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## CONFLICT-OF-LAWS PROBLEMS IN ADMIRALTY: THE PASSENGER TICKET\*

*Alan M. Sinclair\*\**

### I. INTRODUCTION

A contract is made in Detroit for transportation of a British subject from New York to Southampton on a British steamship. After two days at sea, the passenger is injured by a torrent of water rushing through an open port negligently left unfastened by a servant on the steamship. If the action is brought in an English forum and the defendant steamship company pleads an exculpatory clause in the contract of carriage, what should be the result?

This may sound like a manufactured fact situation for law students. However, the above narrative is closely akin to a famous English case<sup>1</sup> and almost on all fours with scores of others which have arisen in the United States and other seafaring states.<sup>2</sup> Although there are other important problems inherent in this example, the conflict-of-laws question is the one that predominates. Immediately, the problem looms: what law determines the fact of the tort; what law the validity of the contractual exemption clause; what of the public policy of the forum; and so on. In other words, this problem has been, and will continue to be, essentially one of choice of law. Although the present writer has investigated somewhat deeply the relative problems dealing with bills of lading and the conflict of laws,<sup>3</sup> it is perhaps surprising to discover that the loose body of conflict rules there present is shelved fairly consistently when passenger carriage is involved and the courts have before them broken bodies rather than broken bales.<sup>4</sup> There have been a number of different

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<sup>1</sup> Jones v. Oceanic Steam Nav. Co. [1924] 2 K.B. 730.

<sup>2</sup> Many of these will appear in subsequent notes in this article.

<sup>3</sup> Sinclair, *Conflict of Law Problems in Admiralty* (pts. 1-2), 15 Sw. L.J. 1, 207 (1961).

<sup>4</sup> *Id.* at 241.

reasons advanced for this divergence,<sup>5</sup> but one cannot avoid the conclusion that it is largely a matter of policy, that of protecting human life, which makes the difference.<sup>6</sup> In any event, even a cursory examination of the cases will illustrate that there are different forces at work in the passenger carriage field.

To begin, it would perhaps be best to state the first barrier; that is, once the passenger is injured and is prepared to litigate his claim, what form of action is to be followed? Is this to be a tort action or a contract action? Anyone even vaguely familiar with conflict-of-laws problems will recognize the extreme importance of this classification. It is elementary that vastly different choice-of-law rules will be pressed into action dependent on the choice that is made. At first insight, one might venture to say that there is such a difference that if the former choice is made, the *lex loci delicti commissi* will control; if the latter, it may well be the proper law of the contract which will be selected.

That the problem exists is not difficult to understand. The plaintiff has been injured due to the negligence of the defendant or of one of its servants. The action on a delictual basis for resultant damages is a natural course. On the other hand, the plaintiff has a contract with the defendant to carry him from one point to another in a safe, unharmed condition, and this contract has been breached by an act of the defendant. Which line will the plaintiff follow? The obvious, immediate answer is to do both. The problem with this, of course, is that it has long been the practice in the common-law world to separate precisely tortious and contractual obligations.<sup>7</sup> However, if the court at the forum is willing to accept such an alternative plea, and many will,<sup>8</sup> all well and good; part of the problem, but a very small portion, is overcome. The real problem stems from the argument that if the plaintiff sues the defendant carrier in tort, then obviously the latter is going to plead the exculpatory clause contained in the contract of carriage. To complete the picture, take into consideration the public policy side of such clauses in relation to the views of the forum. In summary, the court is first asked to determine if in fact a tort has been committed (referring for this answer to some one body of law, as suggested above perhaps the *lex loci delicti*

<sup>5</sup> See *The Assunzione* [1954] P. 150, at 190 (Hodson, L.J.); *Boorman v. Morris* [1944] 2 West. Weekly R. (n.s.) 12, at 16 (Alta.) (MacDonald, J.); Dicey, *Conflict of Laws* 830 (7th ed. 1958).

<sup>6</sup> "But passengers, being human beings, are certainly not comparable to inert freight. As human beings, they have volition, feelings and dignity not possessed by crates of cargo." Norris, *Maritime Personal Injuries* 220 (1959).

<sup>7</sup> See 2 Rabel, *The Conflict of Laws: A Comparative Study* 287 (1947).

<sup>8</sup> See 6 Williston, *Contracts* § 1528 (1938).

*commissi*); then it is forced over into the contractual side to determine the validity of a clause in a contract (choosing from among a number of available choices, perhaps proper law, law of the flag, *lex loci contractus*, or many others). If matters have proceeded to such a stage that the forum recognizes the tort and recognizes the validity of the contractual exemption clause by some foreign law, the difficult hurdle still remains of public policy at the forum. It will be, therefore, the burden of this Article to find a consistent path through this maze and to examine not only what has happened in past instances, but to portray, if possible, the best available avenues for the future. In this process, an analysis of cases which have arisen in the common-law countries—the United States, the United Kingdom, and Canada—is necessary.

It was mentioned above that there is a considerable difference between the carriage of goods and the carriage of passengers. Courts, as well as theorists,<sup>9</sup> have long recognized this. If a carriage of goods is involved, to base the choice of law on a delictual footing is unsound.<sup>10</sup> Of course, it is possible, on a theoretical basis, to conclude that the law of the place of injury is a wise choice. The place where the damage is done is easily ascertained,<sup>11</sup> and at first glance this is appealing. The reminder comes quickly, however, that locating the locus is *ex post facto* and thus self-destroying. If the shipment of goods has gone from San Francisco to Bombay by way of Hong Kong and Manila, it is obvious that the potential number of places of injury is great. Consider, however, the status of the carrier and the shipper back in California who have entered into a contract of carriage and included certain terms, valid by the law of California, (or the United States) and have based their freight rates and insurance coverage on the basis of that law. If the goods are lost or damaged en route—no one could forecast at the time of contracting where the damage will occur—then the delictual theory would apply some body of law unknown at the time of contracting; such law might or might not uphold the validity of the contract of carriage. However, if the forum characterizes this question as one of contractual obligation

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<sup>9</sup> See Dicey, *op. cit. supra* note 5, at 831; Graveson, *The Conflict of Laws* 199 (3d ed. 1955); Hutchinson, *Carriers* 220 (3d ed. 1906); Williston, *Contracts* § 1113 (1936).

<sup>10</sup> The writer's criticism of this basis has already been treated in a previous article. See Sinclair, *supra* note 3, at 238-42.

<sup>11</sup> If in coastal waters or harbor, no difficulty at all is encountered; if on the high seas, the law of the flag is always available. If a single ship is involved, *i.e.*, there is no collision with another, the law of the flag is the only available choice if the incident occurs on the high seas. See Cheshire, *Private International Law* 282 (5th ed. 1957). If at least two vessels are involved, reference may be had to the general maritime law. See *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.*, 10 Q.B.D. 521, 537 (1883).

solely,<sup>12</sup> the parties are in a position at the time of agreement to foresee with reasonable security (perhaps by express stipulation) what the law governing this contract will be. This then is the carriage of goods side of the shipping picture—an entirely contractual area from a conflict-of-laws standpoint. Is this to be carried over into the passenger side?

In a previous article, the present writer had this to say: "First, the cases which deal with the liability of a carrier to its passengers must be set aside. It might be mentioned, however, that the choice of the place of injury is not open to nearly as much criticism in passenger as it is in cargo cases, chiefly because of matters of policy."<sup>13</sup> The compelling question then is whether the cases will bear the supposition and show that the law of the place of injury will have some weight; to see, that is, if in the passenger cases, a delictual approach can be used as an alternative to a pure contractual approach or perhaps in conjunction with it. To best understand this and to see if it is possible, a brief survey of the historical background is necessary.

It will be remembered that the early common-law lawyer was more interested in forms of action than in substantive rights. Accordingly, instead of today's classification of "tort" and "contract," there were trespass, trespass upon the case and debt, actions of covenant, and detinue. The fourteenth century saw the introduction of a new remedy, *assumpsit*. The *Humber Ferry Case* of 1348 (in which the transportation of B's horse across the Humber so overloaded the ferry that the horse was drowned) has been regarded as one of the early developing cases on *assumpsit*.<sup>14</sup> One can see that the dual elements of contract (for carriage) and tort (misfeasance) were equally as important then as in the case of the passenger carried under contract today. The transition from misfeasance to nonfeasance was followed by *Slade's Case* in 1602 and the intricacies of *indebitatus assumpsit*. This brief summation is inserted to illustrate the early nexus of tort and contract from which spring a great many of the problems today.

For over one hundred years, the courts have been confronted with the plaintiff bringing alternative contract and tort claims.<sup>15</sup> There-

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<sup>12</sup> It should be remembered that if it were not for the contract of carriage there would be no obligation at all; the obligation comes only from the agreement and any damage claim can only be based on that contract.

<sup>13</sup> Sinclair, *supra* note 3, at 241.

<sup>14</sup> Winfield, *A Text-Book of the Law of Tort* 668 (5th ed. 1950).

<sup>15</sup> See, e.g., *Brown v. Boorman*, XI Clark & Finnelly 45, 8 Eng. Rep. 1003 (1844); *Union Pac. R.R. v. Shook*, 3 Kan. App. 710, 44 Pac. 685 (1896).

fore, one might conclude that the injured passenger might today bring his action against the carrier on either or both contractual and delictual grounds.<sup>16</sup> If it is purely contractual, no real problem is present as there will be here no significant difference between a cargo and a passenger case.<sup>17</sup> If an action based on the negligence of the carrier is brought to recover damages for breach of duty, one must investigate further into the conflicts field.

## II. TORTS AND THE *Lex Loci Delicti*

There have been a number of railroad cases<sup>18</sup> in the United States which have held that if a passenger purchased his ticket in one state to travel to a second state and was injured in a third, the plaintiff was restricted to actions founded in tort alone (thus governed by the law of the third state, the place of injury) and could not classify the carrier's responsibility as contractual to apply the law governing the contract. In *Maynard v. Eastern Air Lines*<sup>19</sup> (in which an airline ticket was purchased in New York for a flight to New Jersey and the aircraft crashed in Connecticut) it was held that Connecticut law applied as this was the *lex loci delicti* and no reference to the *lex loci contractus* was possible.<sup>20</sup> In another New York case,<sup>21</sup> this ruling was followed. As expressed by Robbins,<sup>22</sup> "the situs of a tort is at the place where the tort is committed, and that law governs the questions whether a tort has been committed and whether a right of action arises therefor. But if the injury occurs on the high seas, the law of the state whose flag the vessel flies controls."<sup>23</sup>

<sup>16</sup> "The passenger injured through the fault of the carrier has a cause of action based on the breach of the contractual obligation, either express or implied, to transport him safely. He also has the alternate cause of action, of damage for personal injuries under tort principles." Norris, *op. cit. supra* note 6, at 227. An example of the confusion present in the courts as to the characterization of the problem may be found in *Tookhill v. Cunard Steamship Co.*, 130 F. Supp. 128 (D.C. Mass. 1955), in which the contract of carriage was made in Massachusetts for passage to Ireland and the injury was occasioned in New York harbor. A clause of the contract restricted suits to writs filed within one year. The court declared that liability of the carrier was to be determined by the law of the United States as that was the *lex loci contractus* and the original place of performance. The court then went on to conclude that as this was a maritime tort, it was governed by general maritime law.

<sup>17</sup> If such a course of action were pursued, then it is further submitted that of the choice-of-law rules available on the contract side, the intention of the parties is still the most logical and reasonable choice. The argument for such a selection is fully set out in a previous article on bills of lading. See Sinclair, *supra* note 3; see also text accompanying note 112 *infra*.

<sup>18</sup> See, e.g., *Pittsburg, C., C. & St. L. Ry. v. Grom*, 142 Ky. 51, 133 S.W. 977 (1911).

<sup>19</sup> 178 F.2d 139 (2d Cir. 1949).

<sup>20</sup> Cf. *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692 (1935).

See text accompanying notes 94-96 *infra*.

<sup>21</sup> *McDonald v. Mallory*, 77 N.Y. 546 (1879).

<sup>22</sup> Robbins, *Conflict of Laws* (1915).

<sup>23</sup> *Id.* at 21.

It is evident, therefore, that it is possible to control the choice-of-law question to such an extent as to enable exclusive use of the *lex loci delicti*.<sup>24</sup> It is submitted that such a choice is erroneous to some degree; of even more importance, it creates more problems than it solves. Although it was mentioned earlier<sup>25</sup> that such a selection might at first appear advantageous, an attempt will now be made to illustrate the opposite.

The fact that the causes of action with which we are concerned occur on water and generally on the high seas presents the first major problem. The multilateral nature of the sea voyage provides the second. The combination of these two in some jurisdictions provides even more difficulty.

Regarding the locus of the injury, only one real problem is apparent; however, there are many facets. The quotation from Robbins<sup>26</sup> leads the way into the problem; to paraphrase, while the *lex loci delicti* governs and controls in a normal tort action, the law of the flag applies if the injury is incurred at sea. It is clear, therefore, that the great body of stable, normal (equating normal with land situations) tort rules in the conflicts field will be partially displaced. It does not take many ventures into the maritime field to realize that if one "injects" water into the "ship is part of the territory whose flag it flies" theory, the fiction is doubly compounded.<sup>27</sup> Even though there are problems in cases in which a passenger or another falls off a gangplank to the dock below and is injured,<sup>28</sup> and where the act complained of occurs entirely in state waters and is in other par-

<sup>24</sup> Today, the decision in *Carroll v. Lanza*, 349 U.S. 408 (1955) . . . make[s] it clear that the law of the contract does not necessarily dominate the law of the tort after all. The state where the tort occurs has such legitimate concern with the legal, social and economic consequences of the tort that it may properly apply its law to the facts *despite contrary provisions in a prior contract valid where made*. Leflar, *The Law of Conflict of Laws* at 224 (1959). (Emphasis added.)

<sup>25</sup> See text accompanying note 11 *supra*.

<sup>26</sup> See text accompanying notes 22-23 *supra*.

<sup>27</sup> The solution most commonly accepted as to torts in our municipal and in international law is to apply the law of the place where the acts giving rise to the liability occurred, the *lex loci delicti commissi*. This rule of locality, often applied to maritime torts, would indicate application of the law of Cuba, in whose domain the actionable wrong took place. The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate. *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953).

<sup>28</sup> Notwithstanding Professor Stumberg's forecast that as the injury was inflicted on land (as the last place necessary) this could not be a maritime tort; thus there would be no admiralty jurisdictions. Stumberg, *Tort Jurisdiction in Admiralty*, 4 *Texas L. Rev.* 306 (1926). *The Admiral Peoples*, 295 U.S. 649 (1935), decided otherwise. See also *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935), noted in 3 *U. Chi. L.R.* 321 (1936); *cf. Smith & Son v. Taylor*, 276 U.S. 179 (1928).

particulars local in nature,<sup>29</sup> these do not provide, by any means, the majority of the difficulties. The problems arise because there is no "land" with which the tort can be connected and the courts are forced to rationalize. Therefore, if the injury is occasioned in territorial waters by or on a "foreign" ship, or on the high seas, or involves more than one vessel in either case, the rules must bend to fit the mold. This process is handled with fair consistency in many countries, as will be revealed shortly; however, the introduction of fictions with their accompanying difficulties makes for anything but uniformity in a field in which uniformity should be all-important.

Apart from the question of admiralty jurisdiction<sup>30</sup> and concentrating upon finding the locus of the tort, a beginning can be made by a simple categorization. If a passenger is injured or killed, the places in which this can happen are somewhat limited and can be listed as follows:

- (a) on board his own vessel; or
- (b) in the sea.

If he meets his tragedy on board his own vessel then a further classification can be made:

- (i) the vessel is on the high seas; or
- (ii) the vessel is in the territorial water of some state.

These facts have presented difficulties in the past and presumably will do so in the future. Only a portion of the factual picture has been presented so far. The above classifications assume that only one ship is involved. Obviously, it often happens that the passenger is killed or injured in an accident involving more than one ship. Thus, the passenger may meet his accident on board his own vessel or in the water; he may do so in either case in territorial waters or on the high seas; and, finally, the initial acts which cause the misfortune may stem from or concern more than one vessel. To round out completely the possibilities and emphasize perhaps the inherent difficulties, the reader should be reminded that if the incident is formed by the actions of more than one vessel, those vessels, perhaps more often than not, will fly different flags. With these combinations pos-

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<sup>29</sup> In *Just v. Chambers*, 312 U.S. 383 (1941), noted in 29 Calif. L. Rev. 519 (1941), in which a passenger on a private yacht was injured and the owner later died of an unrelated cause, the Supreme Court held that the law of Florida applied as the cruise was entirely in Florida waters. As the note on this case in 40 Colum. L. Rev. 1434 (1940), concluded, the doctrine from *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917), of "maritime but local" is preserved in the field of maritime torts.

<sup>30</sup> The picture in the United States is fairly well expressed in *Hermann v. Port Blakely Neil Co.*, 69 Fed. 646 (N.D. Calif. 1895), in which, in seeking the place of tort for jurisdictional purposes, the court held that it was where "the substance and consummation of the tort happened which is the ultimate test of admiralty jurisdiction, and not the origin. . . ." *Id.* at 648.



sible, the question is once again squarely put: where is the place of the tort? A brief discussion will now follow outlining these combinations as they have been presented to the courts and the resultant solutions.

### A. *Single Ship In Territorial Waters*

As previously mentioned<sup>31</sup> regarding suits in the United States, if the vessel is a "Florida" vessel and the injury is occasioned in Florida waters, the law of Florida will be applied. The "local" character of the situation is, of course, sufficient as well to prevent the rise of any conflict-of-laws problems. The facets need only be altered slightly, however, to create a possible conflict-of-laws problem. For example, if the injury is incurred by the passenger on board a Swedish vessel in the territorial waters of Florida, the law of Sweden, the law of Florida, and the law of the United States are all presented to the court. Clearly, the law of Florida should be excluded; no longer is the situation "maritime but local" but purely "maritime." Is it then to be the law of Sweden or the law of the United States?

Notwithstanding the fact that "the universally settled rule calls for the application of the law of the state to which the waters belong,"<sup>32</sup> this is not as broad as it first appears. The Restatement,<sup>33</sup> authors,<sup>34</sup> and case law<sup>35</sup> have carved out exceptions to the rule.<sup>36</sup> In England, it apparently is well settled that the territorial law will be applied.<sup>37</sup> If it is accepted that a passenger is injured on board any vessel in the territorial waters of a state and only that vessel is involved (and thus it is not a collision case), then (assuming such not to be merely a matter of an "internal" nature) it is clear that most, if not all, jurisdictions would apply the law of the state whose waters are involved. For purposes of this discussion, therefore, it is assumed

<sup>31</sup> See note 29 *supra* and accompanying text.

<sup>32</sup> Rabel, *op. cit. supra* note 7, at 343.

<sup>33</sup> Restatement, Conflict of Laws § 405 (1934). "Liability for an alleged tort committed on board a vessel while the vessel is in the territorial waters of a state is determined, if it affects only the internal economy or discipline of the vessel, by the law of the state whose flag the vessel flies." *Id.* at 490.

<sup>34</sup> 2 Beale, *The Conflict of Laws* 1328 (1935); Hancock, *Torts in The Conflict of Laws* 264 (1942); Rabel, *op. cit. supra* note 7, at 344.

<sup>35</sup> *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Grand Trunk R.R. v. Wright*, 21 F.2d 814 (2d Cir. 1928); *Patton-Tully Transp. Co. v. Turner*, 269 Fed. 334 (6th Cir. 1920); *Rainey v. New York & P.S.S. Co.*, 216 Fed. 449 (9th Cir. 1914); *Thompson T. & W. Ass'n v. McGregor*, 207 Fed. 209 (6th Cir. 1913); *Jennings v. Piwinski*, 136 Misc. 447, 241 N.Y.S. 349 (Cayuga County Ct. 1928).

<sup>36</sup> The exceptions have to do, in all cases, with matters which affect only the internal discipline and management of the vessel and thus exclude the territorial law as having no interest in the matter.

<sup>37</sup> Cheshire, *Private International Law* 295 (6th ed. 1961); Schmitthoff, *The English Conflict of Laws* 155 (1945).

as settled that in the above fact situation—in answer to the question, Swedish or American?—American law will apply.<sup>38</sup> Thus, if a passenger is injured on board any vessel in American territorial waters, the forum will apply the maritime law of the United States.

#### B. *Collision In Territorial Waters*

If two vessels collide in the territorial waters of the United States and both fly the flag of that country, then all would agree no change should be made in applicable law from that chosen in the single vessel category. If, as is more likely, the flag of one or both of the vessels is not that of the place where the collision occurs, more choice is presented. Even so, the rule is apparently no different;<sup>39</sup> English<sup>40</sup> and American<sup>41</sup> cases have applied the law of the territorial waters.<sup>42</sup> Therefore, in the most extreme case—for example, a Liberian freighter which rams a passenger vessel registered in Japan in American waters and injures a passenger on the latter—the maritime law of the United States will be chosen as the applicable law. So far then, in all cases arising in territorial waters (with the minor exception of the “internal discipline” factor) the law of the territorial waters will apply uniformly regardless of forum.

#### C. *Single Ship On The High Seas*

If one imagines a storm in the North Atlantic, a passenger lying in his bunk on an English liner, and a negligent steward who has left a port unfastened so that a wave now engulfs the unfortunate passenger and throws him to the deck, the next stage is set. To hasten to the crux, is the law of the flag to apply (as the ship is a “floating island” of England) or does the law of the North Atlantic apply, whatever that might be? Once again, as in the previous categories, no problems have arisen. Courts in both England<sup>43</sup> and the United States<sup>44</sup> have declared the law of the flag to be the logical and compelling choice.<sup>45</sup> The one possible alternative, of course, is to apply the “general maritime law” as being the law of the North Atlantic.

<sup>38</sup> The American law will be the admiralty or maritime law of the United States as contrasted with any state law.

<sup>39</sup> Restatement, Conflict of Laws § 409 (1934); Rabel, *op. cit. supra* note 7, at 343.

<sup>40</sup> *The Mary Moxham*, 1 P.D. 43 (1875); *The Arum*, [1921] P. 12.

<sup>41</sup> *The Albert Dumois*, 177 U.S. 240 (1900).

<sup>42</sup> *Cf.*, however, the Scottish decision in *S.S. Reresby v. S.S. Cobetas*, Scots L.T.R. 719 (1923), where the law of the forum was chosen on a “highly objectionable” basis. Hancock, *op. cit. supra* note 34, at 268.

<sup>43</sup> *Regina v. Anderson*, L.R. 1 Cr. Cas. Res. 161 (1868); see Schmitthoff, *op. cit. supra* note 32, at 156.

<sup>44</sup> *The Titanic*, 233 U.S. 718 (1914).

<sup>45</sup> Restatement, Conflict of Laws § 408 (1934). “Liability for an alleged tort in the navigation of a vessel on the high seas outside the territorial waters of any state is determined by the law of the state whose flag the vessel flies.” *Id.* at 491.

Although this was accepted by one court in a case in which the deceased was swept overboard after the vessel shipped a large wave (on the basis that the tort was consummated in the place of drowning—the sea—and not on board where it was merely initiated), this was not accepted on appeal, and the law of the port of registry was substituted.<sup>46</sup> In summary, the law of the flag is the universal choice in these situations, and it is submitted that no other choice is logically or practically possible.

#### D. Collision On The High Seas

For the first time in this discussion, a separate treatment of English and American cases will be undertaken with respect to a collision between two or more ships on the high seas.

In England, following the lead of *The Mary Moxham*<sup>47</sup> and *The Leon*,<sup>48</sup> the courts have uniformly held that, regardless of the flags which the two vessels fly,<sup>49</sup> the law of the flag is to be disregarded, and instead the general maritime law of England is to be applied.<sup>50</sup> As Winfield so aptly stated the rule:

But collisions between ships at sea are subject to exceptional rules. Even apart from statute and treaty, it seems that litigation in an English court as to such collisions is governed entirely by English law. It matters nothing that one or both of the ships are foreign, or that according to foreign law the act is not a tort, for the jurisdiction is based on the fact that 'the high seas . . . are subject to the jurisdiction of all countries,'<sup>51</sup> and once get the parties before the Court, that is enough to make the English maritime law applicable.<sup>52</sup>

When the governing law is sought in the United States, a different picture is presented. To state the situation as succinctly as possible:<sup>53</sup> if the two colliding vessels are both of the same flag, the American courts are inclined to apply the law of that flag to delictual matters which arise from that collision.<sup>54</sup>

<sup>46</sup> *Lindstrom v. International Nav. Co.*, 117 Fed. 170 (E.D.N.Y. 1902).

<sup>47</sup> 1 P.D. 43 (1875).

<sup>48</sup> *The Leon*, 6 P.D. 148 (1881).

<sup>49</sup> In *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.*, [1883] 10 Q.B.D. 521, the colliding ships both flew the Dutch flag, but the locus was the high seas, and the English court chose the maritime law over the flag law.

<sup>50</sup> When consideration is given to the variances between English and American tort views in the conflicts field, this choice by the courts of the former country will have rather wide repercussions, and this should, therefore, be borne in mind by the reader.

<sup>51</sup> For criticism see Cheshire, *op. cit. supra* note 37, at 298.

<sup>52</sup> Winfield, *Torts* 181 (4th ed. 1948).

<sup>53</sup> As this portion of the tort field is being brought out by the writer merely to illustrate some defects in a delictual approach, heavy borrowing and paraphrasing of both Rabel and Hancock has been thought necessary and advantageous.

<sup>54</sup> *The Eagle Point*, 142 Fed. 453 (3d Cir. 1906); see also *The Belgenland*, 114 U.S. 355 (1885); *The Scotland*, 105 U.S. 24 (1881); Hancock, *op. cit. supra* note 34, at 275; Rabel, *op. cit. supra* note 7, at 347. Restatement, Conflict of Laws § 410(a) (1934).

If the ships fly different flags and collide on the high seas, "the case . . . is desperate."<sup>55</sup> The Restatement blithely states that liability for the tort is governed "by the law of the forum if the laws of the states whose flags the vessels fly are not the same."<sup>56</sup> As has been remarked elsewhere,<sup>57</sup> this may well be "a declaration which is sound as a desideratum of policy but at least dubious as a statement of fact." The fact is that American courts have found this situation "desperate" and have concluded that in some instances the law of the flag of that vessel on which the injury actually occurred should be chosen,<sup>58</sup> in others that the law of the flag of the vessel causing the injury would be a correct choice,<sup>59</sup> and again, as in England, the general maritime law.<sup>60</sup> It would appear that the majority of courts have chosen (as the Restatement indicates) the law of the forum. Whether this be as a "last resort"<sup>61</sup> or for some other reason, it may be concluded, for this treatment alone, that the *lex fori* will control in the situation of a collision on the high seas between different flag vessels.

Before moving to the next phase, it would be well to assimilate what has been stated up till now. The conclusions which have been reached are: In territorial water cases, the law of the state to whom the territorial waters belong will govern. In high seas cases, if a single vessel is involved, the law of the flag of that vessel will govern. Moreover, in a collision on the high seas, an English court would apply the general maritime law as administered in England regardless of the flag situation. However, in the United States, if both are of the same flag, that law will control; if each is different, the *lex fori* will predominate. That confusion is possible and uniformity among seafaring states lacking in this vital field seems obvious. Lest one should feel doubts about this statement, the second phase of the discussion on the difficulties with the tort theory, the *lex loci delicti commissi* in particular, will now be started.

Everyone who has even cursorily studied the problem of torts in the conflict of laws is aware of the distinctions between the so-called English and American views. One can get deep and penetrating treatment from a number of sources;<sup>62</sup> thus, the present writer will

<sup>55</sup> Rabel, *op. cit. supra* note 7, at 348.

<sup>56</sup> Restatement, Conflict of Laws § 410(b) (1934).

<sup>57</sup> Casner & Leach, Cases & Text on Property 362 (1951), in speaking of the Restatement of Property.

<sup>58</sup> *La Bourgogne*, 210 U.S. 95, 138 (1908).

<sup>59</sup> *The James McGee*, 300 Fed. 93 (D.C.N.Y. 1924).

<sup>60</sup> *The Windrush*, 286 Fed. 251 (S.D.N.Y. 1922), *aff'd*, 5 F.2d 425 (2d Cir. 1924).

<sup>61</sup> Rabel, *op. cit. supra* note 7, at 350.

<sup>62</sup> Cheshire, *op. cit. supra* note 37; Hancock, *op. cit. supra* note 34; Yntema, Book Review, 27 Can. B. Rev. 116 (1949).

attempt only a very summary treatment to illustrate further the burden of the present facet of this Article.

The trilogy of English cases,<sup>63</sup> which at least present the problem, may be summarized as follows: After a suit in an English forum which arose as a result of a collision in Belgian waters between a Norwegian sailing vessel and an English steamship (which was caused by the negligence of a compulsory pilot in the latter vessel), the rule was laid down by the Privy Council that no action could be maintained in England unless the charged party would have responsibility under that law.<sup>64</sup> This was followed closely by the now-famous ruling of Willes, J.: "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."<sup>65</sup> Finally, in *Machado v. Fontes*, the word "justifiable" was held to mean not only non-tortious, but, as well, noncriminal.

It is apparent, at least at first glance, that for a plaintiff to succeed in an English forum for a tort committed abroad, he must establish both conditions of the rule in *Phillips v. Eyre*, *i.e.*, that he could have recovered if all the events had occurred in England and that the injury complained of was nonjustifiable under either civil or criminal laws of the *lex loci delicti*. This rule reached its height in the Canadian case of *McLean v. Pettigrew*<sup>66</sup> in which the Supreme Court of Canada declared that a defendant, in a civil action for damages brought in the Province of Quebec for injuries received while driving in Ontario, must pay damages as he would have been found so liable under the *lex fori* (Quebec) and could have been punished under the laws of the *lex loci delicti* (Ontario). The defendant had already been acquitted by an Ontario magistrate.

Turning to the results obtained in similar cases in the United States, the decision of Mr. Justice Holmes in *Slater v. Mexican National R.R.*,<sup>67</sup> pronouncing the *obligatio* theory by which *lex loci delicti* is the controlling factor, is as expressive as any other. By this decision, "the theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it

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<sup>63</sup> The *Halley*, L.R. 2 P.C. 193 (1868); *Phillips v. Eyre*, L.R. 6 Q.B. 1 (1870); *Machado v. Fontes*, [1897] 2 Q.B. 231.

<sup>64</sup> The *Halley*, *supra* note 63.

<sup>65</sup> See *Phillips v. Eyre*, L.R. 6 Q.B. 1, 28-29 (1870).

<sup>66</sup> [1945] Can. Sup. Ct. 62, 2 D.L.R. 65.

<sup>67</sup> 194 U.S. 120 (1904).

gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.<sup>68</sup>

Although attempts have been made to equate the English and American schools of thought on a number of bases,<sup>69</sup> it remains quite evident that a wrong beginning was made (from one point of view, at least) in the interpretative process of previous decisions in England, and no complete relief is as yet in sight; as such is the case, no uniformity is present between these two systems. Therefore, one can only conclude that if a search is to be made for such uniformity, an almost insurmountable barrier is yet to be overcome. The fact remains, however, that this hurdle exists only in the field of torts in the conflict of laws, and the conclusion is inescapable that some other answer must be sought to reach the end which is both necessary and desirable in this phase of sea transportation.

One point remains in this illustration of inherent difficulties; it arises from the question of proper law and jurisdiction if an event occurs on the high seas. To portray this problem more vividly, one should think of a passenger who is injured on board a vessel which is at the time of the injury on the high seas; the forum is England.

No further problem is encountered if the damage complained of has occurred because of negligence on board a vessel which injures the passenger on that vessel. That is, if a single vessel only is involved, the English court would have no hesitation in deciding that the rules coming from *Phillips v. Eyre* would control; accordingly, the action must have been nonjustifiable under the law of the flag of that vessel as well as actionable if it had occurred in England.<sup>70</sup>

If two vessels collide on the high seas however, whether they be vessels of the same flag or of different flags, and a passenger on one is injured and institutes action in England, the immediate problem

<sup>68</sup> *Id.* at 126. See also *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918). (Cardozo, J.)

<sup>69</sup> In *Canadian Pac. Ry. v. Parent*, [1917] A.C. 195, Viscount Haldane impliedly judged that the *lex loci delicti* controlled, and accordingly hinged his decision more on one arm of Willes' judgment than on the other. This "natural construction" of the latter's judgment may well be the logical and rational choice, but it is submitted that it is not yet the law in England or her dominions. On this point, recourse may profitably be had to Professor Yntema's observations in the review of Dean Falconbridge's book. See Book Review, *supra* note 62, at 121. Finally, Mr. Justice Holmes, himself, at one time concluded: "[W]hen it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views." *Walsh v. New York & N.E.R.R.*, 160 Mass. 571, 572, 36 N.E. 584, 585 (1894). In *Shuman & Prevezer, Torts in English and American Conflict of Laws: the Role of the Forum*, 56 Mich. L. Rev. 1067 (1958), the authors conclude that the tort rules in the two jurisdictions are really no different because in the United States no enforcement at the forum is possible, even if the matter is actionable by the *lex loci delicti commissi*, if contrary to the forum's public policy.

<sup>70</sup> Wolff, *Private International Law* 496-97 (2d ed. 1950).

from a conflict-of-laws viewpoint is presented to that court, for obviously the first portion of the *Phillips v. Eyre* rule is in shambles. The leading English case in this particular area, *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.*,<sup>71</sup> illustrates the results of this dilemma. Lord Justice Brett was confronted with the problem and neatly buried it in the following manner:

But the negligence complained of took place upon the high seas, which is the common ground of all countries. Therefore that rule with regard to the exclusive jurisdiction of a foreign country does not apply. The case comes to this, whether an action for a tort committed on the high seas between two foreign ships (for I assume for this purpose that both are foreign ships) an action can be maintained in this country, although it is not a tort according to the laws of the Courts in that foreign country. From time immemorial, as far as I know, such actions have been maintained in the Court of Admiralty, and the rule of the liability of the shipowner for the acts of his servants has been invariably employed . . . inasmuch as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country, but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common law of England, but by the maritime law, which is part of the common law of England as administered in this country. . . .<sup>72</sup>

The conclusion as to English law then is this: if a vessel on the high seas collides with another (regardless of their flags), the sole question put to an English court is one of liability under English municipal law, "for the general maritime law forms, of course, part of English municipal law."<sup>73</sup> To contrast this with the result of an English forum looking at a territorial waters case produces the utmost confusion because *Phillips v. Eyre* will be applied under these facts.<sup>74</sup> In order to understand the total picture or at least see it portrayed (if not perhaps understood), one must examine other possible fora to see how far uniformity can be pressed.

In Canada, a leading case is that of *Canadian Nat'l Steamships Co., Ltd. v. Watson*,<sup>75</sup> in which a seaman was injured on the high seas on a vessel registered in the Province of British Columbia. The Province

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<sup>71</sup> [1883] 10 Q.B.D. 521.

<sup>72</sup> *Id.* at 537. And Sir Robert Phillimore, in *The Leon*, 6 P.D. 148 (1881), followed the same line by saying: "[T]he law which is applicable here and governs the liability of the defendants in this case is the general maritime law as administered in this country." *Id.* at 150.

<sup>73</sup> Schmitthoff, *op. cit. supra* note 37, at 156.

<sup>74</sup> See Hancock, *op. cit. supra* note 34, at 269.

<sup>75</sup> [1939] Can. Sup. Ct. 11, 1 D.L.R. 273, noted in 17 Can. B. Rev. 546 (1939) and 18 Can. B. Rev. 308 (1940). It should be mentioned that this case was so decided because of section 289 of the Canada Shipping Act, Can. Rev. Stat. ch. 29 (1952).

of Quebec provided the forum. The Supreme Court of Canada held that the *Phillips v. Eyre* decision must be followed and, therefore, took as the *locus actus* the place of the ship's registry, British Columbia. Even though no case has arisen in a Canadian court similar in its facts to the *Chartered Mercantile Bank* case in England, it is certain that, unless basic philosophies are to change, the results would be the same and the *lex fori* selected as the governing law; that is, the rules stemming from *Phillips v. Eyre* would be displaced temporarily.<sup>76</sup>

Turning to the United States, a start can be made with an initial reference to the Restatement. Section 410(a) provides an obvious disparity between English and American law (in the former it will be remembered, the *lex fori* controlled). The latter's rule as to collisions is: "Liability for an alleged tort caused by collision on the high seas outside the territorial waters of any state is governed by the laws of the state whose flags the vessels fly if the laws of such states are the same." Although it is true that subsection (b) of section 410 aligns the English and American view to a limited extent,<sup>77</sup> it is clear that at least in one major category—collision at sea of vessels bearing the same flag—the *obligatio* theory is preserved in the United States as the basic conflict-tort rule, but the fundamental conflict-tort rule in England has been totally displaced. To further complicate the entire scene, one need only refer again quickly to the second part of section 410 of the Restatement to see that it is necessary in the United States to have two very dissimilar rules as basic solutions to conflict-tort situations for what are really very similar fact situations. Moreover, of course, it need not be emphasized that judicial expediency has forced the English courts into the same corner. The "tangled web" has indeed been woven, and the resulting trap is all too obvious and far-reaching to be taken lightly.

Finally, to inject perhaps more clarity into the American scene, one must not forget that the Restatement is not codified and that the cases are still the law. For example, in *La Bourgogne*,<sup>78</sup> two vessels of different flags collided killing some passengers on one of the ships. The Supreme Court held that the law of the vessel (the flag-law) on which the injury was occasioned should control. This is in line with the decisions of many courts in "land" cases; of course, many writers have also advocated that the law of the place where

<sup>76</sup> See Castel, *Private International Law* 227 (1960); Falconbridge, *Essays on the Conflict of Laws* 828 (1947).

<sup>77</sup> The law of the forum will apply "if the laws of the states whose flags the vessels fly are not the same." Restatement, *Conflict of Laws* § 410(b), at 492 (1934).

<sup>78</sup> 210 U.S. 95 (1908).



the injury was felt, not where it perhaps was initiated, should control. On the other hand, there are cases such as *The Titanic*,<sup>79</sup> in which the "general maritime law as administered by the admiralty courts of the United States" was held to govern.<sup>80</sup> And, finally, as Professor Beale has pointed out: "In some cases it is said that the law of the flag of the vessel which negligently does the injury is applicable."<sup>81</sup>

The point of this digression is to attempt to extract clarity from what can only charitably be called confusion; no one needs to go deeply into the case law on either side of the Atlantic to see the difference between the solutions to tort problems in the field of conflict of laws. When a slightly deeper penetration is made of one facet of the tort field, maritime torts and injuries to passengers, it quickly appears that there is little hope of achieving any sort of uniformity among these countries. If this is accepted, and the writer submits that such acceptance is inescapable, then as uniformity is the goal toward which all is aimed, some other approach must at least be attempted.

### III. TORTS AND CONTRACTS

#### A. *Lex Loci Delicti And Proper Law*

Two Americans bought tickets in New York for passage to England on an English steamship. One of them was injured because of the negligence of the carrier, and suit was commenced in the United States.<sup>82</sup> These typical facts give rise to the next short departure which must be made before going into the real alternatives to tort characterization. In the decision of this case, an interesting statement appears which will illustrate the reason for the departure. Mr. Chief Justice Harlan, in the course of his opinion remarked as follows:

In *Jansson v. Swedish American Line*, a suit brought originally on the civil side of the federal court but also involving a maritime tort, the court applied the federal choice-of-law rule. It is true that in that case there was no defense, as there is here, based on a contract made in one of the United States, but we do not think that should change the result. *That might be a ground for judging the claim and the defence by different laws.*<sup>83</sup> (Emphasis added.)

Recently, another court held, "The instant cause of action is a maritime tort governed by the general maritime law of the United

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<sup>79</sup> 233 U.S. 718 (1914).

<sup>80</sup> See *The Belgenland*, 114 U.S. 355 (1885); *The Scotland*, 105 U.S. 24 (1881).

<sup>81</sup> 2 Beale, *op. cit. supra* note 34, at 1331.

<sup>82</sup> *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

<sup>83</sup> *Id.* at 193.

States."<sup>84</sup> However, they went on to say (respecting a time-bar provision in the contract of carriage—the ticket) that "federal courts ordinarily determine which law governs the contractual relationship of the passenger and the carrier by 'grouping the contacts' or 'finding the center of gravity' of the contract."<sup>85</sup>

To come directly to the issue, is it possible, and, if so, is it practical to divide the problem and ask for choice-of-law solutions for the tort and similar answers for the contract? That is to say, (1) can a court determine if there has been a tort committed by reference to the tort-conflict rule (and thus refer, perhaps, to the *lex loci delicti commissi*) and (2) if the tort is found to have been committed, switch over to the contractual aspects of the fact situation and determine by the proper law of this contract (or *lex loci contractus*) whether this is a valid agreement? Although this theory has received some measure of support,<sup>86</sup> it is inherently wrong. Taking for examination only one aspect of this argument, how does one answer the following: if it is agreed that the *lex loci delicti* determines the fact of the tort and further that the *lex loci contractus*, for example, controls the validity of the contractual exculpatory clause, to be consistent should one then return to the *lex loci delicti* to see if it will accept this exemption based on contract as a defense to the tort? There are two alternatives: (1) examine the law governing the tort to determine if there is tortious liability and then examine the law governing the contract (the ticket) to see if that law will prove exculpatory or (2) find the contract valid by its appropriate law and bring it back to the law governing the tort to see if that law will accept it as a defense.<sup>87</sup> The present writer submits that the material which has already been outlined in this Article adequately dismisses the *lex loci delicti* and, in fact, the entire tort concept as being cumbersome and nonuniform. Furthermore, it pro-

<sup>84</sup> *Caruso v. Italian Line*, 184 F. Supp. 862 (S.D.N.Y. 1960).

<sup>85</sup> *Id.* at 863.

<sup>86</sup> Wharton, for example, writing in 1905, remarked: "[A]ny defense based upon the express terms of the contract is governed by the *lex loci contractus*, even though the action be *ex delicto*." 2 Wharton, *Conflict of Laws* 1105 (3d ed. 1905).

<sup>87</sup> A passenger may, therefore, elect to disregard the contract and the rights arising out of it, and sue upon the common-law or statutory breach of duty by the carrier. In such case the law of the place where the injury occurs must always govern, for that law only can impose common-law or statutory duties within its territory. The carrier, of course, may plead his contract as a defense, but the question as to whether any rights were created by such contract sufficient to stand as a shield for the consequences of his breach of a common-law or statutory duty must be governed entirely by the law of the same place which created that duty. *The rights given by the lex loci delicti can only be defeated by defenses which are good under the lex loci delicti*. Hutchinson, *Carriers* 220-21 (3d ed. 1906). (Emphasis added.)

vides a clear reason for the rejection *in toto* of the thought that a tort-contract combination would be effective. Surely, if the states are opposed on the correct choice-of-law rules in the tort field alone, no help is forthcoming by adding to the confusion. It is really substitution, not addition, which will enable a clear picture to emerge. Before that substitution can be attempted, however, one final point remains for clarification—that is, what is the proper law?

### B. *The Proper Law*

In *Jansson v. Swedish American Line*,<sup>88</sup> the plaintiff, a Swedish citizen, was injured while boarding a Swedish vessel in Swedish waters. The ticket was purchased (and thus the contract made) in Sweden for transportation to the United States, and the forum was the United States. Magruder, C. J., held that the substantive law to be applied was general maritime law, not local substantive law, and that such general maritime law included its choice-of-law rules. Under such rules, it was for Swedish law to determine the existence of a maritime tort and the validity and effect of the contractual limitations contained in the ticket. To paraphrase this as succinctly as possible, one could say this: if, upon adding up the points of contact from the facts as presented, one state stands out as having the most contacts, then this state is the one primarily concerned with the *whole* matter and thus should control both the delictual and contractual sides of the personal injury picture. This initially appears to solve many of the problems which have been encountered up till now. However, there are basically two things wrong with this approach.

The first is that never before has any attempt been made to bring the center-of-gravity theory over from the contract of the conflicts field and into the tort side. Although this in itself is no compelling reason why such should not be done, the obvious reason why this has never been done before is because there has never been any necessity to go abroad for choice-of-law rules in the tort field. The advantages of the *lex loci delicti commissi* are apparent to most people who work in the field,<sup>89</sup> and there is really no need to resort to other aids. The shifting of the theory into this field is once again only a further illustration of the "tangled web."

The second reason is that no case, upon careful analysis, will bear

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<sup>88</sup> 185 F.2d 212 (1st Cir. 1950).

<sup>89</sup> It should be emphasized here that the author intends only to convey the meaning that the *lex loci delicti* is an admirable choice where the initial characterization of the problem is "tort." It will be seen shortly that if the characterization is "contract," then any reference to the *lex loci delicti* would be erroneous.

the statement that the center-of-gravity theory is really being used to solve both the contract and tort problems. If you look closely at the *Jansson* case, for example, you find the following:

Thus it would be universally agreed . . . that the Swedish law determines whether any initial liability for a maritime tort arose out of the circumstances of the plaintiff's injury on board a Swedish ship in Swedish territorial waters.

But the present case is complicated by the fact that the asserted maritime tort arose out of the performance of a contract made in Sweden; and the defense is that this liability, if it once existed, has been extinguished by a condition subsequent, so to speak, that is, by failure of the plaintiff to bring suit within a year, as required by the printed conditions on the back of the contract of carriage and as such valid and binding upon the passenger. What law determines whether this defense is good?<sup>90</sup>

Magruder, C. J. then goes on to answer by concluding that Swedish law applies as it has the most points of contact.

It is apparent that what is really being decided here is that whether or not there has been a tort committed is to be determined by the law of Sweden and whether or not the contractual clauses are to have an exculpatory effect is also to be determined by the law of Sweden. But the conclusion cannot be made immediately that because the latter question is answered by a contracts answer, *viz.*, a points-of-contact theory, that the former was so treated when it was first under consideration, for it is clear upon even cursory analysis that the law of Sweden was chosen to control the tort picture as this was the *locus delicti*. If this thesis is adopted, and it is submitted that no other rational course is open, then we are thrown back into that area from which we have just escaped, the dilemma of one law for tort and another for contract. If one is satisfied with this bifurcation (and, of course, no one should be if there is a better method available), then clearly no uniformity is possible.<sup>91</sup>

#### IV. CONTRACTS

As has been intimated throughout this Article, this writer submits that the choice-of-law rule selected to determine the validity of an injured passenger's claim should be chosen from the contractual side

<sup>90</sup> Annot., 30 A.L.R.2d 1385, 1394 (1953).

<sup>91</sup> An analogous situation is neatly summed up in the following quotation: "The construction and validity of a release are governed by the law of the place where it is executed . . . but the validity . . . as a defence in an action in tort is governed by the law of the place of injury. . . . The laws of that state which gave the plaintiff the cause of action also control in determining the effect of the releases." *Preine v. Freeman*, 112 F. Supp. 257, 260 (E.D. Va. 1953).

of conflict of laws. It is obvious that if this view is accepted, the hurdle of characterization or classification will still remain, but there is no need of attempting this obstacle until some groundwork is laid leading to acceptability of the contract argument. Characterization will thus be left until the late stages of this Article.<sup>92</sup>

First of all, is this proposal of restriction to the contract side merely hypothetical as being perhaps desirable on the part of the writer, or is there some substance to the claim from which more valid conclusions can be drawn? A study of the cases reveals no dearth of support for the idea; although only some of the pertinent cases will be investigated at this juncture, it must not be assumed that this is an ill-favored theory. To begin, one should keep in mind that this "contract theory" has received wide acceptance; however, it will be found that, as in the case of bills of lading and the conflict of laws,<sup>93</sup> apparently no uniform application at first appears.

Reverting to the fundamental example given at the outset of this Article, the plaintiff is suing an English carrier in an English court for injuries received on a transatlantic voyage which began in the United States where the ticket had been purchased. If reference for choice-of-law purposes is to be confined to contractual terms, then it is clear that even within the contract field a number of possible choice-of-law rules will be presented. However, before looking at these, it must be asked whether the contract area can be entered at all. To this question many courts have not hesitated in giving affirmative answers.

Taking first some analogous land and air cases and beginning with one that is of some stature, we find the following facts:<sup>94</sup> An airline ticket was purchased in New York for passage to New Jersey, and the holder of the ticket was killed when the plane on which he was traveling crashed in New Jersey. One of the provisions of the contract of carriage as provided in the ticket stated a maximum liability on the part of the carrier of 5,000 dollars in the event of death caused by negligent act. The court concluded:

As a general rule the place of the wrong is in the State where the last event necessary to make an actor liable for an alleged tort takes place. . . . The accident occurred in New Jersey. The law of the state of New York, however, governs this case. The validity of a stipulation in a contract for the transportation of persons or property from one state to another limiting the carriers' common-law liability is to be determined by the law of the place where the contract was made and

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<sup>92</sup> See text accompanying notes 117-132 *infra*.

<sup>93</sup> See note 3 *supra*.

<sup>94</sup> *Conklin v. Canadian Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692 (1935).

the transportation commenced, without reference to the law of the place of destination.<sup>95</sup>

Although Augustus Hand, C. J., in a later, similar case held the *lex loci delicti* controlled, the cases are easily distinguishable. In *Maynard v. Eastern Air Lines*,<sup>96</sup> in which the ticket was purchased in New York for a Massachusetts destination and the crash occurred in Connecticut, the learned judge chose the law of Connecticut as controlling and expressly ruled out any application of the *lex loci contractus*. The factual difference, however, between the two cases is that in the *Conklin* case the court was confronted with a contractual clause in the ticket limiting liability, whereas in *Maynard* the case involved merely the failure of the carrier to act with due care. It is submitted that in dealing here with exculpatory clauses in carriers' contracts more strength is found in *Conklin* than in *Maynard*.

There are as well a number of United States railway cases involving interstate transactions which provide similar analogies to the maritime picture and are worth mentioning. For example, in *Dyke v. Erie Ry.*,<sup>97</sup> the plaintiff purchased a train ticket in New York and was injured in Pennsylvania. The court concluded, "The actions are not given by the laws of Pennsylvania. They grow out of the contracts and the duties resulting from the contracts. . . ."<sup>98</sup> And, again, in a later case<sup>99</sup> (contract to carry passengers from Michigan—where contract made—to New York; injury in New York) the following appears: "The question is, which law governs the rights of the parties. Preliminarily it may be observed that the action here is *ex delicto* for an accident occurring in this state; but the rights of the parties are none the less governed by the contract."<sup>100</sup> The real compelling reason for this decision is expressed in this fashion: "In such a case as the one at bar the place of the personal injury should not determine the validity of the contract. If that were the rule, it could never be known by what law a contract is to be governed until that important consideration is determined by sheer accident."<sup>101</sup> It is precisely for this same reason that the present writer advised against selection of the *lex loci delicti* as appropriate law to govern damage suits in cargo cases in which bills of lading are involved.<sup>102</sup> If a contract can be performed in more than one jurisdiction, then

<sup>95</sup> *Id.* at 245, 194 N.E. at 694.

<sup>96</sup> 178 F.2d 139 (2d Cir. 1949).

<sup>97</sup> 45 N.Y. 113 (1871).

<sup>98</sup> *Id.* at 119.

<sup>99</sup> *Fish v. Delaware, L. & W.R.R.*, 211 N.Y. 374, 105 N.E. 661 (1914).

<sup>100</sup> *Id.* at 382, 105 N.E. at \_\_\_\_\_. See also *Horn v. North British Ry.*, [1878] 5 R. 1055.

<sup>101</sup> *Fish v. Delaware, L. & W.R.R.*, 211 N.Y. 374, 383, 105 N.E. 661, \_\_\_\_ (1914).

<sup>102</sup> See *Sinclair*, *supra* note 3, at 238-43.

surely the selection of the place of injury can only be happenstance.<sup>103</sup>

Turning now to cases involving vessels and their passengers, a number of interesting cases present themselves. For example, in *O'Regan v. Cunard Steamship Co., Ltd.*,<sup>104</sup> in which the transatlantic ticket was purchased in the United Kingdom for passage from Ireland to the United States on a British steamship and, after injury, action was brought in the United States, the court held, "[the contract] being valid in Great Britain, where it was made, it will be enforced on principles of comity by our courts."<sup>105</sup> The law of Great Britain was then chosen as controlling of this contract.<sup>106</sup>

One of the leading passenger-steamship cases is *Oceanic Steam Nav. Co. v. Corcoran*,<sup>107</sup> in which the plaintiff purchased a ticket from the defendant in Boston for passage from Montreal, Quebec, to Liverpool on a British steamer. The ticket contained a negligence clause exempting the carrier from any liability for injuries received by the passenger even if caused by the carrier's negligence; it also stipulated for the application of British law to determine disputes arising out of the carriage. The court, in a far-reaching extension of the *lex loci contractus* rule,<sup>108</sup> held that the contract was governed by the law of the United States even though by the application of the stipulated law, it would have been upheld.<sup>109</sup> Although the writer

<sup>103</sup> "It is therefore a contract which can be performed everywhere and hence by any rule should be governed by the *lex loci contractus*." 2 Beale, *op. cit. supra* note 34, at 1190.

<sup>104</sup> 160 Mass. 356, 35 N.E. 1070 (1894).

<sup>105</sup> *Id.* at 1071.

<sup>106</sup> See generally *The Constantinople*, 15 F.2d 97 (E.D.N.Y. 1926); *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N.E. 665 (1891); *The Aquitania*, 1933 A.M.C. 93 ( ).

<sup>107</sup> 9 F.2d 724 (2d Cir. 1925).

<sup>108</sup> "On reason, this case is a good example of how the rule usually summarized as that of *lex loci contractus* can be pushed to an absurdity." *Id.* at 733. (Hough, C.J., dissenting).

<sup>109</sup> In *Corcoran*, the majority of the court relied to a great extent on the decision in *The Kensington*, 183 U.S. 263 (1902), but that case involved an application of the law of the place of performance.

<sup>110</sup> The decision is severely criticized in Cook, 'Contracts' and the Conflict of Laws; 'Intention' of the Parties, 32 Ill. L. Rev. 899, 912-914 (1938). The decision, however, was subsequently applied in *Barndt v. Det Bergenske Dampskibsselskab*, 28 F. Supp. 815 (S.D.N.Y. 1938), in which a passenger, a resident of New York, purchased in New York a ticket from a Norwegian corporation for passage from Norway to England. Between these two countries, he was injured. The ticket contained a negligence clause and a stipulation for Norwegian law. The court remarked:

The nature of this entire contract between the parties to this suit is what determines whether it is one of admiralty jurisdiction. Obviously the contract is wholly maritime and properly of admiralty jurisdiction. The admiralty law is the only law which determines whether or not the contract limitation of liability is valid. This law is announced by the courts of the United States and is found in *Oceanic Steam Nav. Co. v. Corcoran*, which invalidates the limitation clause set up in the answer and holds it illegal and void. *Id.* at 816.

Careful note should be taken however of the fact that the case was considered solely on contractual grounds.

cannot at all agree with the decision reached in *Corcoran*, the court at least, in the writer's opinion, was on the right track in confining the case to a contractual approach rather than to a delictual approach.<sup>110</sup> Similar results may be seen in a number of other cases.<sup>111</sup>

If one can conclude that to approach the claim of the injured passenger from a contractual viewpoint is not too untoward, then the question still remains: which of the available choice-of-law rules in the contracts area is best suited to govern the case as presented? A fairly detailed investigation of these choices and the discarding process has already been attempted, in relation to cargo shipments involving bills of lading, in other articles by the present writer.<sup>112</sup> No useful purpose can be served by any further cataloguing or dissecting of these approaches, and, hence, concentration will be fastened here on the one choice felt to be wise in connection with bills of lading; in so doing, it is hoped that the reader may be convinced that such a selection may have equal advantages in the passenger ticket field. It must be remembered that the search is centered on uniformity, and accordingly it is submitted that the autonomy theory of conflict of laws is best suited as a means to this end.

It is advocated, therefore, that (1) if the passenger ticket (the contract) stipulates for the application of some particular law (and most steamship tickets do),<sup>113</sup> (2) if this selection has been done for a legitimate purpose,<sup>114</sup> and (3) if it does not conflict with statute, convention, or public policy *at the forum*,<sup>115</sup> then this choice should be adhered to by the court. Also, if no express stipulation has been made, the court should attempt to "survey the points of contact, 'localize' it, and then proceed to apply this law as that which the parties impliedly intended."<sup>116</sup>

No doubt, if such a scheme were followed, it would be commercially efficacious, and the result would tend toward a uniform system. The law of the place where the contract was made or to be performed, of the flag, or of some other fictitiously invented place can only be fortuitous and unpredictable. No man of commerce would agree with the selection of any of these places; notwithstand-

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<sup>111</sup> See, e.g., *Born v. Norwegian Am. Line, Inc.*, 173 F. Supp. 33 (S.D.N.Y. 1959); *The Arabic*, 50 F.2d 96 (2d Cir. 1931).

<sup>112</sup> See note 3 *supra*.

<sup>113</sup> "All questions arising under this contract shall be decided according to the laws of the United States." From a passenger ticket issued by the United States Lines Co.

<sup>114</sup> And this includes a "legitimate" business purpose. See generally Sinclair, *supra* note 3, at 257-60.

<sup>115</sup> See text accompanying notes 133-143 *infra*.

<sup>116</sup> See Sinclair, *supra* note 3, at 267.



ing the fact that some (perhaps many) theorists and members of the bench and bar would select one of these as preferable, none will serve the ends of uniformity. It appears, therefore, after detailed studies that stipulation for proper law, expressly or otherwise, is the only true answer to this hoped-for end.

If one can agree with this thesis, then the following problem may still remain: how the characterization (classification, qualification) can be accomplished so as to get into the contract field. To put it another way, if the injured passenger brings his action in tort, how can the process be shifted from tort into the contract area so that the advantages proposed above may be gained? The answers to this problem will now be attempted.

#### V. CHARACTERIZATION

Although it is true that a negligent act on the part of the carrier does give rise to a claim in tort because of the breach of duty to carry safely and set down, it is equally valid to say that if the passenger is injured while the carriage is in progress, the contract has been breached. No one can deny that the issuance of a ticket establishes a contractual relationship between carrier and passenger. To convince a court that resort should be had to the contract law rather than the tort law will be the task of anyone desiring to follow the pattern outlined in this paper. It is, of course, a problem of characterization, *i.e.*, of fitting the available facts into one or the other category. How is this accomplished? One can say, like the editors of Dicey,<sup>117</sup> "In some cases the defendant may be liable for breach of contract as well as in tort, and it may be possible, by applying the proper law of the contract, to eliminate hardships arising from a rigid application of the *lex loci delicti*." The idea is then advanced that a passenger who purchases a ticket in Glasgow for London and is injured during the carriage in England "may perhaps rely on Scottish law as the proper law of the contract if it is more favorable to him than the English *lex loci delicti*."<sup>118</sup> But this does not really answer any part of the problem as it presents a case in which the facts clearly disclose that the choice for an application from the contractual side has already been made by the litigant; the difficulty, of course, lies where the plaintiff has chosen the tortious side and must now be "forced" over into the contract side. To face the question squarely: if the plaintiff frames his form of action on a delictual base, can the court disregard this and initiate

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<sup>117</sup> Dicey, Conflict of Laws 939 (7th ed. 1958).

<sup>118</sup> *Ibid.*

its decision by characterizing the entire problem as being contractual?

A leading Canadian case comes fairly close to this result. In *Scott v. American Airlines, Inc.*,<sup>119</sup> a passenger on an airliner was killed on a flight from Detroit to Buffalo when the plane crashed in Ontario. His widow brought an action in Ontario under the Fatal Accidents Act<sup>120</sup> for damages for the death of her husband. In turning down her request for relief on a tortious claim, the court held that "the validity and construction of a contract are determined by the law of the place where the contract was made."<sup>121</sup> To support this same line of reasoning, one can refer to many maritime cases involving damage to cargo in which the courts have characterized the facts as leading into contractual categories.<sup>122</sup> As the court may presumably characterize the problem as falling within the realm of contracts, no real advantage can be gained by making any detailed investigation of the manner in which this is accomplished. Many learned writers have expressed varied rules and practices on how this is done and how it should be done.<sup>123</sup> It is hoped that it will be sufficient for the purposes of this work to outline the possible methods of characterization and to suggest one of the more reasonable of them. First of all, it should be stated that most people are substantially in agreement on at least one point, *i.e.*, that characterization has been done (a) by using the *lex fori*, (b) by using the *lex causae*, (c) by separating primary and secondary characterization, and (d) by using a combination of "analytical jurisprudence and comparative law."<sup>124</sup>

If the court, when confronted with the present hypothetical fact situation (the plaintiff is suing an English carrier in an English court for injuries received on a transatlantic voyage which began in the United States where the ticket had been purchased), would take the facts as set forth, put the facts into the contract area, and use the domestic laws of the forum and its categories, no real problem can

<sup>119</sup> [1944] 3 D.L.R. 27 (Ont. H.C.).

<sup>120</sup> Ont. Rev. Stat. ch. 210 (1937).

<sup>121</sup> *Scott v. American Airlines, Inc.*, [1944] 3 D.L.R. 27, 29 (Ont. H.C.). In his explanation of this case, O. Kahn-Freund, the editor of the relevant portion of Dicey suggests that the holding of it is weighed in favor of the "proper law." It is difficult to see how this can be taken from the words of the judgment as quoted in the text herein.

<sup>122</sup> See, *e.g.*, *Liverpool & Great Western Steam Nav. Co. v. Phenix*, 129 U.S. 397 (1889); *The Oranmore*, 24 Fed. 922 (D. Md. 1885), *aff'd mem.*, 92 Fed. 396 (Cir. Ct. D. Md. 1885).

<sup>123</sup> See, *e.g.*, 1 Rabel, *Conflict of Laws* 47-60 (1945); Cook, *Characterization in the Conflict of Laws*, 51 Yale L.J. 191 (1941); Falconbridge, *Conflict of Laws: Examples of Characterization*, 15 Can. B. Rev. 215 (1937); Lederman, *Classification in Private International Law*, 29 Can. B. Rev. 3, 168 (1951); Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 Yale L.J. 743 (1944); Robertson, *A Survey of the Characterization Problem in the Conflict of Laws*, 52 Harv. L. Rev. 747 (1939).

<sup>124</sup> Morris, *Cases on Private International Law* 23-4 (3d ed. 1960).

be forseen. The sometimes difficult analogy of forum categories to foreign facts is certainly not present when one attempts to divide into "tort" or "contract" the facts as they are put forth here.

If the *lex causa* be used as the characterizing tool, the perennially difficult choice of foreign law is portrayed vividly. How one can select the foreign law in order to use it to characterize in a multiple contact fact situation is difficult to imagine. Even if this were surmounted, the argument that circular reasoning is introduced is difficult to overcome.<sup>125</sup> Just how one can characterize by the applicable foreign law, when that law cannot be selected until a prior characterization is made so as to select that foreign law, is sometimes beyond understanding.<sup>126</sup> To use the third method (c), apparently one primarily characterizes (by the *lex fori*) to select the correct category (contract or tort), and then secondarily characterizes to obtain the correct choice-of-law rule. As we are interested here only in "primary" characterization, *i.e.*, finding the correct pigeon-hole (contract), this method does not differ from the first, the use of the *lex fori*. Finally, although the "analytical jurisprudence and comparative law" approach is initially appealing, it overlooks the fact that few of the judiciary are trained in other than their own system of law.<sup>127</sup>

The conclusion appears quite evident, therefore, that the predominant opinion of both cases and writers is that the job of deciding—tort or contract—is a matter for the *lex fori*.<sup>128</sup> In England, "it must, in fact, be admitted that classification of the cause of action is in practice effected on the basis of the *lex fori*. . . ."<sup>129</sup> In the United States, "the practical solution would appear to be to resort, as a general rule, to the law of the forum in resolving questions of characterization."<sup>130</sup>

If the decision is then made to leave the categorization portion of characterization to the forum<sup>131</sup> (and thus not refer at all, at this stage, to the *lex loci delicti* or the laws of any other jurisdiction),<sup>132</sup> the form of action in which the plaintiff's claim is framed is com-

<sup>125</sup> See Beckett, *The Question of Classification [Qualification] in Private International Law*, 15 Brit. Yb. Int'l L. 46, 58 (1934).

<sup>126</sup> Robertson, *supra* note 124, at 760.

<sup>127</sup> Cheshire, *op. cit. supra* note 37, at 47; Dicey, *op. cit. supra* note 117, at 48.

<sup>128</sup> Which includes, of course, the conflict-of-laws rules of the forum; not just its internal law.

<sup>129</sup> Cheshire, *op. cit. supra* note 37, at 48; see also Schmitthoff, *op. cit. supra* note 37, at 34.

<sup>130</sup> Goodrich, *Conflict of Laws* 16 (3d ed. 1949).

<sup>131</sup> There should be no reason to change this if courts on both sides of the Atlantic are reasonably secure in their holding to this method; uniformity would certainly not be served by advocating any change of this portion of the field.

pletely immaterial. If the court has before it a statement of the facts which make up the case and if the thesis as set out herein is adopted, the court will simply say that the claim is of a contractual nature and thus call into play the rules by which such a category is "connected" to a choice-of-law rule which has already been advocated as depending on autonomy of the parties. In conclusion, therefore, the burden of this thesis is that if a court is confronted with a fact situation involving injury to a passenger on board ship, it should apply the law of the forum; classify this action as one of breach of contract; and apply that rule of law which the parties have stipulated should apply, or if this is lacking, that law which they must have intended to apply when all the contacts are surveyed.

The final point, perhaps anticlimatical, remains. Suppose all of this approach is accepted, and the law intended by the parties, England for example, is selected. If the court were to apply English law, it would offend the public policy of the United States. Is the court to forge ahead and "disregard" this policy, or is it to defer to it and thus refuse to apply the chosen, applicable law? The answer to this question is relatively easy to obtain; the public policy argument presents no real obstacle.

## VI. PUBLIC POLICY

As this Article is primarily concerned with the laws of England, the United States, and Canada, the investigation of the public policy of those countries regarding negligence clauses<sup>133</sup> in passenger tickets is all that will be attempted. If a case were to arise in any one of these countries and not present any conflict-of-laws problems—one in which all the facts were inherently domestic such as a carriage from London to Birmingham, Boston to New York, or Montreal to Halifax—the policies of these countries relative to their own cases would be clear. In England, there is no doubt that a carrier may exempt himself from liability for his own negligence (and of his servants' as well) by including such a clause in the contract of

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<sup>132</sup> If the *lex loci* regards such facts as belonging to the subject of torts whereas the law of the forum does not so regard them, it would seem clear that the *lex loci delicti* would not be applied by the court of the forum. A rule of the conflict of laws of the forum must be understood in the light of the general law of the forum, and a matter which is regarded by the latter as falling within the law of contracts . . . cannot be brought within the scope of the *lex loci delicti* of its conflict of laws even though it be 'qualified' as delictual by the *lex loci*. Lorenzen, *Tort Liability and the Conflict of Laws*, 4 L.Q. Rev. 483, 494-495 (1931).

<sup>133</sup> One can also include contractual terms, such as notice requirements and limitations of liability on baggage and personal injuries claims, in the discussion of the public policies of the various jurisdictions.

carriage.<sup>134</sup> The courts in Canada would not deviate from this type of decision.<sup>135</sup> In the United States, many cases prior to the enactment in 1936 of applicable legislation<sup>136</sup> had held that any term in a ticket which attempted to exempt the carrier from liability for his own negligence was void as against the public policy of the United States.<sup>137</sup> Today that public policy is effectively portrayed by this legislation so that it is unlawful for a carrier to put in a ticket any provision purporting, in event of loss or personal injury to a passenger, to provide relief entirely from liability or from liability beyond a stipulated amount.<sup>138</sup> Similarly, it is unlawful for the carrier to require a shorter notice of claim period than six months and to require less than one year for filing claims.<sup>139</sup> It is simple then to conclude that the public policy of the United States is not in favor of that type of agreement typified by the negligence clause,<sup>140</sup> whereas in England and Canada no such policy is present in either case or statute. What effect then does this difference of opinion have on obtaining uniformity? It is submitted that the effects will be negligible if the scope of application of public policy is viewed in its proper light.

It is, of course, beyond argument that there are cases in the United States in which courts have seen fit to rely upon public policy in deciding the cases before them. Thus, in the *Corcoran* case, as discussed earlier, the court struck down a clause in a ticket even though that clause would have been valid by the stipulated law.<sup>141</sup> It should be noted, however, that all of the cases which have been so decided had as component facts origin of carriage or termination of carriage in the United States.<sup>142</sup> No one can quarrel with a court in the United States declining to uphold the validity of a negligence clause in a ticket for a voyage to or from the United States, either because of the scope of the law as expressed in the legislation or because of the

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<sup>134</sup> In *Beaumont-Thomas v. Blue Star Line, Ltd.*, [1939] 3 All E.R. 127 (Ct. App.), the plaintiff was a passenger on the defendant's vessel and slipped on the deck while the vessel was at sea. The court said, in dictum, that if the carrier had been negligent (which here he was not), he could effectively exempt himself by a negligence clause.

<sup>135</sup> See, e.g., *Dill v. G.T.P. Coast S.S. Co.*, [1915] 21 D.L.R. 392 (Sup. Ct. B.C.).

<sup>136</sup> See 49 Stat. 960, 1480 (1936), 46 U.S.C. §§ 183(b), (c) (1958).

<sup>137</sup> See, e.g., *The Oregon*, 133 Fed. 609 (9th Cir. 1904). *But cf.* *Garcin v. Compagnie Generale Transatlantique*, 289 N.Y.S. 1075, 160 Misc. 687 (N.Y. City Ct. 1936).

<sup>138</sup> 49 Stat. 1480 (1936), 46 U.S.C. § 183(c) (1958).

<sup>139</sup> 49 Stat. 960 (1935), 46 U.S.C. § 183(b) (1958).

<sup>140</sup> Two recent cases applying the legislation are: *Lawlor v. Ingres Nassau Steamship Line, Inc.*, 161 F. Supp. 764 (D.C. Mass. 1958) (exculpatory clause) and *Hawthorne v. Holland-America Line*, 160 F. Supp. 836 (D.C. Mass. 1958) (contributory negligence).

<sup>141</sup> See also *The Kensington*, 183 U.S. 263 (1902).

<sup>142</sup> Although, in *Corcoran*, the carriage originated in Montreal, P.Q., the ticket was sold and thus the contract made in New York.

expressed public policy which emanates therefrom. Similarly, if an English passenger sailed from Montreal on an English ship to an English port, an English court would not accept the public policy as expressed in the legislation of the United States as controlling simply because the ticket was purchased in New York. It is obvious that the English court (or any court anywhere) is not interested in what may be the public policy of some other jurisdiction, no matter how closely that place may be tied to the facts of the case. Public policy has a role to play in the conflicts field, but it should be restricted to where it sensibly belongs, that is, to the forum. If a court is confined to a study of the public policy of the forum for purposes of decision, no real obstacles present themselves. If, on the other hand, that court wanders afield in search of public policy, no gains can be made in the direction of uniformity. One example will, it is hoped, illustrate this proposition. If the passenger sails from New York to Liverpool on an English steamship and the ticket contains a negligence clause, should a Canadian court look to the public policy of the United States and, once discovered, bring such policy over into Canada? Obviously, it is the public policy at the forum, Canadian public policy in regard to negligence clauses, which should rule this case *if at all*. The last few words are emphasized for the writer firmly believes that there is no possible use for the doctrine of public policy in the facts as presented in this example. The public policy of Canada can not possibly be affected by such a fact situation. The only connection with Canada is the fact that it happens to be the forum. Any decision of this court cannot affect or be affected by Canadian public policy. While the court may select the law of the United States to govern this case, because it is stipulated for or for some other reason, this, of course, is not applying the public policy of the United States. And, of course, if these facts were presented to an American court, no public policy would be presented to buttress any decision; none would be necessary in the light of the available legislation.

Finally, there are a number of passenger cases which are correctly decided and which illustrate the true role of public policy. For example, if the contractual clause is valid by the correctly chosen choice-of-law rule, it should be upheld unless the forum is directly involved in the actual transaction as being the place of departure or the place of destination. There are older cases in the United States (prior to the 1936 legislation) which held that if, for example, a passenger embarked in the United Kingdom for carriage to the United States and the ticket contained a negligence clause, such a

clause was valid even though it would have infringed the public policy of the United States if the contract had been made there.<sup>143</sup> Such cases could not be so decided today.

## VII. CONCLUSIONS

A very few words will help to collate the thoughts which have been proposed in this Article. Although not all of the theses advanced herein will be acceptable to the reader, if one takes in the whole picture, it will be seen that all parts are necessary to create the desired uniformity among the maritime states. The steps must be followed in some order, and no deviation is thought possible. In summary, when presented with a fact situation whereby a passenger is injured on board a vessel (no matter where that vessel may be at the time and no matter whether the damage caused arises from collision or is internal to the carrying ship), the forum must characterize the facts according to its own laws as presenting an action for breach of contract (even if framed by the plaintiff as a tort claim). Next, the forum must choose the law which the parties have expressly or impliedly chosen to govern their relationship and apply that law unless it conflicts with its own public policy and that public policy is directly<sup>144</sup> concerned with the facts of the case.

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<sup>143</sup> *O'Regan v. Cunard S.S. Co.*, Mass. 356, 35 N.E. 1070 (1894); *Fonseca v. Cunard S.S. Co.*, 153 Mass. 553, 27 N.E. 665 (1891).

<sup>144</sup> If the carriage is completely foreign to the forum (as where the carriage goes from Canada to the United Kingdom) and the forum has no interest other than as a forum, many cargo cases have held public policy to be inapplicable. See *The Miguel di Larrinaga*, 217 Fed. 678 (S.D.N.Y. 1914); *The Fri*, 154 Fed. 333 (2d Cir. 1907), *cert. denied*, 210 U.S. 431 (1908); and *Vita Food Prod., Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.N.S.).