring in New Jersey: (1) a duty (owed to Y) on the part of A, in Massachusetts, to stay off the land; (2) a similar duty on the part of B, in New Jersey; (3) a similar duty on the part of C, in New York. But, if any other state allows action for trespass to foreign realty, its law also imposes similar duties.

⁶⁹ Note that continental countries have very different notions as to what is proper service; also that England by statute or rule of court has recently extended substituted service against absent defendants to cover many more types of cases. Cf. the American case of *Flexner v. Farson* (1919) 248 U. S. 289, 39 Sup. Ct. 97, with the recent Rule of Court in England authorizing substituted service upon non-resident natural persons doing business through agents in England. Dicey, *The Conflict of Laws* (3d ed. 1922) 246; (1923) 23 COL. L. REV. 793, 795. Compare also the Australian notions as to "jurisdiction" of Australian State courts to render judgments, as shown in the Service and Execution of Process Act, 1901-1912, reprinted in (1919) 28 YALE LAW JOURNAL, 441, 449.

⁷⁰ Compare (8th ed. 1883) sec. 7, p. 8, with sec. 306, p. 424. The latter passage recognizes in essence the validity of the views here contended for.

country into which the injured person may subsequently go? Does a criminal or a tort-feasor *submit* to the law when he commits a crime or a tort? Surely such statements are nothing but fictions invented to make the facts appear to fit an unworkable theory based upon inadequate observation and analysis of legal phenomena.

For lack of space I must refrain from discussing the significance of *Fauntleroy v. Lum*⁷¹ in which the Supreme Court of the United States upheld the validity of a judgment rendered (after proper personal service) by the Supreme Court of Missouri, in which the latter court had attached to a purely Mississippi group of facts⁷² legal consequences entirely at variance with the law of Mississippi; but it seems to me to have a bearing upon our problem. In saying this, I do not forget such cases as *New York Life Insurance Co. v. Head*,⁷³ and *New York Life Ins. Co. v. Dodge*,⁷⁴ which are of course to be explained as limitations on the power of American states to create rights, growing out of the due process clause as interpreted by the Supreme Court. As to whether the results reached in these latter cases are "sound," I express no opinion.⁷⁵

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,⁷⁶ 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. As we have seen, "law" is not a material phenomenon, which spreads out like a light wave until it reaches the territorial boundary and then stops. 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. Whether international law imposes limitations and if so, what they are, can be determined only by observation. Personally, I

⁷¹ (1908) 210 U. S. 230, 28 Sup. Ct. 641.

⁷² An agreement was made in Mississippi between two citizens of that state resident there, to be performed there. The agreement was illegal and void by Mississippi law.

⁷³ (1914) 234 U. S. 149, 34 Sup. Ct. 879.

⁷⁴ (1918) 246 U. S. 357, 38 Sup. Ct. 337.

⁷⁵ Very possibly the result in these cases depends, as in some other "due process" cases, upon the fact that the members of the Supreme Court shared the notions about the necessary territorial limitations upon "law" which have been current and which it is here sought to show are erroneous. *Flexner v. Farson*, *supra* note 69, is possibly another example.

⁷⁶ The present territorial organization is of course not the only possible form, though probably most of us would regard it as the only convenient one. Cf. the situation after the Goths, Burgundians, Franks and Lombards had founded kingdoms in the countries formerly subject to Rome, as described in Story, *op. cit. supra* note 70, sec. 2a, at p. 3; 1 Savigny, *History of the Roman Law in the Middle Ages* (Cathcart's translation, 1829) ch. 3, pp. 99-104.

can find no consensus of opinion among civilized countries upon the matter under consideration; in fact, the utmost diversity of opinion seems to exist. I must, however, leave it to others more competent to speak to say whether my observations are in accord with the facts. Constitutional limitations exist, in the case of American states—the due process clause and the full faith and credit clause. Beyond these, I discover no limitations.

The fundamental point of the foregoing discussion may perhaps be expressed as follows: by far the larger number of the rules for the solution of cases involving the conflict of laws do not relate to the “power” or “jurisdiction” of the particular court or state to decide the case before it in a certain way. Cases involving power arise only where some limitation is imposed by some system of positive law—such as the federal constitution. Other limitations on power do not exist.

I shall probably be met with the statement that the view presented in the foregoing discussion is directly contrary to all that the courts have *said*, as distinguished from what they have *done*. To some extent this is true, although it is believed that that extent is not quite so great as imagined. To begin with, apparently few courts have directly said that they were enforcing a foreign-created right. Such expressions are found chiefly in texts. The language of the courts is usually that they are applying the foreign “law” to the case in hand. As I have pointed out, this expression is ambiguous and can be given an interpretation which will describe what the courts actually have done. That the courts have not *consciously* given it the other meaning (equivalent to saying that they are enforcing foreign-created rights) is clear from the fact that they do not in the typical cases go on to find what the foreign law applicable to the very controversy before them really is, but content themselves with ascertaining the foreign domestic rule. The truth is, most of the judges have never had time or taken the trouble to analyze very clearly just what they do mean. In view of the fact that the legal training of most of them did not include a study of these problems, and of the further fact that only a limited time can be devoted by a busy judge to the study of a single case, this is only natural. In the second place, even if the formulation here presented is novel, in the sense of departing from the language of the opinions, if it is true that the courts have actually done certain things, and that the usual way of describing these things is inaccurate and misleading, does it follow that we ought to continue to misdescribe the actual decisions because such has been the loose practice in the past? Surely progress in the science of the law consists in continually reformulating our generalizations so as to make them bring out more clearly just what the past phenomena described really are and just what we predict will happen in the future.⁷⁷

⁷⁷ Note the beneficial effect of the re-formulation by law teachers of the rule as to “lack of mutuality” in specific performance, as shown in *Epstein v. Gluckin*

But, I may be asked, if the answer to conflict of laws cases cannot be deduced from certain pre-existing principles relating to "jurisdiction," how are they to be decided? The only answer that can be given, by the same methods actually used in deciding cases involving purely domestic torts, contracts, property, etc. The problem involved is that of legal thinking in general. It requires for its adequate discussion an inquiry into the technique of human reasoning in general and that of reasoning in the field of law in particular. It must be admitted that the "outrageous bit of nonsense"⁷⁸ that men think in syllogisms, that they solve the problems of life by deductive reasoning, has apparently ruled in law as well as in morals and theology. Actually, however, in law as in the natural sciences, practice has preceded theory, at least to a considerable extent, and conclusions have not actually been reached deductively. The reason for this is shown by recent investigations into human thinking. These investigations have convinced the leading students of logic that formal logic, the deductive syllogism, is always purely hypothetical reasoning and never of itself assures us of the factual truth of the conclusions reached.⁷⁹ Its content seems to be identical with pure mathematics, which, Bertrand Russell tells us, is "the science in which we never know what we are talking about nor whether what we are saying is true."⁸⁰ The actual process involved in settling a situation of doubt—a new case, if we are dealing with law—involves a comparison of the data of the new situation with the facts of a large number of prior situations which have been subsumed under a "rule" or "principle" within the terms of which it is thought the new situation may be brought. This comparison, if carried on intelligently, necessarily involves a consideration of the policy involved in the prior decisions and of the effects which those decisions have produced.⁸¹

(1922) 233 N. Y. 490, 135 N. E. 861. The work of Ames, Stone, and others showed that while saying one thing courts were actually doing another; the re-formulation was an attempt to get an accurate general description of the *decisions*. The result was to modify the current of decisions in New York. In the present discussion the attempt is to do for the fundamentals of the conflict of laws what these writers did for the more narrow field of mutuality.

⁷⁸ C. I. Lewis, *NEW YORK EVENING POST LITERARY REVIEW*, Feb. 4, 1923, reviewing H. B. Smith, *First Book in Logic*.

⁷⁹ Morris R. Cohen, *The Subject Matter of Formal Logic* (1918) 15 *JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHOD*, 673, and other discussions referred to in that article.

⁸⁰ Quoted in A. S. Eddington, *Space, Time, and Gravitation* (1920) 14.

⁸¹ Any result reached is of course an experiment—merely a working solution, whose validity is to be tested by how it works. This is what is meant when modern students of logic tell us that "men think as a cat opens a gate—by trial and error," and that "even the mathematician . . . presents finally in deductive form what he himself has arrived at after a dozen false starts and by continual emendation." C. I. Lewis, in the review cited *supra* note 78. An interesting and illuminating example of the continual redefining of a "middle term" in deciding new cases as they arise is found in the line of New York cases beginning with *Thomas v. Winchester* (1852) 6 N. Y. 397 and coming down to *MacPher-*

If the points in which the new situation resemble the older situations already dealt with are thought to be the qualities the existence of which were decisive in leading to the decisions in the prior cases, the new case will be put under the old rule or principle. In doing this, the rule or principle as it existed has not been applied; it has been extended to take in the new situation. In other words, however great the appearance of purely deductive reasoning may be, the real decision where a case presents novel elements consists in a re-defining of the middle term of the major and minor premises of the syllogism; that is, of the *construction* or *creation of premises* for the case in hand, which premises did not pre-exist. The statement of the premises of the deductive syllogism is therefore a statement of the conclusion which has been reached on other grounds, and not of the real reason for the decision. When once the premises have been thus constructed, the conclusion inevitably follows.⁸²

This view does not lead to the discarding of all principles and rules, but quite the contrary. It demands them as tools with which to work; as tools without which we cannot work effectively. It does, however, make sure that they are used as tools and are not perverted to an apparently mechanical use. It points out that the use never can be really mechanical; that the danger in continuing to deceive ourselves into believing that we are merely "applying" the old rule or principle to "a new case" by purely deductive reasoning lies in the fact that as the real thought-process is thus obscured, we fail to realize that our choice is really being guided by considerations of social and economic policy or ethics, and so fail to take into consideration all the relevant facts of life required for a wise decision. We shall thus be guided by the "inarticulate major premise" of Mr. Justice Holmes, and that may be a premise which if dragged out into the light we should after examination decide to be unsound.⁸²

In the field of the conflict of laws, it is unfortunately true that past judicial phenomena are so confused that the formulation of tools with which to work is vastly more difficult than in most fields of the law.

son v. Buick Motor Co. (1916) 217 N. Y. 382, 111 N. E. 1050. The statement in the opinion of Cardozo, J., in the latter case, that "the principle that the danger must be imminent does not change, but the things subject to the principle do change" is of course not true if taken literally, and contains within it a lingering trace of the traditional notions as to the efficacy of deductive logic. The words or symbols may not have changed; what they stand for has changed as each new case was decided. There is new wine in the old bottles, even though the labels remain unaltered.

⁸² The traditional legal view in its clearest form is expressed in the article on *German Legal Philosophy* by John M. Zane in (1918) 16 MICH. L. REV. 287, at pp. 337-338, 345-348. It would be difficult to imagine a more complete misdescription of the actual process of deciding a case involving a new situation than the one presented by Mr. Zane, who ignores the modern studies of human reasoning to which reference has been made. Quite naturally he does not understand the realism of Mr. Justice Holmes.

This is due largely to the fact that when American courts first began to be confronted with cases involving the problem, there were so few phenomena in the way of decisions to describe that there could hardly be said to be well recognized principles and rules established by prior English decisions. Without adequate guides to go by, and confronted by the chaotic and conflicting views of continental writers as gathered together in Story's treatise, the courts of last resort in our states found themselves on a largely uncharted sea. For this reason a writer attempting to set forth the "American law" upon the conflict of laws is necessarily compelled more often than in any other field to choose between conflicting rules. In making a choice between such rules, it is obvious that here as elsewhere the basis must be a pragmatic one—of the effect of a decision one way or the other in giving a practical working rule.⁸³ In this connection it may be suggested that in many cases it makes little difference which rule is adopted, so long as it is reasonably simple and definite and after its adoption is not departed from in cases clearly falling within it.⁸⁴

⁸³ The essence of this view was presented almost a generation ago by Mr. Justice Holmes in his two papers on *The Path of the Law* (1897) 10 HARV. L. REV. 457, *Collected Legal Papers*, 167, and *Law in Science and Science in Law* (1899) 12 HARV. L. REV. 443, *Collected Legal Papers*, 210. Compare the remarks of Holmes, *Collected Legal Papers*, 239:

"I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which both cannot have their way."

There is a fine chapter in Dewey, *Human Nature and Conduct* (1922) 238-247, on "The Nature of Principles," which can be made to apply to the lawyer's "law" as well as the "moral law" by substituting the word *law* for *morals*, and *legal* for *moral*, wherever the terms occur. It is the best and clearest statement of the matter of which the present writer is aware.

⁸⁴ Compare the passage from Holmes, *Collected Legal Papers* (1920) 239, cited *supra*, note 36.