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SOME ASPECTS OF CONFLICT OF LAWS IN THE OLD SPANISH JURISPRUDENCE

WILLIAM Q. DE FUNIAK*

It is, as the courts would say, a matter of common knowledge that Judge Story, in preparing his authoritative treatise on Conflict of Laws, found relatively few Anglo-American cases available and that he made an exhaustive study of the work of many of the European juris-consults and commentators in order to present a well-rounded survey. The necessity of such a complete and well-rounded treatment of the subject, he realized, was of present and of constantly increasing future importance in our union of sovereign or quasi-sovereign states. Such a union could not but present and continue to present numerous opportunities and, indeed, absolute requirement for the application of the principles of Conflict of Laws. Working from the theories and conclusions of these European writers, Story analyzed and interpreted them in the light of our needs and supplied a body of principles that long furnished our courts with the means of solving our increasing problems in that field of law.

Of course, the very nature of the subject of Conflict of Laws necessarily brings us in touch with the legal thought of other countries, but Story must receive chief credit for initiating our contact with those legal sources. A consideration of the "List of Authors Cited" in the second edition of his work and a consideration of the work itself shows that his primary recourse was to legal writers of the Dutch and French schools, with secondary consideration given to German, English, Scottish and Italian legal writers. Incidentally, it is interesting to notice that one American writer, Samuel Livermore, antedated Story with a

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1 STORY, COMMENTARIES ON THE CONFLICT OF LAWS (2d ed. 1841).
brief treatise, *Dissertations on the Contrariety of Laws,* published in New Orleans in 1828 and dealing with the theories of the Dutch and French legal writers. Story described it as "learned" and generously recommended reference to it as an excellent work.3

Whether Story set an example which has influenced later American writers on Conflict of Laws, or whether other causes may be credited, American writers and jurists since his day, in studying European legal thought on Conflict of Laws and, in fact, on the civil law generally have seemed to pursue their studies and researches within the confines delineated by Story. There has, in short, been reference to almost every European school of legal thought except the Spanish. For example, an illustration of this may be seen in the exhaustive bibliography of pre-nineteenth century legal writers in Professor Beale's excellent *Treatise on the Conflict of Laws.* No Spanish writers seem to be listed there. (It is otherwise, however, in his listing of the modern legal writers. There Spain receives full representation.)4

Besides the already suggested reason of the example set by Judge Story, other valid reasons may exist. The works of the Spanish commentators and jurisconsults may not have been so readily available as those of the Dutch and French schools. There is also the fact that the Spanish legal writers of the fifteenth, sixteenth, seventeenth and eighteenth centuries did not (to my knowledge) enter upon studies confined to the principles of Conflict of Laws. Their works were usually keyed to the various codifications of the Spanish law and were commentaries on the codes with, however, expansion, development and interpretation of the law generally which revolved around the hub of the particular code. Their treatment of Conflict of Laws principles was not to be found in independent treatises but within the framework of their over-all discussions and com-

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3 The writer has not, up to this writing, been able to put his hands on a copy of this work. Professor Stumberg, in his *Principles of Conflict of Laws,* p. 6, n. 16, gives the title in full as *Dissertations on the Questions Which Arise From the Contrariety of the Positive Laws of Different States and Nations.*

4 *Story, Commentaries on the Conflict of Laws* (5th ed. 1857) p. 14, n. 1, wherein Story says, "I gladly refer the reader to these Dissertations, as very able and clear."

4 *Beale, A Treatise on the Conflict of Laws* (1931) xvii.
mentaries. However, this was equally true of many Dutch and French legal writers whose works have been studied for their treatment of the principles of Conflict of Laws, and has not prevented such study.

There would seem to be no real reason why the theories and conclusions of the older Spanish legal writers should not be of interest to us. In fact, there are three definite reasons why they should be. First, Spain occupies a position of deserved pre-eminence in European legal history as the first country to bring legal order out of the confusion brought about by the Germanic or Teutonic conquest of the Roman Empire. As evidence of this are some of the earliest written codes of laws of the European continent after the fall of Rome. And despite eight centuries of almost incessant warfare to break the Moorish grip on the Iberian Peninsula, Spain produced from the thirteenth century on a series of codes far in advance of the accomplishments of other European countries. Despite certain verbosities and other criticizable qualities from a present-day standpoint, these codes represent a remarkable achievement. Moreover, they were accompanied by an impressive and truly learned amount of legal commentaries and dissertations. These, covering the period from the thirteenth through the eighteenth centuries, display an exhaustive study of the Roman law and of the Italian and French legal writers of past and contemporary periods. So far as these Spanish legal writers considered principles of Conflict of Laws, their conclusions deserve our attention from a standpoint, at least, of a survey of comparative law.

5 The first of these seems to be the Code of Uric or Code of Tolosa, in the year 480, a compilation of Germanic customs. Under Euric's son Alaric appeared the Breviary of Alaric or Lex Romana Visigothorum, approved in 506. The former was designed to govern the Visigoths and to govern in matters between themselves and the Hispano-Roms; the latter, based on Roman sources, was designed to govern the Hispano-Roms. In 693, in its more or less completed form, appeared the code variously known as Liber Judiciorum or Forum Iudicum, or in the Castilian the Fuero Juzgo, which supplanted the double system of law and provided one law for all. See Vance, The Background of Hispanic-American Law (1943) 35 et seq.; De Funiak, Principles of Community Property (1943) sec. 22 et seq.; Schmidt, Civil Law of Spain and Mexico (1851).
6 E. g., Fuero Real, 1255; Las Siete Partidas, 1263; Nueva Recopilacion, 1567. See authorities cited, supra, note 5.
7 See Rafael Attamira's article in A General Survey (Continental Legal History Series) 1918; Vance, loc. cit., n. 5; de Funiak, loc. cit., n. 5; Schmidt, loc. cit., n. 5.
Secondly, our own frequent accession of territory governed by the Spanish law should warrant an interest in the legal sources of Spanish law. The influences of the Spanish law have not completely disappeared in all of that territory and Spanish law has been resorted to, on occasion, even on Conflict of Laws principles. It is reasonably well known now that in several of our southwestern and far western states, the law governing marital property rights has its basis in the Spanish law. And the field of marital property rights is one highly productive of problems in Conflict of Laws. It may not be so well known that the mining law of our western states is often quite soundly based in the Spanish and Spanish-Mexican mining law. Much of the early land law and legal problems arising from public grants of land in those regions required consideration of Spanish and Spanish-Mexican law. While these latter subjects are not frequently productive of Conflict of Laws problems, they are instanced as examples of the extent of the Spanish law in our American jurisprudence. Peculiarly, although the physical nature of much of the southwest and far west resembles Spain much more than it does England, the law of water rights appears to owe little to Spanish law. On the other hand it frequently owes little or nothing to the English common law, as in the field of irrigation.

Although there have been several definable upsurges in interest in the Spanish law, each upsurge being traceable to an

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See Platt, Law as to Property Rights of Married Women (1885); Ballinger, Community Property (1895); de Funiak, Principles of Community Property (1943) vol. 1.

See Foreword, Ricketts' American Mining Law (State of California, Division of Mines) (1943); Halleck, Mining Laws of Spain and Mexico (1859); Rockwell, Compilation of Laws of Spain and Mexico in Relation to Mines and Titles in Real Estate (1851). Some writers attribute practically the whole basis of our western mining law to such sources. Others, such as Ricketts, give equal weight to customs developed among the miners themselves in the early days.

These problems contributed to bringing about the publication of such works as Joseph M. White's New Collections of Laws, Charters and Local Ordinances (1839) and Rockwell's work, supra, n. 9.

See, e.g., Austin v. Chandler, 4 Ariz. 346, 42 Pac. 483 (1895), remarking that at common law no such thing as an irrigating ditch was known and that the Arizona statutes must be looked to, since "the common law has no application whatever to the use of water with us."
accession of former Spanish territory, none of these upsurges of interest seems to have been accompanied by any particular display of curiosity about Conflict of Laws in Spanish jurisprudence. For example, after the Louisiana Purchase, in 1807, the territorial legislature of Orleans, which in 1812 was admitted as the state of Louisiana, ordered a digest of the ancient Spanish laws to be made; and later, in 1819, the legislature of the state of Louisiana authorized at its expense a translation of the Spanish code, _Las Siete Partidas_, which it recognized as having the force of law in the state. Yet, as already mentioned, when Mr. Livermore, of New Orleans, prepared and published in 1828 his monograph on “contrariety” of law, it seems to be the Dutch and French legal writers and commentators to whom he resorted.

Thirdly, the situation in Spain over a long period of time bears many points of similarity to our own country with its...
many separate state jurisdictions. During the centuries in which Spain, after the Moorish conquest, was being consolidated into one country, it was made up of many provinces and kingdoms with varying laws, usages and customs. Accordingly, questions of jurisdiction of the courts and of the law applicable and governing were frequently matters of importance. Even in the paramount kingdom of Castile, the codes frequently took account of variant laws and customs in parts of that kingdom; even as these codes began to be extended to other provinces, their provisions were frequently made subordinate to local laws and customs which might be different. For example, the code of Las Siete Partidas of 1263 makes the point that although custom cannot abrogate the general law ordinarily, it may do so in that place where the custom is practiced. However, definitely by the time of the seventeenth century we find that the codes become supreme even in the face of variant local laws or customs, and indeed express legislation, in many instances, began to remove these variances and make the law uniform for all parts of Spain.

A consideration of conflict of laws principles may well start with the jurisdiction of the courts, both in rem and in personam, and the resulting validity and conclusiveness of judgments. In our own country, while it is not necessarily the first case in point of time, we frequently start our consideration of jurisdiction in rem and in personam with the leading case of Pennoyer v. Neff. While that case is not strictly a conflict of laws case, since only one jurisdiction is involved, it definitely has a bearing on the validity and conclusiveness of a judgment when brought into question in another state. From that point one may proceed to consider what is necessary to acquire juris-
diiction by way of service of process on domiciliaries, non-residents, temporary residents, and so on.

Turning specifically to the Spanish law, we find the code of *Las Siete Partidas* providing that “when a plaintiff desired to assert his claim he should do so in the presence of a judge who has jurisdiction over the defendant, for the defendant would not be required to answer before another judge, except concerning the matters herein enumerated, and which we shall proceed to mention.” The code then proceeds to set out fourteen bases of jurisdiction. The eminent jurist, Palacios Rubeus (or Ruvios), points out that these so-called fourteen bases of jurisdiction are commonly reducible to four, namely, domicile, contract, delict, and the *situs* of the res. The later commentators Aso and Manuel, in their *Institutes of the Civil Law of Spain*, however, prefer to define these bases in terms of seven distinct ones. These are given as follows:

“Domicile, so that any person may be sued before the judge of the place where he is found settled, * * * 2d, Birthplace, provided the defendant be not removed from it.” It will be noticed that while Aso and Manuel thus profess to define two separate bases of jurisdiction, they are in fact merely stating that domicile of choice and domicile of origin (which has been retained) are the bases. Since we would consider that a domicile of origin retained after emancipation or reaching majority becomes a domicile of choice, we would make no particular distinction in these two cases and would merely say that domicile affords a basis of jurisdiction of the court. That, indeed, is what Palacios Rubeus does in stating, concisely, that domicile is one of the bases of jurisdiction. The same conciseness appears in the

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19 Partida III, Title II, Law 32.
20 Juan Lopez de Vivero, usually known as Palacios Rubeus, 1447-1523, was successively Professor of Law at the University of Salamanca, Supreme Judge of Valladolid and Vizcaya, and Royal Councillor, as well as being a legal writer of recognized distinction.
21 Commentaries on law cited supra, n. 19.
22 Ignacio Jordan de Aso y Del Rio and Miguel de Manuel y Rodriguez, famous legal commentators of the second half of the eighteenth century, are best known for their various joint commentaries. Because of their frequent association the impression frequently exists that they were one man.
23 *Instituciones del Derecho Civil de Castilla*.
Manual del Abogado, America, or El Abogado Americano, issued for the Spanish territories in the Americas, which states that "a competent judge in civil causes is, 1st, the judge of the place where the defendant is domiciled."  

With regard to the foregoing it may be remarked that the law made provision for personal service of process, except that in the case of one, such as a domiciliary, considered subject to the jurisdiction of the local courts, a substituted service was provided by leaving a summons at the defendant's house with members of his family, and if the defendant had no house, by publication through proclamation in the market places.  

Returning, however, to Aso and Manuel, they state as the third basis of jurisdiction: "The place where the property is situate although the defendant be not a resident of it, nor domiciled there; but this is understood when the plaintiff institutes a real and not a personal action."  

Subsequently, in their work, the authors give certain definitions, pertinent here, that "The principal division of actions, according to our jurisprudence, is into real, personal, and mixed. By real action the dominion or property in the thing (i.e., *jus in re*) is demanded or sued for; by personal, the right which belongs to one in virtue of any contract (i.e., *jus ad rem*); the mixed partakes of both, such as the personal action strengthened or secured by the establishment of a mortgage."  

With us, we would class actions for torts as personal actions, but the Spanish law distinguished between civil actions and delictual actions. A delict or wrong could give rise both to a criminal prosecution for the delict and an action for damages for the delict. The latter seems not to be considered in the same classification as a personal action on a right arising from contract. This is discussed, however, subsequently in this article.  

With regard to the right of action based on a contract, it is somewhat startling to find Aso and Manuel announcing briefly as the fourth basis of jurisdiction of the court "The place where

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27 Partida III, Title VII, Law 1; see also Novisima Recopilacion (1805). Book 11, Title 4, Law 3.
28 See supra, note 24.
29 Aso and Manuel, Instituciones del Derecho Civil de Castilla, Book 3, Title 4, Sec. 1.
30 De Funiak, Principles of Community Property, Sec. 81. And see post, this article.
the contract is entered into which gives rise to the suit.'\textsuperscript{31} If tangible property which is the subject matter of the contract is within the court's jurisdiction, the authors' statement is quite true, because the court could proceed \textit{in rem} on the basis of its jurisdiction over the property. The jurist, Didacus Covarruvias,\textsuperscript{32} in his \textit{Practicarum Quaestionum},\textsuperscript{33} observes justly that for there to be competency of jurisdiction in respect to the place of contract, it is necessary that the defendant be found in that place at the time the action is instituted against him. There would definitely seem to have been some conflict of views over the nature of obligations or rights of action arising from contracts. Evidently, some Spanish jurisconsults considered that making a contract in a place produced some sort of \textit{res} having its \textit{situs} at that place so as to warrant jurisdiction by the courts of the place. This is illustrated by the commentaries of the jurist, Juan de Matienzo,\textsuperscript{34} who asks: "What of debts and rights of action. As to this there is great doubt. Some think they should be reckoned as immovables, others as movables, and others think that they are a third kind of property. . . . But . . . rights of action and debts are not confined to a place and cannot be called property situate in any place. . . . [Lapus] says debts are not said definitely to be situate in a place, yet so far as regards their effective enforcement which is only possible in a definite place they are said to be property in that place or province. And so, Lapus says, they belong to the place where in law and in fact they can be enforced." Accordingly, concludes Matienzo,

\textsuperscript{31} See supra, note 24.

\textsuperscript{32} Diego Covarruvias y Leiva, 1511-1587, styled by his contemporaries the Spanish Bartolus, was Professor of Law at the University of Salamanca, Bishop of the Roman Catholic Church, Royal Judge and Royal Councillor.

\textsuperscript{33} Covarruvias, \textit{Practicarum Quaestionum}, Cap. 1.

\textsuperscript{34} Juan de Matienzo, one of the most illustrious of the Spanish jurisconsults, lived during the latter half of the sixteenth century. Distinguished as a practitioner of law with great success, he was also Royal Judge of Charcas and Sima and the Supreme Judge of the Primera Audiencia. He finished his distinguished legal career in a high administrative post in the Argentine Chancellery of the Kingdom of Peru, where he prepared an exhaustive survey on all aspects of colonial government with comprehensive plans for legislative reforms of wide variety. It was during this period that he published his Commentaries on the Nueva Recopilacion, the Spanish Code of 1567. See Vance, \textit{The Background of Hispanic-American Law} (1943) 155, n. 241; de FuniaK, \textit{Principles of Community Property}, vol. 2, Appendix II.
who was considering the nature and extent of marital property rights in certain kinds of property, the spouses' rights in debts and rights of action must be governed by the law of the place in which they could be enforced. Moreover, as to contracts generally, Matienzo points out that if one enters into a contract with a foreigner, knowing that he intends to return to his own domicile, it is presumably intended that the foreigner will perform at his domicile and according to its laws, and if he is to be sued it must be at that place. But if the contract is entered into with the foreigner with the intention that it be performed where made, it will be governed by the laws of the place where made. However, wherever there is a breach, it is clear, according to the views of both Matienzo and Covarruvias, that the foreigner cannot be sued in that place unless he is present there at the time of the institution of the suit.

Returning to Aso and Manuel and their listing of the bases of jurisdiction, two of the remaining three may be passed over as not pertinent. One relates to the authority of the court to cite before it the heir of a deceased ancestor, the other to certain classes of society, such as clergymen and nobles, not subject to the authority of the ordinary courts. However, the remaining one is of interest. It is that "The commission of crime requires the prosecution and punishment of the delinquent in the place where he perpetrated it." This is in entire accord with that principle of conflict of laws which we recognize, that one jurisdiction will not enforce the penal laws of another jurisdiction.

Reference has been made in the preceding paragraph to the matter of an heir. It would not do to pass from the question of jurisdiction without remark on the matter of administrations and the like. Turning to the Manual del Abogado, already cited, we may note the following statement as to competency of jurisdiction of a court "in the matters of accounts that guardians or curators ought to give [being] where the guardianship or curatorship was administered", and "in possessorcy causes of inheritance, the judge of the place where the inheritable things

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25 Gloss I, Nos. 84, 85, of Commentaries to Law 2, of Book 5, Title 9, of NUEVA RECOPIILACION of 1567.
26 Gloss I, No. 71, to same.
27 See supra, note 24.
29 i.e., actions to enforce the right to an inheritance.
are; in causes where legacies are claimed, if they are specific, the judge of the place where they are, or where the greater part of the estate of the deceased may be, or where the heir\textsuperscript{40} may reside, and if they are generic or of an article which it is usual to count, measure or weigh, the judge of the first two places indicated, or the judge of the place in which the heir commenced paying the legacies, unless the testator had designated the place."

It is appropriate, perhaps, to ask at this point what is the effect of a judgment rendered by a court in a cause where it has not obtained jurisdiction. It was provided that the judgment was not valid where "rendered against a party and he was not summoned in the first place",\textsuperscript{41} and further "Judges sometimes oppress defendants who answer before them, although they belong to another jurisdiction over which said judges have no judicial authority; and in a case of that kind we decree that every judgment rendered in this way shall not be valid. The same rule applies where the parties make a mistake by accepting some judge who has no authority over them."\textsuperscript{42} Or as more briefly stated by Aso and Manuel, "a judgment alone is valid which is given against a person subject to the jurisdiction of the judge.\textsuperscript{43}

It will be seen from the foregoing that the parties' mere acceptance of a judge who had no authority over them did not render his judgment valid. This, when viewed in the light of certain other provisions of the Spanish law, has relation to the same thing that we recognize, that is, that parties cannot confer jurisdiction by mere consent. Thus, it will be recalled that with us the courts of the matrimonial domicile do not give effect to divorce decrees of some other jurisdiction even though both spouses appeared and consented to the supposed authority.

\textsuperscript{40}Partida III, Title XXII, Law 12.
\textsuperscript{41}Partida III, Title XXII, Law 15; Sala, Ilustracion del Derecho Civil de Espana, vol. 2, Book 3, Title 2.
\textsuperscript{42}Aso and Manuel, Instituciones del Derecho Civil de Castilla, Book 3, Title 8, Cap. 1.
of the court rendering the decree.\textsuperscript{44} However, the Spanish jurisprudence recognized the validity of judgments rendered where the parties voluntarily submitted to a court having "antecedently lawful jurisdiction."\textsuperscript{45} In other words, although not the most convenient forum, the court had the necessary power and jurisdiction to proceed if it wished, in view of the parties' voluntary submission. This was referred to as jurisdiction prorogado.\textsuperscript{46}

Incidentally, it may be stated that where two courts had concurrent jurisdiction over causes of the same nature, the one before which the cause was first instituted and by which the defendant was lawfully cited acquired exclusive jurisdiction over the cause to conclusion, with "preventive" powers against the continuance of the subsequent suit.\textsuperscript{47}

The effectiveness of a valid service of summons on a defendant as cementing the jurisdiction of the court and rendering its subsequent judgment valid shows little or no difference from the principles followed in this country. Thus, where a domiciliary was properly served with summons, his removal immediately thereafter to some other province or district or country, did not defeat the jurisdiction of the court and it could validly proceed to judgment.\textsuperscript{48} Likewise, where the defendant was a nonresident but was served while temporarily within the bounds of the court's jurisdiction, the court had jurisdiction to proceed against him and render a valid judgment.\textsuperscript{49} As with us, certain exemptions from service of process existed as to a person coming within the confines of the court's jurisdiction to appear as a witness in some pending cause or for certain other specified reasons; but if while so doing he entered into any contract or committed some wrong, as to such matter he was subject to suit.\textsuperscript{50}

\textsuperscript{44}See, e.g., Andrews v. Andrews, 188 U.S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903).
\textsuperscript{45}Aso and Manuel, Instituciones del Derecho Civil de Castilla, Book 3, Title 1, Cap. 4.
\textsuperscript{46}See note 45, supra; also Manual del Abogado, vol. 1, sec. 11. This situation was not of common occurrence, according to Juan Sala.
\textsuperscript{47}See Novisima Recopilacion, Book 5, Title 14, Law 9; Las Siete Partidas, Partida 3, Title 7, Law 12.
\textsuperscript{48}Partida 3, Title 7, Law 12.
\textsuperscript{49}Partida 3, Title 3, Law 4.
\textsuperscript{50}Partida 3, Title 3, Law 4; Partida 3, Title 7, Law 2.
To what extent, if any, a valid judgment in one province or district in Spain was given effect in another province or district, I have observed no authority, but it seems probable that occasion for such a question did not arise. In the case of a proceeding, *in rem*, of course, the property was usually attached or taken possession of pending the suit and satisfaction, in part at least, obtained therefrom. In a proceeding *in personam* the defendant debtor might be obliged to give security or bail and imprisoned if he did not do so. Accordingly, there was little or no opportunity for him to escape the jurisdiction without having satisfied any judgment against him.

When we turn to the principles of conflict of laws which relate to the law applicable to determine the nature of rights and causes of action, we find discussions relating to contract and property matters but not to what we know as torts. This latter is explainable by the fact, which has already been indicated, that the Spanish law, following the Roman law, classed all wrongs or injuries under the general head of delicts. True, the Spanish law subdivided such delicts into two classes, those termed public and those termed private. In other words, a public offense or true crime (*delito verdadero*) was proceeded against by what corresponded to our criminal proceeding; a delict which caused damage to person or property gave rise to an action for damages, in the nature of our tort action. Nevertheless, whether one or the other, it was based on a delict or wrong. Thus, the attempt to bring an action for damages in one province of Spain for a delict committed in another province or for one committed outside the country would simply run against the stone wall of the statutory provision that, for some delict which had been committed, "where a suit is instituted against him on this account he is required to answer where the delict was committed." That was so "even though he be a native or resident of some other country." So, if the wrongdoer had left the jurisdiction where he committed the private wrong (or

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31 Aso and Manuel, *Instituciones del Derecho Civil de Castilla*, Book 3, Title 10.
32 See supra, note 51, especially Cap. 1, sec. 6 thereof.
33 The delict in the Spanish law generally, see De Funiaq, *Principles of Community Property*, sec. 81; Aso and Manuel, *Instituciones del Derecho Civil de Castilla*, Book 2, Titles 19 and 20.
34 Partida 3, Title 2, Law 32. See Aso and Manuel, *Instituciones del Derecho Civil de Castilla*, Book 3, Title 2, Cap. 1.
tort), it would seem that no right existed to bring action against him elsewhere and, hence, no occasion arose for developing any principles of conflict of laws in regard to the law applicable to determine the existence of a right of action for tort.

In the matter of contracts, which have already been referred to in a preceding part of this article, it appears that regardless of where the contract was made, the place of performance was considered to be intended to supply the law by which the rights of the parties under the contract were to be determined. This may be more fully seen in the discussion following to the extent to which it relates to marital contracts between spouses. The following discussion, it may be remarked, is based largely on commentaries of the jurist Matienzo, who provides many interesting lights on certain aspects of conflict of laws principles in the Spanish law. However, concurring views of other jurists are also given.

In discussing the law that husband and wife share equally the earnings and gains acquired during marriage, Matienzo raises the question of the effect of a different law being in force in any state or province of the country, pointing out that in the state of Cordoba the law requiring such sharing is not in force. The law of marital gains can apply only, he says, "to property situate in the place of the husband's domicile but not to property situate in some other place where a different custom is in force. Property situate in Cordova will be dealt with according to the custom of Cordova and so will not be divided. . . . The law of the husband's domicile must not be considered so far as concerns property owned by the spouses in other jurisdictions. Such property is dealt with according to the law or custom of the place where it is situate; for custom does not extend beyond its own territory, least of all to govern property situate abroad where different or contrary laws or customs are in force. . . .

See supra, note 34.
56 Specifically, Gloss I, Nos. 65-85, to Law 2 of Book 5, Title 9, of the Nueva Recopilacion of 1567. See de Funiak, vol. 2, Appendix III.
57 e.g., by Azevedo, Commentariorum Iuris Civilis (1597); Gutierrez, Practicarum Questionum (1606-1612); Llamas y Molina, Comentario a las Leyes de Toro (1827).
58 In 1802, however, this disparity from the law of the rest of Spain was removed and community of property between spouses made the law. See Novisima Recopilacion (1805) Book 10, Title 4, Law 13.
This view is supported by many legal principles and is adopted by the larger number of legal authorities. . . . it is the general opinion that in intestate succession regard is had to the place where the property is situate and that it makes no difference whether the relevant law [of the domicile] speaks *in rem* or *in personam*. . . . the sounder view is that whether a statute speaks *in rem* or *in personam* it does not apply to property situate outside the jurisdiction, and that the appropriate laws are the local customs and laws where the property is situate.\(^\text{5}\) In the foregoing discussion, Matienzo cites many authorities at length, including Baldus and Bartolus and others of the Italian schools, and likewise remarks that the view given is that followed in the kingdom of France. He makes the further point that if the law of the spouses' domicile and the law of the place where the property is situate are entirely contrary or opposite in effect, the law of the domicile will certainly be so objectionable in the jurisdiction where the property is situate as to be definitely unacceptable.\(^\text{6}\) In short, as we would say, the public policy of the latter jurisdiction would constitute an important factor.

But, he continues, what about the case of movable property acquired during marriage in a place other than the matrimonial domicile? He points out that according to views expressed by Baldus and many others, including Casaneus in his *Conscutudines Burgundiae*, immovables are subject to the law of the place where situate but that movables follow the person of the owner. "According to this view regard should always be had to the law of the place of origin or domicile of the deceased and not to the law of the place in which such movables are situate, by reason of the fact that they attach to the person and not to the place. But the contrary view is sounder and more popular, viz.: that movable property is presumed to belong to the territory in which it is situate. This was also the view of Baldus—contradicting himself as he often does. . . . [We may safely infer that Matienzo had not too high an opinion of Baldus.] But you must understand this generally accepted rule as applying only when movable property is permanently and not merely temporarily situate in a place. Such was the opinion of Baldus (who never failed to lend his support to any and every opin-

\(^{5}\) Matienzo, *Commentaria*, Gloss I, No. 74, to Law 2, etc.

\(^{6}\) Matienzo, No. 76.
The reason for this is . . . that property which is in a place for a period and is to be taken to another place is not deemed to belong to the place where it is, but to the place whither it is to be taken. It is not deemed to be where it is found but rather belongs to the place of its destination and it should be dealt with according to the laws and customs of that place. . . . If property is situate in any place and is intended to remain there permanently, it is deemed to be attached to that place in the same way as immovables.\(^6\)

It is interesting to interject at this point the observation that the European legal writers to whom Story resorted would seem to be those who insisted that the maxim ""Mobilia personam sequuntur"" applied always, and Story himself seems to have advocated that view.\(^6\) The conclusion of the Spanish writers, after considering the views of Italian and French commentators, was that there should not be a complete subservience to that maxim on every occasion.

"'Let us then decide,' Matienzo continues, 'with regard to movable property acquired during marriage that it is shared between husband and wife if it is situate in a place where there is in force a custom to this effect, or alternatively, if it was intended by the acquiring spouse to be taken to such a place even though it was at the time of the marriage [when acquired] actually situate at Cordova or in some other place where no such custom is in force.'\(^6\)

Lest it be assumed that an easy division existed between what were movables and what were immovables, it may be added that Matienzo, Covarruvias and others distinguished between such matters as rents of a temporary nature which were to be considered as movables, and various other rights and interests in land which were to be reckoned as immovable property.\(^6\)

The question of what law governed the spouses' property rights in debts and causes of action has already been mentioned in a preceding part of this article.\(^6\) Such rights, it may be re-

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\(^{6\text{a}}\) Matienzo, No. 79.

\(^{6\text{b}}\) Matienzo, No. 80.

\(^{6\text{c}}\) Story, secs. 379, 380.

\(^{6\text{d}}\) Matienzo, No. 81.

\(^{6\text{e}}\) Matienzo, Nos. 82, 83.

\(^{6\text{f}}\) See supra, note 35.
peated, were determinable by the law of the place where the debt or right of action was enforceable.\(^6\)

In this country the problem of determining the spouses' rights in the marital property under the properly applicable law is complicated by ease in changing, and the frequent tendency to change, the matrimonial domicile and innumerable cases have arisen upon this problem.\(^6\) Even back a hundred years or more one finds a considerable number of cases in Louisiana and Texas based upon this problem.\(^6\) Occasionally, one of these older cases was decided on the basis of the application of the Spanish law or on a case which had in turn applied such law.\(^7\)

It is somewhat interesting to note, therefore, the discussion by Matienzo of situations where the spouses changed to a new domicile, whether immediately subsequent to the marriage ceremony or whether some time thereafter.

Must regard be had, he asked, to the law of the place where the marriage was contracted, or to the law of the place of the husband's domicile (if that was other than the place of marriage), or to the law of the place to which they remove after the marriage (being other than the husband's former place of domicile), or to the law of the place where acquired property is situate?\(^7\)

Some consideration has already been given to the last mentioned question of the situs of property. Leaving aside that question, let us consider the absence of any express agreement between the spouses as to how marital acquisitions should be divided. "If," said Matienzo, "the laws enacted or the customs adopted, with regard to the sharing or division of property acquired during marriage, or with regard to anything else, differ in the place of the husband's domicile from those in force in the place where the marriage was contracted, the law to be observed is that of the husband's domicile. . . ." The foregoing applied, however, only "in a case where the husband makes the marriage

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\(^7\) Matienzo, No. 66.

\(^7\) See Beale, Conflict of Laws, Sec. 289.1 et seq.; Leflar, Community Property and Conflict of Laws (1923) 21 Calif. L. Rev. 221; Stumberg, Marital Property and Conflict of Laws (1932) 11 Tex. L. Rev. 53; Note (1930) 43 Harv. L. Rev. 1286.

\(^7\) See Story, Conflict of Laws (5th ed. 1857) Chap. VI.

\(^7\) See, e.g. Saul v. His Creditors, 6 Mart. N.S. (La.) 569, 16 Am. Dec. 212 (1827).
contract as a foreigner in the place of his wife's domicile without intending to stay and remain there and with the intention of returning at once to the place where he is domiciled and resides. In such a case it is natural to have regard to the customs, not of the place where the marriage is contracted, but of the place to which they betake themselves. . . . The case is different, however, if they make the contract of marriage with intent that they should reside as husband and wife in the place of the wife's domicile where the marriage contract was made. In that case, as the husband intends to live with his wife in the place of her domicile, the laws of her domicile must be followed. Similarly, if the parties did not intend to make their domicile that of the place of contracting marriage but did not intend to remove to the husband's domicile and instead to go to some third place of residence to make their residence or domicile, it was presumed, according to Matienzo, that the parties contracted the marriage with intent to follow the laws of the new domicile intended by them. Judge Story followed the same view, it may be noticed, in defining the matrimonial domicile to be "the domicile of the husband, if the intention of the parties be to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is to be in some other place, as in New York, then the matrimonial domicile would be in New York." Of course, if the husband intends to reside at the wife's domicile, this becomes his domicile so that it is really the husband's domicile that continues to control.

But suppose that although the parties intend to and do remove to the place of the husband's domicile after being married elsewhere, they enter into a contract or agreement at the place of marriage which is designed to govern their rights in the marital property? Even though their agreement encompasses matters permitted by the law of the place of marriage, if it contemplates anything contrary to the law of the husband's domicile—and hence the matrimonial domicile—it will certainly come in conflict with the public policy of the latter domicile. However, so far as the Spanish law was concerned there would seem to be little likelihood of public policy becoming involved.

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7 Matienzo, Nos. 70, 71.
77 Story, Conflict of Laws (8th ed.) sec. 194.
Under the Spanish law of community property, as under the present French Civil Code, it was possible for spouses to contract that earnings and gains acquired during the marriage should be governed by some other arrangement than by the provisions of the community property law. Since such an agreement would be recognized if made under the Spanish law of community property, it would not be against public policy to recognize such an agreement entered into elsewhere. "If in the marriage contract there is an express agreement that such property is to go in whole or in part to one spouse or to the other or to both of them, such an agreement must be observed and all distinctions of places or customs are irrelevant. For such agreements are not contrary to good morals and indeed are actually approved of by our laws." Admittedly the situation might be otherwise in a province of Spain such as Cordova—instanced by Matienzo—or Valencia or Majorca where, for some period of time, a system of separate property prevailed. Would one of those provinces recognize or give effect to a contract by its domiciliaries where such contract provided for community of property between the spouses? One may here consider Law 24 of Partida 4, Title 3, of Las Siete Partidas of 1263, which provided that when a man and woman married, making an agreement as to the manner in which they should hold property earned by them during marriage and thereafter went to live in another country having customs contrary to that of the agreement, the agreement should be given effect. The Partidas, Llamas y Molina pointed out, overrode local customs. (This view, although later accepted, is not born out by the provision of the code itself.)

It must be noted, however, that this Law 24 was interpreted to apply to the situation where husband and wife married in a jurisdiction wherein they intended at the time to make their domicile and then subsequently determined to change their domiciles. As early as the year 693, the Fuero Juzgo provided that, "And as to earned property as to which they shall make written contract, each shall have such share as the written contract stipulates." Fuero Juzgo, Book 4, Title 2, Law 17. See also De Funjak, Principles of Community Property, sec. 135.

*Code Civil*, sec. 1400 et seq., sec. 1497 et seq.

Matienzo, No. 67.

Llamas y Molina, Comentario a Las Leyes de Toro, Nos. 23, 24, to Law 15.

See *supra*, text and note 16.
It should also be mentioned here that the law in question also provided that if the spouses entered into no express agreement, they were to be presumed to have contracted marriage with the law of their then domicile in mind.\footnote{Matienzo, No. 73.}

This brings us to another matter for consideration. Spouses marry in the place of their domicile, having at that time every intention of remaining there. They make an express contract as to what their respective rights shall be in the marital property, a contract sanctioned by the law of their domicile. Or they make no express contract, but, as it is usually deemed, impliedly contract with the law of their then domicile in mind. Later on, they change their domicile to another jurisdiction having different laws as to marital property rights. What are their respective rights in the marital property acquired up to the time of the change of domicile? That is, will their rights be deemed by their new domicile to have become fixed in the property as determined by the law of their former domicile? What law will govern their rights in property acquired in the new domicile? As to their rights in the property acquired before their change of domicile, it seems pretty universally recognized that their rights are fixed in the property, according to the laws of their domicile when the property was acquired there, and their rights therein will continue to be recognized even when they take the property to their new domicile. There are innumerable cases of this sort in this country, wherein rights once fixed in property are continued to be recognized in other jurisdictions which, having contrary laws, would have attributed other or different rights in the property if it had been acquired by the spouses while domiciled there.\footnote{See text, post, for translation of Law 24.}

There is, though, diversity of opinion as to the law to govern property rights in property acquired in the new domicile. This is so well known that it is probably presumptuous to mention it. The English courts, in the \textit{De Nicols} cases,\footnote{See \textit{Beale, Conflict of Laws}, sec. 289.1 et seq.} have held that spouses married while domiciled in France and impliedly contracting that their marital property rights should be governed by French law were entitled to have that law govern their marital

\footnote{\textit{De Nicols} v. Curlier, [1900] A.C. 21; \textit{In re De Nicols}, [1900] 2 Ch. 416.}
property acquired in England after they changed their domicile to England. The same thing has been held in Ontario with respect to spouses married in Quebec and subsequently changing their domicile to Ontario. In this country, however, it has been uniformly held that such an implied contract does not have effect to extend to and overreach the contrary laws of a new domicile. Even in the case of an express contract there has been disinclination to consider that it was intended to cover a change of domicile.

Turning to the Spanish law, we find Law 24 of the Partidas, referred to above, reading as follows:

"It often happens that when a husband and wife marry, that they agree with one another, that when one of them dies the other shall inherit the marriage gift or donation brought by either to the marriage or they jointly agree in what manner they shall hold the property which they earn while married. And after they are married they go to live in another country in which is practiced a custom contrary to that of the agreement or contract which they made. And because there may be doubt when one of them dies, whether the agreement they made between them, before or when they married, should govern, or the custom of the country to which they moved should govern, to that end we shall explain. And we say that the agreement they had made before or at the time of their marriage ought to have its effect in the manner they may have stipulated, and that it will not be avoided by the custom of the place to which they have removed. And so we say it ought to be, if they had not entered into any agreement; for the custom of the country where they contracted the marriage ought to have its effect as regards the dowry, the marriage gift, and the earnings they may have made; and not that of the place to which they have removed."

In the Louisiana case of Saul v. His Creditors, which had

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"See, e.g., Hoefer v. Probasco, 80 Okla. 261, 196 Pac. 138 (1921), reviewing many of the cases; Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277 (1858).
"Original and translation, see de Funiak, Principles of Community Property, vol. 2, Appendix I, C.
"6 Mart. N.S. (La.) 569, 16 Am. Dec. 212 (1827)."
to be decided under applicable Spanish law, Judge Porter interpreted Law 24 and the commentaries of Matienzo and other jurisconsults to apply only to property earned or acquired in the old domicile before the change of domiciles is made. That is, the new domicile must give effect to the express or implied agreement so far as concerned property acquired in the old domicile and in their hands in the new domicile. But, Judge Porter determined, the Spanish law did not intend to require the new domicile to give effect to such agreement to the extent of making it cover property acquired in the new domicile having different marital property laws.

It is true, as Judge Porter insisted, that Matienzo fully recognized and discussed the fact that the laws of one jurisdiction have no extraterritorial effect so as to determine property rights in property in another jurisdiction. Property in the forum, for example, is governed by the law of the forum and not by the laws of some other jurisdiction. But suppose the forum is willing to have parties living elsewhere contract that they will have their rights in property in the forum governed by the law of their place of contracting? That would appear to me to be the effect of Law 24 and Matienzo's commentaries thereon. The question becomes somewhat academic so far as Louisiana itself is concerned, since local statutes now put Louisiana in line with all the other American states and provide that nonresidents moving to Louisiana shall have their rights in property there acquired governed by the same law as applies to other inhabitants of the state.\(^8\)

In the foregoing discussion, in giving some picture of certain pertinent conflict of laws matters such as domicile, jurisdiction of courts, and tort, contract and property situations, in the old Spanish jurisprudence, it is believed that the most relevant subjects have been touched on. It is to be hoped that these will provide some interesting points of comparison between that jurisprudence and the jurisprudence of other European countries, especially as the Spanish writers have heretofore been generally ignored. It is also to be hoped that interest in these writers will be stimulated. There are many very excellent legal writers and commentators among the Spanish school whose works are as yet virtually untapped by American scholars.

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\(^8\) La. Civ. Code, art. 2401.
Investigation of the Spanish writers and the Spanish codes will reveal an astonishing amount of material that is modern by our standards. A general survey of the entire subject is well worthy of treatment at book length. Meanwhile, this article may serve to introduce, however concisely, some idea of conflict of laws in that jurisprudence.