Vanderbilt Law Review

Volume 3
Issue 4 *Issue 4 - June 1950*

Article 13

6-1950

Conflict of Laws in Multistate Fraud and Deceit

William O. Beach Jr.

NOTES

CONFLICT OF LAWS IN MULTISTATE FRAUD AND DECEIT

Unlike most conflict of laws questions, the choice-of-law problem in tort actions based on multistate fraud and deceit has been given surprisingly little attention. Until recent years the problem had been raised in but two or three reported cases, and no real attempt had been made to analyze and clarify it. The recognition and stanty treatment of the problem in the *Restatement of Conflict of Laws*[1] has perhaps been primarily responsible for the growing awareness of it in the courts in the past two decades. Nevertheless, neither the courts nor the secondary authorities have come forward with a thorough study and analysis or a clear and uniform treatment. Perhaps both the frequent failure to face the problem squarely and the scarcity of serious efforts to treat it may be mainly attributed to the extremely elusive and perplexing nature of the problem itself. No doubt in some cases it has been overlooked or avoided.[2] Yet in view of the constant increase in interstate transactions and the diversity of domestic laws with respect to the elements of a cause of action for deceit, there is every indication that the problem will become increasingly important.[3]

It has been the traditional view in the United States that liability for tort is governed by the law of the place of wrong.[4] If all the elements of a

1. RESTATEMENT, CONFLICT OF LAWS § 377 *et seq.* (1934). The pertinent passages are quoted herein, p. 770 *infra.*

2. See, *e.g.,* Brown v. Ohman, 42 So. 2d 209 (Miss. 1949), *aff'd on suggestion of error,* 43 So. 2d 727 (Miss. 1949).

3. There are several distinct types of causes of action based upon fraudulent misrepresentation, some of which are of a delictual, and some of a contractual nature. If a person has been fraudulently induced to enter into a contract, for instance, he may seek to have a court of equity rescind the contract and restore him to his former position. He may bring an action at law for restitution. He may seek to have the contract reformed. Or he may sue for breach of warranty. These actions are not delictual, and the law to be chosen as governing the substantive elements of the cause of action will depend upon the forum's conflict of laws rules pertaining to contracts or restitution. He may have, however, still other types of relief available to him—a tort action for damages for deceit or a tort action for negligent misrepresentation. See PROSSER, TORTS 701-19 (1941). It is important that these distinctions be kept clearly in mind, for actions based on contract and actions based on tort are governed by different choice-of-law rules and policies.

4. *E.g.,* Young v. Masci, 289 U.S. 253, 53 Sup. Ct. 599, 77 L. Ed. 1158, 88 A.L.R. 170 (1933) (personal injuries); Cuba R.R. v. Crosby, 222 U.S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L.R.A. (N.S.) 40 (1912) (same); Diesbourg v. Hazel-Atlas Glass Co., 176 F.2d 410 (3d Cir. 1949) (same); Perkins v. Great Central Transport Corp., 262 Mich. 616, 247 N.W. 759 (1933) (same); M. Salimoff & Co. v. Standard Oil Co. of New York, 262 N.Y. 220, 186 N.E. 679, 89 A.L.R. 345 (1933) (suit to recover oil converted in foreign jurisdiction); Parsons v. American Trust & Banking Co., 168 Tenn. 49, 73 S.W.2d 698 (1934) (wrongful death action); Richardson v. Pacific Power & Light Co., 11 Wash. 2d 288, 118 P.2d 985 (1941) (same); 2 BEALE, CONFLICT OF LAWS §§ 378.1, 378.2 (1935); GOODRICH, CONFLICT OF LAWS § 92 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS § 378 (1934); 11 AM. JUR., CONFLICT OF LAWS § 182 (1937). The British view is that the act must have been wrongful under the civil or criminal law of the place

cause of action sounding in tort occur within the territorial boundaries of a single jurisdiction and suit is brought in a different jurisdiction, the forum will ordinarily not be faced with a difficult choice-of-law problem. It will apply the law of the jurisdiction where those elements occurred. It is cases in which one or more of the elements take place in one state and others in some other state or states, or in which a single element occurs across state boundaries, that give rise to a multiple contact situation and present to the forum a sometimes harassing choice-of-law problem.[5] The difficulty obviously consists in determining the place of wrong.

The American courts have generally held that the place of wrong is the place where the defendant's conduct has resulted in injury to the plaintiff.[6] Moreover, since injurious consequences may be spread over several states, it is the state in which they first occur whose law is chosen to govern.[7] This

---

where it occurred and also must be actionable under the domestic law of the forum. Machado v. Fontes, [1897] 2 Q.B. 231; Phillips v. Eyre, L.R. 6 Q.B. 1 (1870); CHESHIRE, PRIVATE INTERNATIONAL LAW 297 *et seq.* (2d ed. 1938); STUMBERG, CONFLICT OF LAWS 162 (1937).

5. No multiple contact choice-of-law problem exists unless (1) there are multiple contacts, and (2) the laws of the states having significant contacts are conflicting. See HANCOCK, TORTS IN THE CONFLICT OF LAWS 171-72 (1942).

6. Hunter v. Derby Foods, Inc., 110 F.2d 970, 133 A.L.R. 255 (2d Cir. 1940) (death caused by eating poisoned food in Ohio which defendant had shipped from New York); Rundell v. La Compagnie Generale Transatlantique, 100 Fed. 655, 49 L.R.A. 92 (7th Cir. 1900) (negligent operation of French ship caused collision resulting in drowning of plaintiff's intestate; action held governed by maritime, not French law); Alabama G.S.R.R. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L.R.A. 433, 38 Am. St. Rep. 163 (1892) (negligence in Alabama caused injury in Mississippi); Cameron v. Vandergriff, 53 Ark. 381, 13 S.W. 1092 (1890) (injuries inflicted in Arkansas as result of rock blasting in Indian Territory); Otey v. Midland Valley R.R., 108 Kan. 755, 197 Pac. 203 (1921) (fire in Oklahoma caused by sparks from railway engine apparently in Kansas); Strogoff v. Motor Sales Co., 302 Mass. 345, 18 N.E.2d 1016 (1939) (defendant loaned automobile in Connecticut and plaintiff negligently injured in Massachusetts); Mike v. Lian, 322 Pa. 353, 185 Atl. 775 (1936) (plaintiff's injury in Ohio allegedly caused by defendant's negligence in Pennsylvania); Dallas v. Whitney, 118 W. Va. 106, 188 S.E. 766 (1936) (property damage in Ohio caused by blasting in West Virginia); 2 BEALE, CONFLICT OF LAWS § 377.2 (1935); GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949); 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 323 (1947); ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 228 (1940); RESTATEMENT, CONFLICT OF LAWS § 377, Notes 1-4, § 378, comment *b* (1934); *id.*, TENN. ANNOT. § 377 (1935); see Note, 133 A.L.R. 260 (1941).

The problem remains of determining where the place of injury is. This is, strictly speaking, not a choice-of-law problem. It has been variously termed the problem of "secondary characterization," "localization," or "determination of the connecting factor." See ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 104 *et seq.*, 226-29 (1940); Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws,* 14 So. CALIF. L. REV. 221, 241 (1941); Unger, *The Place of Classification in Private International Law,* 19 BELL YARD 3, 4, 16 (1937).

7. T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 48 Sup. Ct. 228, 72 L. Ed. 520 (1928) (longshoreman struck on Louisiana wharf, later found dead in water; Louisiana Workmeu's Compensation statute, not admiralty law, held applicable); Louisville & N.R.R. v. Williams, 113 Ala. 402, 21 So. 938 (1897) (injury inflicted in Tennessee, death in Alabama); Crane v. Chicago & W.I.R.R., 233 Ill. 259, 84 N.E. 222 (1908) (injury in Illinois, death in Indiana); McCarthy v. Chicago, R.I. & P.R.R., 18 Kan. 46, 26 Am. Rep. 742 (1877) (injury in Missouri, death in Kansas); Melton's Adm'r v. Southern R.R., 236 Ky. 629, 33 S.W.2d 690 (1930) (injury in Virginia, death in Kentucky); 2 BEALE, CONFLICT OF LAWS § 377.2 (1935); GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949); see Note, 133 A.L.R. 260, 262, 268-70 (1941).

view proceeds upon the theory that it is the fundamental purpose of the law of torts of every jurisdiction to define the measure of protection to which individuals within its borders are entitled against the harmful consequences of tortious conduct. Whether harm to the plaintiff's person or his property has been wrongfully inflicted is determined by the law of the place where it was incurred.[8] This theory seems to coincide nicely with the axiomatic concept that no cause of action for tort arises unless and until the plaintiff has received an injury as a result of the defendant's misconduct.[9]

This rule, which has been referred to as the "place-of-injury" or "place-of-harm" rule, has been the subject of considerable comment and debate among legal writers, from whom it has elicited both favorable[10] and adverse[11]

8. 2 BEALE, CONFLICT OF LAWS §§ 377.1-378.4 (1935). "The plaintiff does not sue the defendant for the latter's negligence, but because the negligence has caused the plaintiff harm." GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949).

9. That there is any necessary relation between the underlying theory on which the choice of governing law is based and the condition precedent to the accrual of a cause of action has apparently not been explained. "The very fact that there is no tort without the injurious effect readily leads to the conclusion that the harmful effect is the most important element of liability, and in the process of selecting the proper law to determine liability for a foreign tort, it becomes the outstanding factor. . . . Explanation of the legal result in terms of enforcement of a right created by the proper foreign law is merely a method of rationalizing a result which has been reached because of the feeling that harmful effect is normally the sine qua non for an action in tort." STUMBERG, CONFLICT OF LAWS 167-68 (1937). It will be seen that the idea that the foreign created right is necessarily created at the place where harm occurs may cause considerable difficulty in cases in which the harm consists of pecuniary loss.

10. "[M]uch is to be said in its favor, but a few modifications seem to be suggested by comparative considerations." 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 302 (1947); GOODRICH, CONFLICT OF LAWS § 93 (3d ed. 1949); RESTATEMENT, CONFLICT OF LAWS, TENN. ANNOT. § 377 (Schermerhorn, 1935).

11. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 311-46 (1942); STUMBERG, CONFLICT OF LAWS 160-87 (1937); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays,* 56 YALE L.J. 1155, 1162 (1947); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law,* 19 TULANE L. REV. 4 & 165 (1944); Note, 44 YALE L.J. 1233, 1236 (1935); see Stimson, *Conflict of Laws: Four Basic Problems as to the Applicable Law,* 34 A.B.A.J. 107 (1948). The gist of the adverse criticism of the place-of-injury rule is (1) that it is difficult to apply in some types of tort, (2) that it may sometimes invoke the law of a state which had only accidental contact with the transaction, and (3) that it fails to attach any significance to the other elements of the tort, particularly the defendant's conduct. The place of injury is often difficult to ascertain, especially when the injury consists of pecuniary loss. See 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 326 (1947), citing RAAPE, DEUTSCHES INTERNATIONALES PRIVATRECHT 203 (1938-39). Injurious effects may occur simultaneously in a plurality of states, especially when the injury is defamation. See HANCOCK, TORTS IN THE CONFLICT OF LAWS 252 (1942); Note, *The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem,* 60 HARV. L. REV. 941, 946 (1947). The place-of-harm rule ignores an important function of the internal tort law of every jurisdiction: namely, to serve as a guide for behavior. It is said to be unfair to the defendant to be subjected to liability under the law of the place of injury if his conduct would not have been defined as tortious under the law of the place where he acted, particularly if he had no reasonable ground to believe his act would take effect in the other state. One writer has, by a searching analysis of many of the cases usually cited in support of the place-of-injury rule, concluded that it is supported by meagre and questionable case authority. Rheinstein, *supra* at 165 *et seq.* The "place-of-acting" rule is said to be followed by the great majority of European writers. 2 RABEL, *op. cit. supra,* at 303-04; LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 370 (1947).

A considerable portion of the conflict of opinion may be attributed to the fact that the proponents of the place-of-injury rule and its critics have emphasized different under-

criticism. The courts, however, by their language if not always by their holdings, have thus far almost invariably supported it. At any rate, there is no indication that any other solution will replace it as the general rule in the American courts. The rule has found its most positive expression in the *Restatement of Conflict of Laws,* which has apparently been, since its publication in 1934, the dominant influence in the widespread adoption of the rule in deceit cases.[12] The pertinent sections and passages are quoted here:

"§ 377. THE PLACE OF WRONG.

"The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

"Comment:

"a. . . . Although by statute, the state in which any event in the train of consequences, starting with the act of the wrongdoer and continuing until the final legal consequences thereof, may make the event a wrong, the situation is, in most cases, governed by the common law. The common law selects some particular point in the train of events as the place of wrong. In the following Note are stated rules which represent the general common law as to what constitutes the place of wrong in different types of torts. . . .

"NOTE

"Summary of Rules in Important Situations Determining Where a Tort Is Committed.

. . .

"4. *When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made.*

"Illustrations:

"5. A, in state X, makes false misrepresentations by letter to B in Y as a result of which B sends certain chattels from Y to A, in X. A keeps the chattels. The place of wrong is in state Y where B parted with the chattels.

"6. A, in state X, owns shares in the M Company. B, in state Y, fraudulently persuades A not to sell the shares. The value of the shares falls. The place of wrong is X."

"§ 378. LAW GOVERNING PLAINTIFF'S INJURY.

"The law of the place of wrong determines whether a person has sustained a legal injury.

"Comment: . . .

"b. . . . Whether a particular harm which a plaintiff has sustained constitutes an injury for which he may recover compensation is determined by the law of the place of wrong. It is immaterial whether by the law of the forum, or by the law of the place where the actor acted, the harm in question was or was not a legal injury."

---

lying purposes of tort law. "The bases of tort liability are not easy to state, much less to compress. . . . A primary purpose is to fix the standards of conduct of a person, so he can know what he may do and what he may not do, and so that others can know what type of conduct to expect from him. This purpose of delimiting tort liability suggests that it is for the state where a person acts to determine whether his conduct and its consequences create liability. . . . Another purpose of the law of torts is to fix the measure of protection to which each person is entitled against his fellows. This purpose suggests it is for the state where the damage is suffered to determine whether the damage was wrongfully inflicted and gave rise to a right of action in tort." CHEATHAM, DOWLING, GOODRICH AND GRISWOLD, CASES AND MATERIALS ON CONFLICT OF LAWS 416 (2d ed. 1941).

12. This is evidenced by the substantial increase in the number of cases since 1934 in

It has been said of the place-of-injury rule that its "greatest virtue is its simplicity, the facility of its application." [13] The problem of ascertaining the place of injury presents comparatively little difficulty when the injury consists of bodily harm or damage to tangible property. Usually such injury is easily localized at the place where the body or property is located when the harmful force first impinges upon it. But when, as is generally the case in an action for deceit, the injury consists of pecuniary loss, it is often difficult to say just where the loss occurred. Of the few reported cases involving tort actions based on multistate fraud,[14] most were decided after the publication of the *Restatement* and each of these cites the *Restatement* as authority for the position it takes. Few of the cases have made any real attempt to meet the problem squarely. Some do not clearly show that multiple contacts existed.[15] In some no choice of law had to be made because of the absence of a conflict of laws.[16] In some the choice which was made was accompanied by little or no explanation or analysis.[17] Some of the deficiencies of the rule as applied to deceit cases may now be pointed out and the need for further analysis indicated.

The statement in Note 4 following § 377 of the *Restatement* as to how the rule should be applied in cases involving fraudulent misrepresentations provides a starting point. Since the sustaining of a loss is the last event necessary to give rise to a cause of action for deceit, the law of the place where the loss occurred will be chosen to govern. This does not, however, answer the all-important question, "Where is the loss sustained?" It has been suggested

---

which the problem has been raised and the fact that all of them have cited the *Restatement* as authority.

13. STUMBERG, CONFLICT OF LAWS 182 (1937).

14. *I.e.*, actions for deceit or for negligent misrepresentation. The following tort cases have been found in which the problem of multistate fraud was raised or suggested. Iasigi v. Brown, 17 How. 183, 15 L. Ed. 208 (U.S. 1854); Smyth Sales, Inc. v. Petroleum Heat & Power Co., 128 F.2d 697 (3d Cir. 1942); Keeler v. Fred T. Ley & Co., 49 F.2d 872 (1st Cir. 1931), *second appeal*, 65 F.2d 499 (1st Cir. 1933); Boulevard Airport, Inc. v. Consolidated Vultee Aircraft Corp., 85 F. Supp. 876 (E.D. Pa. 1949); Geller v. Transamerica Corp., 53 F. Supp. 625 (D. Del. 1943); Israel v. Alexander, 50 F. Supp. 1007 (S.D.N.Y. 1942); A.B. v. C.D., 36 F. Supp. 85 (E.D. Pa. 1940), 41 COL. L. REV. 918 (1941), 25 MARQ. L. REV. 167 (1941); Moore v. Pywell, 29 App. D.C. 312, 9 L.R.A. (N.S.) 1078 (1907); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925), 24 MICH. L. REV. 499 (1926); Bradbury v. Central Vermont Ry., 299 Mass. 230, 12 N.E.2d 732 (1938); Brown v. Ohman, 42 So. 2d 209 (Miss. 1949), *aff'd on suggestion of error*, 43 So. 2d 727 (Miss. 1949).

15. See Keeler v. Fred T. Ley & Co., 49 F.2d 872 (1st Cir. 1931), *second appeal*, 65 F.2d 499 (1st Cir. 1933); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925), 24 MICH. L. REV. 499 (1926).

16. See A.B. v. C.D., 36 F. Supp. 85 (E.D. Pa. 1940), 41 COL. L. REV. 918 (1941), 25 MARQ. L. REV. 167 (1941); Brown v. Ohman, 43 So. 2d 727, 732 (Miss. 1949) (concurring opinion).

17. "The cause of action upon which the plaintiff relies was [the false misrepresentation made by the defendant]. . . . That misinformation was given in Vermont. Whether it gave rise to a cause of action must be determined in accordance with the law of Vermont. . . . Am. Law Inst. Restatement: Conflict of Laws, § 377, paragraph 4." Bradbury v. Central Vermont Ry., 299 Mass. 230, 12 N.E.2d 732, 733-34 (1938); see Keeler v. Fred T. Ley & Co., 49 F.2d 872 (1st Cir. 1931), *second appeal*, 65 F.2d 499 (1st Cir. 1933).

that Illustration 5 provides the answer—the place where the plaintiff parts with his assets.[18] In the rather clear-cut factual situation presented by the illustration this seems, indeed, to provide an entirely satisfactory solution. But the application of this test to the case in Illustration 6 is not so easy. Plaintiff's assets were the shares he owned in *M* Company. He necessarily parted with part of those assets when their value fell, and this constituted the loss he sustained. Where can it be said that this decline in value, this parting with assets, took place? The place of loss in such a case as this becomes a nebulous concept.[19]

It may be questioned whether the term, "sustaining a loss," can always be adequately defined in terms of the phrase, "parting with assets." The difficulties involved can be brought into clearer focus by discussing them in connection with a few additional hypothetical cases.

> Case (1). *A* owns land in state *X*. Falsely representing the value of the land, *A* makes an offer in state *X* to sell it to *B* for $10,000. It is actually worth only $8,000. *B*, who resides in state *Y*, accepts the offer there and pays the purchase price. The deed is subsequently delivered in state *X*. Assume that by the law of state *X* no recovery may be had in an action for deceit for misrepresentation of value, but that the law of state *Y* does allow recovery for such a misrepresentation. *B* sues *A* in state *F* for deceit.

The court in state *F*, in order to determine the applicable law, must ascertain the place where the loss was sustained. It is clear at the outset that the fact that the false representations were made in state *X* does not in itself entitle state *X* to consideration as the place of wrong.[20] In determining in which state the loss occurred the preliminary question immediately arises, "What constitutes the sustaining of a loss?" Did the loss consist in *B's* paying value in state *Y*, or in his receiving land of inferior quality in state *X*? By analogy, Illustration 5 of the *Restatement*[21] would seem to suggest that state *Y*, where *B* parted with his money, was the place of loss. But perhaps it can be plausibly argued that the loss in this type of case is inseparably associated with the locus of the land. *B's* disappointment consisted fundamentally, not in paying his money, but in finding himself the owner of land situated in state *X* which was not worth as much as he had expected it to be.[22]

---

18. "The remarkable solution suggested by the Restatement seems to furnish the answer [in deceit cases]." 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 326 (1947).

19. If the plaintiff is in one state and his assets are located in another state at the time when loss occurs, it is not clear which place should be designated as the place of loss. The latter place would seem to be more logically selected. If so, the loss in Illustration 6 would perhaps be held to have occurred at the place where the assets were when their value fell. This would seem to raise the question of whether the value is to be regarded as inhering in the shares or as associated with the place of the corporate domicil. Beale does not discuss this specific problem. See 2 BEALE, CONFLICT OF LAWS § 377.2 (1935).

20. RESTATEMENT, CONFLICT OF LAWS § 377, Note 4 (1934).

21. Quoted *supra* p. 770.

22. "[I]n the case of transactions alleged to have affected the title to property. . . .

After all, no loss would have resulted but for the combination of both these elements of the exchange. Can the transaction be so divided for the purpose of ascertaining in which of the two states the loss occurred? If not, what else can be said but that the loss occurred in both states? The court finds itself in a dilemma. It cannot apply the laws of both states, and the place-of-loss rule provides no basis for choosing between them.[23]

Case (2). *A*, by making false representations as to *C's* financial standing, induces *B*, in state *X*, to contract with *C* to ship goods to *C* in state *Y*. In order to supply the goods to *C*, *B* purchases them from *D* in state *Z*. *C* receives the goods but is unable to pay for them. *B* sues *A* in state *F* for deceit.

At the outset, the question is again raised, "What constitutes the sustaining of a loss?" *B's* first act of reliance was the execution of the contract with *C* in state *X*. Did *B* sustain a loss in the execution of this contract? He did not here part with any assets. But the making of this contract worked a change in his legal relations with *C*; it created in him an obligation to *C* which before did not exist. Is incurring a contractual obligation equivalent to sustaining a loss?[24] Unquestionably it was one of the events in the "train

[i]f the property was subject to the laws of one State and the parties to the transaction were subject to the laws of another State or States at the significant time, . . . the Court . . . should apply the law to which the property was subject at the time of the conduct the legal effect of which is in question and not the law to which the parties were subject. In the case of real estate, this is the law without question." Stimson, *Conflict of Laws: Four Basic Problems as to the Applicable Law*, 34 A.B.A.J. 107, 109 (1948); see Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155, 1183-85 (1947).

23. In Keeler v. Fred T. Ley & Co., 49 F.2d 872 (1st Cir. 1931), *second appeal*, 65 F.2d 499 (1st Cir. 1933), the defendant by false representations induced the plaintiff to sell land situated in New York. It is not disclosed where the false representations were made, where the contract to sell was made, or where the purchase price was paid. The Circuit Court of Appeals for the First Circuit, sitting in Massachusetts, simply states, without explanation of any kind, that the law of New York was applicable, not that of Massachusetts. The case is one of the two cases cited by Beale in support of the formula in Note 4 following § 377 of the *Restatement*. "It was held that the place of the fraud was the place where the property was actually obtained by the fraud, that being the injury to the plaintiff's estate which the action for fraud is intended to redress." 2 BEALE, CONFLICT OF LAWS § 377.2 (1935). The case of Brown v. Ohman, 42 So. 2d 209 (Miss. 1949), *aff'd on suggestion of error*, 43 So. 2d 727 (Miss. 1949), involves multiple contacts similar to those in Case (1) above. The choice-of-law question, raised for the first time on suggestion of error, was not mentioned in the majority opinion, but was discussed at length in the concurring and dissenting opinions, 43 So. 2d at 732 *et seq.* (concurring), and 43 So. 2d at 746 *et seq.* (dissenting). Defendant, owning land in Mississippi, falsely represented to the plaintiff the quantity of merchantable timber on the land, thereby inducing the plaintiff to contract, in Tennessee, to purchase the land. The dissenting judge argues that the fraud became actionable, if at all, when the plaintiff acted in reliance thereon in Tennessee, and that, therefore, Tennessee law should govern. The concurring judge does not labor the point, contending that the law of Tennessee and the law of Mississippi pertaining to scienter (the element in dispute) are not conflicting.

24. "One who is defrauded through false representations respecting the solvency of another is damnified as soon as he is induced to act in the manner occasioning the loss, and may maintain an action therefor at once." 23 AM. JUR., *Fraud and Deceit* § 175 (1939). "A right of action accrues . . . where a person has been induced to enter into a contract by means of fraudulent concealment or representations. . . ." 37 C.J.S., *Fraud* § 41 *b* (1943). These statements, on their face, would seem to have a significant bearing on the problem of determining the place of loss. It should be noted, however, that they were not made with that problem in mind. The cases and authorities cited in support

of consequences" which occasioned the loss.[25] But this formula may seem unsatisfactory because it does not exclude any of the other events in the series, including the making of the false representations.[26]

If it be conceded that the place where the plaintiff parted with his assets is sufficiently descriptive of the place where the loss was sustained, the question again arises, "Where did he part with his assets?" *B's* second act of reliance was purchasing the goods from *D* in state *Z*. It may be urged that this is when *B* first parted with his assets. But on the other hand, he may be fairly assumed to have received his money's worth from *D* in exchange. If so, he has not parted with his assets, but has merely changed their form. It would seem to follow that he did not really part with his assets—*i.e.*, without receiving in return assets of commensurate value—until he passed them on to *C*. It would then become material to determine where the goods were when *B* had them sent to *C* in state *Y*. Applying the formula suggested by Illustration 5 of the *Restatement,* this place would seem to be the place of loss. It may be urged that even at this point *B* had as yet sustained no loss. It was not until *C's* default that a loss was actually first realized. If *C's* default is taken as marking, in point of time, the instant when loss occurred, then the problem of apprehending the place where it occurred becomes abstruse indeed.[27]

> Case (3). By means of false misrepresentations, *A* persuades *B* to contract, in state *X*, to purchase from *A* a small farm situated in state *X*. In anticipation of his prospective ownership of the farm *B* purchases a tractor in state *Y* and subsequently spends a considerable amount of money in state *X* for other equipment. When *B* discovers *A's* fraud he rescinds the contract. *B* is forced to sell the tractor and other equipment at a loss. *B* sues *A* in state *F* for damages for deceit.

B's first act of reliance was his promise, made in state *X*, to purchase the farm from *A*. Can it be said that the making of this contract directly and immediately involved the sustaining of a pecuniary loss?[28] *B* parted with no tangible assets at this point. Would it suffice, nevertheless, in order to warrant invoking the law of state *X*, to reason that the loss which later followed was

---

do not involve choice-of-law questions, and most of them involve actions of a contractual nature. It is well established that in an action for deceit the plaintiff must show actual damage. "Unless the plaintiff can show an actual pecuniary loss, he can recover nothing." HARPER, TORTS 469 (1933); PROSSER, TORTS 768 (1941).

25. *See* Brown v. Ohman, 43 So. 2d 727, 746-47 (Miss., 1949) (dissenting opinion); *cf.* Smyth Sales, Inc. v. Petroleum Heat & Power Co., 128 F.2d 697, 699 (3d Cir. 1942).

26. See RESTATEMENT, CONFLICT OF LAWS § 377, comment *a*, § 378, comment *b* (1934).

27. A somewhat similar case is that of Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925). According to the court's treatment of the case, no multiple contacts are involved, and the case merely stands for the proposition that the *lex loci delicti,* rather than the *lex fori,* governs. Sufficient facts are not revealed, however, to determine where the plaintiff parted with his assets.

28. If plaintiff's first act of reliance in one state is not detrimental to him, but a subsequent reliance in another state is, the law of the latter state will be held to govern. *Cf.* Boulevard Airport, Inc. v. Consolidated Vultee Aircraft Corp., 85 F. Supp. 876, 880 (E.D. Pa. 1949).

incurred as a result of this first act of reliance?[29] Again, it could be forcibly argued that this contract, like the false representations of *A*, was but an event in the whole series of events which led to loss, and is thus immaterial in determining the place of wrong.[30] It was in connection with *B's* second act of reliance—the purchasing of the tractor in state *Y*—that he actually first parted with his assets. The first element of pecuniary loss for which *B* is seeking redress was actually consummated there. It would seem to be immaterial that *B* suffered further losses in state *X*,[31] or that he suffered the greater part of his losses there. It might therefore seem that the law of state *Y* would be chosen to govern the substantive elements of this action of deceit. As a matter of policy, the advisability of choosing the law of state *Y*, which, as compared to state *X*, had only a minor and incidental contact with the transaction as a whole, seems doubtful.[32]

These illustrations perhaps do not exhaust the difficulties encountered in determining the place of loss. The concept of sustaining pecuniary loss is not in itself difficult to grasp when the transaction is viewed as a whole. The problem of pinning it down in terms of a particular time and place, however, becomes in some cases so elusive as almost to defy analysis. No more convincing testimony of the need for clarification need be sought than the varied interpretations which have been indulged by the courts.[33]

Various underlying policies need to be considered in selecting a choice-of-law rule. An idcal choice-of-law rule would (1) reflect the social interests of all the states having significant contacts, (2) serve the end of justice between the parties before the court, and satisfy the requirements of (3) uniformity and (4) facility of application.[34] Unfortunately the very nature of the choice-of-law principle renders unattainable the perfect fulfillment of all these policies in a single rule. An approximation is the best that can be hoped for. To emphasize the interests of the place of injury tends to repress the interests of the place of acting, and vice versa. Some writers have suggested a middle-of-the-road course whereby the forum would in each case be free to localize the tort at the place where the "most characteristic element of the entire cause of action" occurred.[35] The range of choice would thereby become broadened,

29. *See* Brown v. Ohman, 43 So. 2d 727, 746-47 (Miss. 1949) (dissenting opinion).
30. *See* RESTATEMENT, CONFLICT OF LAWS § 377, comment *a*, § 378, comment *b* (1934).
31. See note 7 *supra.*
32. "This [European] literature objects to the law of the 'place of effect' . . . that effects . . . may obtain at a place by accidental causation, to the surprise of the actor and possibly also of the victim." 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 304 (1947). See LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 370 (1947); STUMBERG, CONFLICT OF LAWS 187 (1937).
33. See notes 15, 16, 17 *supra.*
34. See HANCOCK, TORTS IN THE CONFLICT OF LAWS 54-62, 175-81 (1942); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays,* 56 YALE L.J. 1155, 1159, 1161, 1174 (1947).
35. 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 317 (1947).

so much so perhaps as to preclude the possibility of attaining uniformity and certainty. Experience and evaluation of all the underlying principles, however, might show that "a hard and fast system of doctrinal formulae . . . which purports to have, but lacks, complete logical symmetry" is not as desirable as "one which affords latitude for the interplay and clash of conflicting policy factors." [36]

It suffices at present, however, to observe that the place-of-injury technique seems to have secured a firm foothold in American law. Suggestions for improvement would perhaps be more profitably confined within the limits of the place-of-injury rule. The *Restatement* interpretation of the place of injury, as it pertains to fraud cases involving pecuniary loss, is inadequate because it does not clearly define the place of loss. Thus, the fourth policy need listed above—facility of application—and consequently the third—uniformity—are not met.

It would seem that some, though not all, of the difficulty and confusion could be obviated by shifting the emphasis from the search for the place where pecuniary loss is finally realized to the place where the plaintiff *acts in reliance* in such a way as to cause the subsequent loss. This approach would avoid the troublesome problem of tracing down the place where pecuniary loss ultimately occurs. In many cases, of course, the reliance and the loss occur simultaneously. Illustration 5 following § 377 of the *Restatement* [37] is an example. *B's* parting with his chattels constituted both the reliance and the loss. But in many cases, such as these in which the plaintiff's reliance is the making of a contract, the actual loss may occur at a subsequent time and at a different place. It may also be noted that there may be more than one act of reliance, and that the damage may be a consequence, not of the first, but of some subsequent act of reliance.[38] It is the place of reliance from which the loss proximately results that should be looked to. Thus, the following definition of the place of injury is suggested:

> *The place of injury is the place where the plaintiff first acts in reliance on the defendant's misrepresentation, provided the reliance proximately causes the loss which the plaintiff suffers.*

---

36. Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155, 1157-58 (1947); see also Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

37. Quoted *supra* p. 770.

38. Assume that *B* is *A*'s exclusive agent for the sale of *A*'s products in state *X*. *A* falsely and fraudulently represents to *B* that his exclusive agency contract will be renewed for ten years. In reliance on these representations, *B* contracts, in state *Y*, to purchase certain equipment, with a view to enlarging and expanding the distributorship. Subsequently, *B* contracts, in state *Z*, to purchase additional equipment for the same purpose. *A* wrongfully refuses to renew the agency contract. Assume that *B* is relieved of his obligation under the contract made in state *Y*, but is forced to perform the contract made in state *Z*. The loss was a consequence of the act of reliance in state *Z*.

This definition does no violence to the underlying place-of-injury theory —*i.e.*, that it is the purpose of tort law to create and enforce protective rights. On the other hand, it is true that the place of injury, so interpreted, would not necessarily be the place where the last event necessary to give rise to a cause of action occurred.[39] No cause of action in deceit arises unless and until the plaintiff suffers a loss which can be measured in terms of pecuniary value.[40] But why should this condition precedent to the accrual of a cause of action be the controlling factor in choosing the governing law? [41] Since damage follows as a direct consequence of the reliance, the place of reliance, realistically and practically speaking, is the place of injury. The forum could as reasonably and as logically look to the law of the place of reliance as to the law of the place where damage results. Unquestionably, it could do so more easily.

The hypothetical cases which have been presented in the text could be handled with comparatively little difficulty by applying this formula. In Case (1), *B's* reliance consisted in his accepting *A's* offer and paying the purchase price in state *Y*. The fact that the paying of the purchase price might also be considered as constituting the loss is not controlling. This case may be regarded as an example of the situation in which the reliance and the loss occur simultaneously. The law of state *Y* should be chosen.[42] In Case (2), *B's* first act of reliance was the execution of the contract with *C* in state *X*. The loss which *B* ultimately sustained was incurred as a proximate result of the making of this contract. It is unnecessary to speculate as to where he actually parted with his assets. The governing law is that of state *X*. By the same line of reasoning, the law of state *X* would be chosen to govern in Case (3). It is seen that the approach here advocated would, in this and in many other cases, though not in all, eliminate from consideration those states which have only casual contacts. The place where the reliance occurs is likely to have a closer contact with the transaction than the place where assets are eventually parted with.

It must be frankly admitted that this solution cannot be easily applied to the case presented in Illustration 6 following § 377 of the *Restatement*.[43] When

39. See note 9 *supra*.
40. HARPER, TORTS 469 (1933); PROSSER, TORTS 768 (1941).
41. It has been repeatedly held in wrongful death actions that the place of wrong is the place where the injury was inflicted, not the place where death resulted, though clearly no cause of action for wrongful death could accrue until death occurred. "[T]he cause of action contemplated by the statute is the tort which produces death, and not the death caused by the tort. It is true that the action will not lie unless death follows the wrongful act which occasions it; but death is not the tort but simply its consequences or result." Centofanti v. Pennsylvania R.R., 244 Pa. 255, 90 Atl. 558, 561 (1914). See cases cited note 22 *supra*.
42. If the contract to sell only had occurred in state *Y* and the purchase price had been paid in a different state, the result would be the same.
43. Quoted *supra* p. 770.

reliance consists in refraining from acting, it becomes by nature unsusceptible of easy localization. It may not be incorrect, however, to say that the place of reliance in such a case is the place where the plaintiff would have acted had he not been influenced by the defendant's representations. If this reasoning is accepted, the place of injury in Illustration 6 would be the place where *A* would have sold the shares had he not been misled by *B's* false representations. Admittedly, that place may be difficult to ascertain.

This suggested definition of the place of injury in deceit cases is not offered as an ideal solution. It seems to have been applied in a few of the cases, though perhaps not consciously and as a result of thorough analysis.[44] But it would seem to be the most satisfactory solution within the framework of the place-of-injury rule.

WILLIAM O. BEACH, JR.

44. See Smyth Sales, Inc. v. Petroleum Heat & Power Co., 128 F.2d 697 (3d Cir. 1942); Boulevard Airport, Inc. v. Consolidated Vultee Aircraft Corp., 85 F. Supp. 876 (E.D. Pa. 1949); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925); *see* Brown v. Ohman, 43 So. 2d 727, 746-47 (Miss. 1949) (dissenting opinion).