The three books under review epitomize, in a way, the present situation. Justice Vanderbilt recognizes the need for radical improvements in legal procedure and at least intimates that new techniques for dealing with our terminology must constitute a fundamental part of any important improvement. Mr. Philbrick illustrates the preoccupation with trial-success that characterizes our law schools today to the exclusion of their more important functions. Professor Lasswell suggests some new approaches and techniques that might very well be adapted to the problems of legal semantics. Unfortunately the problems remain virtually untouched. The garrulous goddess continues to babble without a competent interpreter.

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INTERNATIONAL CONTRACTS, by Geoffrey Chevalier Cheshire.* Glasgow: Jackson, Son & Company, 1948. Pp. 90. 6s.

Because *International Contracts* is in fact a lecture delivered before a diversified audience at the University of Glasgow, it might be supposed that the work is merely a popularization of well-known legal principles. Such is most certainly not the case. In the preface to the third edition of his standard work on English conflict of laws, Professor Cheshire expressed dissatisfaction with the treatment given therein to the contract conflicts law.[1] This lucid and brilliantly written lecture is Professor Cheshire's attempt to amend and reanalyze certain topics in this area.

According to the 19th century English scholar Westlake, the "proper law" of the contract (the law which governs a contract generally) is the law of that country with which the contract has "the most real connection."[2] However, English opinions have consistently stated that the proper law of the contract is that law which the parties intend to apply. In most cases these different theories will lead to the same result. If the parties have expressed no intention as to governing law, an intention will be presumed in "the light of the subject matter and of the surrounding circumstances."[3] The presumption will normally select the law of that country which is most substantially connected with the contract. But when the parties have expressly agreed to be bound by the law of a country having no or perhaps only a slight factual connection with the transaction the theories may lead to practical differences. Professor Cheshire launches a heavy attack on the intention of the parties rule if that rule is interpreted to mean that the parties are permitted an unrestricted

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1. CHESHIRE, PRIVATE INTERNATIONAL LAW, iv-v (3rd ed. 1947).

2. WESTLAKE, PRIVATE INTERNATIONAL LAW 289 (6th ed. 1922).

3. Bowen L. J. in Jacobs v. Crédit Lyonnais, 12 Q.B.D. 589, 599-600 (1884).

choice of law to govern their contractual arrangement. The limits on choice of law by the expressed agreement of the parties is the central theme of the lecture's first part.

At the outset Cheshire asserts that a single system of law does not necessarily govern all of the various questions which arise in contract matters. In particular, a distinction must be drawn between the creation[4] of a contract and the substance[5] of an obligation once it has been formed. The parties have no power to choose the law which governs the *formation* of a contract except that they may choose the facts which will objectively localize the contract. Somewhat more latitude to choose is permitted when an agreement's *substance* is in question. In holding to the view that party autonomy does not operate in the case of a contract's formation, Cheshire appeals to both logic and authority.

"A contract, so far as its valid creation is concerned, *must in the nature of things* be subject to the law of the country with which it has the most real connection."[6] The contrary position violates "elementary common sense."[7] Cheshire does not elaborate why this is true. Apparently he believes that some law independent of the parties' choice must impress itself on their acts when the acts are done. That law inevitably will control questions arising under the contract.[8] This position is sound only if the forum, when it decides questions concerning an international contract, is supposed either to be enforcing contract rights *created* under a foreign law or to be fashioning a local right on the pattern of an *already created* foreign right. Given these explanations and assuming that choice of law rules are determined by them, we may agree that a forum should act only if the law of some jurisdiction has "imposed" an obligation on the parties. But are the possibilities necessarily exhausted by these conceptions of what a forum does in a conflicts case? Cannot a court look at all the facts in a transaction involving one or more foreign countries and select any fact or combination of facts as the most important in

4. Cheshire treats as questions concerning creation of a contract: "Have the parties reached agreement? Are they of full capacity? Have the formalities and other requisites of a valid contract been observed? Is the contract illegal?" P. 19.

5. "The expression 'substance of the obligation' is not free from ambiguity, but it includes the effects and consequences of a contract and questions connected with the reciprocal rights and liabilities of the parties." P. 21.

6. P. 21. (Italics supplied)

7. P. 19.

8. "As a distinguished American judge once said: 'Some law must impose the obligation, and the parties have nothing whatever to do with that, no more than with whether their acts are torts or crimes.' It is not for the parties to choose what law shall determine the validity of their agreement; it is for the law to determine what agreements it will govern." P. 19. "[A] faint connection with a foreign law cannot deprive the contract of its essentially English character." P. 21.

Cheshire seems also to have been influenced by the idea that judicial jurisdiction principles are determinative of choice of law rules. "It is idle to maintain that a court can be deprived at the caprice of the parties of control over a contractual question which it regards as subject to its authority." P. 19-20.

establishing a connection with a jurisdiction the legal materials of which will be consulted in deciding a case? If so, then cannot a court seize upon an express choice of law statement agreed to by the parties and hold it the most important fact in the situation?[9] No logical compulsion forbids the forum from so using any expressed choice of law which the parties may care to make.

The English opinions contain statements granting to the parties the widest choice of applicable law but Professor Cheshire cautions that we must look to what the judges do and not what they say. He points out that in all cases save one the law chosen was in fact the law of the country with which the contract had its most substantial connections. In the single case, *Vita Food Products v. Unus Shipping Co.*,[10] the Privy Council did give effect to a choice of English law in a transaction that had practically no factual connection with England. After a brief discussion this case is dismissed with: "It is scarcely credible that it will survive as an authority."[11] But the authorities other than *Vita Food* do not *forbid* the parties to choose the law applicable to the creation of a contract. Merely because an opinion formulates a rule which is broader than the case requires does not necessarily mean that the rule as stated is an inaccurate proposition of law. Further while it is true that *Vita Food* is in theory a Nova Scotia case[12] since it was decided by English judges may it not represent authoritative English opinion on the question?

Professor Cheshire would also limit the choice of law governing the substance of an obligation to the law of a country with which the contract has some factual connection. That such is English law is proved to his satisfaction by a method similar to the one used in proving that English law does not allow parties to choose the law controlling the creation of a contract: "in nearly all cases [there is] some factual connection with the chosen country."[13] How does this demonstrate the *necessity* of the connection? Apparently there is no case *refusing* to apply a chosen law on the ground of no factual connection. On the contrary an expressly chosen law has been applied in cases where the law was not that of a country factually connected with the conduct of the business at hand. This explains why Cheshire uses the phrase "in *nearly* all cases" in the quotation above. The parties may submit themselves to the judicial jurisdiction of any country in the world. In the English law an express submission to a forum amounts to a choice of the forum's law as well. So by means of so-called arbitration clauses the parties may, under English

9. This point of view is worked out in detail by Professor Max Rheinstein. See Book Review, 37 COL. L. REV. 327 (1937).

10. (1939) App. Cas. 277.

11. P. 33.

12. *Vita Food* was a decision of the Privy Council sitting as the highest court for Nova Scotia.

13. P. 36.

authority, select the law of any country to govern their contract. Professor Cheshire admits that these cases present "a certain difficulty."[14] But in them the "chief evil of complete freedom of choice" is avoided. The "absurd and irrational situation" arising from the choice of a law totally unrelated to the transaction does not arise. The most real connection is hard to determine in advance; therefore, a choice of "law which [the parties] know and approve and . . . judges in whom they have confidence" is "convenient and desirable."[15] Amen. But why is it not equally convenient and desirable to permit the choice of law without the mechanics of the arbitration clause. An elaborated and well-known commercial law such as England's might be very convenient for parties whose affairs have no factual connection with England. If so, the choice of that law should be permitted them.

The practical needs of the commercial community rather than logic or ambiguous authority should provide the basis for solving the problem of what limits are to be placed on expressed choice of law by the parties. Of these needs Professor Cheshire here tells us little though elsewhere he has recognized their importance.[16] When entering into a contract involving foreign facts, businessmen find that their lawyers are frequently unable to tell them what law will be used to judge their conduct. The conflict of laws rules in the contract area are many and confused. What a great help it would be if the contractors could agree in advance what legal system will govern the transaction. Is there any reason why parties should not be permitted this method of introducing an element of certainty into their dealings? Cheshire is disturbed about the possibility that a contract with no international aspects will contain a choice of law other than that of the country in which all the facts of the agreement are located. The specter of Henry and William, two Englishmen, contracting in London to do acts in England but providing that their contracts be governed by French law haunts the pages of this lecture. Is it necessary to deprive parties of a legitimate tool in order to guard against this unusual case? In such a case a forum might well decline to be bound by the choice of the parties, since it would be difficult for anyone to show that a reasonable commercial purpose was being served. The exclusive concern of the jurisdiction in which all the facts are centered can easily be recognized by way of an exception to a general rule permitting choice of law by the parties.[17] There is no need to deny totally nor to limit severely a rule which serves the needs of modern commerce.

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14. P. 41.
15. P. 43-4.
16. "Private International Law is no more an exact science than is any other part of the law of England; it is not scientifically founded upon the reasoning of jurists, hut it is beaten out on the anvil of experience." CHESHIRE, PRIVATE INTERNATIONAL LAW 55 (3d ed. 1947).
17. 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 428 (1947).

In the second half of his lecture, Cheshire outlines in detail his suggestion that a single law should not be used to solve all the various problems which may arise in contract litigation. Problems concerning capacity, the formation of the contract, interpretation, the substance of the obligation, voidable contracts, performance and discharge are distinguished. Each category of problems is discussed and some choice of law rule is suggested as the most appropriate for each group. Depending on the question before the court a given contract may therefore be subject to the law of one of the party's domicile, the law of the place of contracting, the proper law, the law of the place of performance or the law of the forum.

Professor Cheshire ignores the recent advice of Dr. Ernst Rabel: "To split the incidents . . . [of a contract] is a grievous mistake. . . ."[18] The great difficulty which multiplicity creates for the practising lawyer can be readily understood. What questions will arise in litigation? Before what courts will the questions arise? How will the court classify the problem which does come before it? How will the court define the various connecting factors such as place of contracting, place of performance and the like? Yet to give worthwhile advice when a contract is to be made a lawyer must make some guess at the answers to these questions. The scholar's analysis can easily become too fine for the practitioner.

If, as Professor Cheshire insists, "the subject requires to be more broken down into separate fragments,"[19] exception may be taken to dividing the subject analytically. Investigation may perhaps be most fruitful if it attempts to discover rules suitable for the diverse kinds of commercial transactions. While we do not know, we may guess that a study of choice of law rules concerning the sale of goods may reveal, as appropriate, rules which differ from those suitable for insurance contracts.

Some beginnings have been made along this line. In America contracts calling for the payment of interest are universally recognized as subject to a special rule when the question of usury is raised. Professor Lorenzen has given us a special study of the conflict of laws relating to negotiable instruments[20] and Professor Carnahan has published a detailed study of the cases in the field of life insurance contracts.[21] Some foreign statutory materials have reflected this conviction that different types of contracts are to be treated in different ways. The Polish statute of 1926 contains special rules for contracts made on the Stock Exchange, in the retail trade, for professional

18. *Id.* at 483.
19. CHESHIRE, PRIVATE INTERNATIONAL LAW, v (3d ed. 1947).
20. LORENZEN, THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES (1919).
21. CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS (1942).

services, for employment, *et cetera*.[22] Similarly the 1948 Czechoslovak Act on Private International Law distinguishes between contracts concerning immovables, those made on an exchange, sales contracts, insurance contracts, contracts for professional services and labor contracts.[23] Of course, this breakdown, too, adds to the difficulty of the lawyer's job; but the classifications, drawn from the facts of business life, should be easier to apply than those based on an analysis of the questions which may arise in contract litigation. Also in such a division at least the desirability of the rules can be tested by criteria drawn from the needs of the business world.[24]

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COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE. By Jerome Frank. Princeton: Princeton University Press, 1949. Pp. xii, 441. $5.

It has long seemed to me that book reviewers, a grubby crew at best, ought always to honor their random readers with a sort of *caveat lector*—a full disclosure of such personal relationship, hot or cold, with a book's author as prompts a prejudiced plug or a prejudiced panning. In just this spirit, let me confess that I plan, with bias aforethought, both to plug and to pan Jerome Frank's "Courts on Trial." As a passionate admirer, personal and professional, of Judge Frank, his works and his ways, I cannot but call his latest book a brilliant, eloquent, wise, witty, go-buy-it-and-read-it job—all of which by sheer happenstance, it is. As a congenitally cantankerous character who would fall over backward any day to avoid the pleasure of over-praising a friend, I cannot but stress the flaws I found in "Courts on Trial," even though their argumentative mention here may seem perhaps to inflate them beyond their actual or relative importance. So much by way of full—or fulsome—disclosure.

Coincidentally, full disclosure—in a slightly different sense—is the very essence of Judge Frank's book. The Judge believes that judges should toss away their robes and appear on the bench as what they are, men; one of his 32 chapters deals delightfully with the absurd and anti-democratic anachronism of the judicial uniform. But the whole of his book is itself a disrobing of another and more meaningful kind. With a forthrightness rare—even, in spots, unique—

22. The statute is cited and discussed in KURATOWSKI, *A General Outline of Some Principles of Conflict of Laws in Poland*, STUDIES IN POLISH AND COMPARATIVE LAW 110 (1945).

23. Sec. 44-6 of the Act dated March 11, 1948, reprinted in 33 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW (3rd series) 78, 83 (1949).

24. 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 440 (1947):

> In conclusion, the task of the court is this: it has, in the absence of an agreement, first, to state whether the individual facts of the contract are colored by a certain law; if not, second, whether the contract belongs to a class typically centering in a certain country. This inquiry has to be done in full consideration of the circumstances personal and economical, but without inferring judicial or state policies.

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