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The Role of the Jury in Choice of Law

Willis L. M. Reese,* Hans Smitt,† and George B. Reese‡

The authors examine the respective roles of the judge and the jury in deciding issues of fact which bear upon the determination of questions of choice of law. After discussing the few cases that have considered this problem and commenting upon the general allocation of issues between judge and jury, the authors conclude that the judge, almost invariably, should decide these issues of fact.

I. INTRODUCTION

WHAT ROLE, if any, should the jury play in deciding preliminary issues of fact essential to the determination of a question of choice of law? The problem has rarely been faced in the decided cases and, so far as is known, has not been discussed in the secondary writings. Its potential importance, however, is demonstrated by the fact that it has figured prominently in three federal decisions, of which two are quite recent. Since none of these decisions considered the problem in the large, it remains ripe for the further exploration attempted here. This exploration will consist of an analysis of the federal decisions, a brief discussion of the respective roles that are customarily played by judge and jury, and, finally, a consideration of the peculiar problems posed in the choice-of-law context.

II. THE FEDERAL DECISIONS

In Orr v. Sasseman, the first of the decisions in point of time, the plaintiff sought recovery in Georgia for alienation of the affections of his wife. The conduct by the defendant that gave rise to the suit had commenced in Georgia, while the wife was visiting her par-

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1. 239 F.2d 182 (5th Cir. 1956).
ents, and had continued after the return of the wife to Illinois, the state of the matrimonial domicile. The plaintiff had already lost the affections of his wife before she met the defendant and hence failed to establish that he had suffered the only type of damages for which Illinois law permitted recovery. Accordingly, his success in the action depended upon application of Georgia law which, in contrast to that of Illinois, permitted recovery for wounded feelings and punitive damages. A jury verdict for the plaintiff in the amount of $17,500 was affirmed on appeal. The court of appeals held that the district judge had properly charged the jury that "the cause of action accrues when there is a loss of consortium." It noted that no objection had been made to the charge that there could be a verdict for the plaintiff only if the jury found that the loss of consortium had occurred in Georgia and concluded: "We cannot say, as a matter of law, that there could not have been alienation of the affections of the plaintiff's wife in Georgia. The jury has said that there was. Its verdict forecloses the question." This decision cannot, of course, be cited as precedent for the proposition that the question of where a loss of consortium occurred must be submitted to the jury. Since the defendant had failed to object to the judge's giving this question to the jury, he could not, and did not, complain on appeal of the judge's action. This being so, the appellate court was not called upon to review whether this action of the judge was correct.

The second decision, also by an appellate court, is Marra v. Bushee. This involved an action for alienation of affections and criminal conversation brought in the United States District Court for Vermont by Helen Marra, a New York domiciliary, against Esther Bushee, who was domiciled in Vermont. The evidence revealed that the plaintiff's husband first met the defendant in a bar in Granville, New York, and "shortly thereafter" went to live with her in her home in Manchester, Vermont. While they were living together, it was customary for the defendant and the husband to visit bars in Granville, New York, on Saturday nights. The plaintiff requested and was granted a jury trial. Following a jury verdict for the plaintiff, the defendant moved for judgment notwithstanding the verdict on the ground that, under the applicable Vermont rule of choice of law, New York was the state of the governing law and that New York had abolished any right of action for alienation

2. Id. at 186.
of affections and criminal conversation. This motion was denied by
the district judge. He held that Vermont law, which allows recovery
for alienation of affections and criminal conversation, was ap-
licable under the governing Vermont rule of choice of law, either
on the ground that Vermont was the place of injury, or more
probably, following section 154 of the Restatement (Second) of Con-
flict of Laws, because Vermont was "the state where the conduct
complained of principally occurred."5 The judge further held that
the question whether Vermont was the state where the defendant's
conduct principally occurred was not for the jury to decide, since
it involved "essentially a jurisdictional preliminary matter."6 The
court of appeals reversed. It agreed that "Vermont would, in this
instance, employ the law of the state in which the defendant's con-
duct primarily occurred."7 The defendant was found, however, to
have preserved for consideration on appeal the question whether it
was for the judge or the jury to determine the place where the con-
duct of the defendant had principally occurred. The court concluded
that "the defendant was entitled to the jury's finding of the facts
which were determinative of the choice of law principles . . . ."8
In other words, the district judge was held to have erred when he
failed to have the jury determine whether the defendant's conduct
had occurred principally in New York or in Vermont.

The third, and most recent, decision is Chance v. E.I. du Pont
de Nemours & Co.,9 an opinion by Judge Weinstein of the United
States District Court for the Eastern District of New York. This
opinion was addressed to a motion to sever an action to recover for
injuries sustained by 13 children in 12 unrelated blasting cap acci-
dents which occurred in 10 different states. The defendants were
the six manufacturers which "comprise substantially the entire
United States blasting cap industry"10 and their unincorporated trade
association, which has its principal place of business in New York.
None of the corporate defendants were incorporated or had their

5. Id. at 977, quoting Restatement (Second) of Conflict of Laws
§ 154 (Proposed Official Draft 1968). This language was adopted without
significant change in Restatement (Second) of Conflict of Laws § 154
(1971).
6. 317 F. Supp. at 978 n.3.
7. 447 F.2d at 1283.
8. Id. at 1285.
9. 57 F.R.D. 165 (E.D.N.Y. 1972). For another opinion by Judge Wein-
stein discussing different aspects of the same case, see Hall v. E.I. du Pont
10. 57 F.R.D. at 167.
principal place of business in New York. The defendants moved to sever on the ground that they were improperly joined because the plaintiff's claims did not involve a common question of law. Whether these claims did involve such a question depended in Judge Weinstein's opinion upon whether, under New York's choice-of-law rules, New York law was properly applicable to determine the rights and liabilities of the parties. This in turn depended upon whether there had been "substantial joint activities by the defendants" in New York. Otherwise, the law of the states in which the injuries had occurred would apply, and the case would not present the requisite "common question of law."

Judge Weinstein was faced with the question whether it was for him or for the jury to determine whether there had been substantial joint activity in New York or whether this question of fact should be submitted to a jury. He noted that the broad language employed by the Court of Appeals in *Marra v. Bushee* could be read as holding that a jury should always be called upon to determine questions of fact on which selection of the appropriate substantive law depends. He questioned, however, whether the court would have stated the rule "so broadly" in *Marra* if it had had "the benefit of full briefs and argument on the point" and thus had been given better opportunity to "explore the implications and substantial difficulties of leaving choice of law issues to the jury." Then, in apparent disagreement with the court of appeals, Judge Weinstein flatly stated that "[t]heory suggests that the facts predicate to a choice of law decision are generally for the judge rather than the jury." In support of this statement, he noted that frequently a judge must determine the applicable law before he can be in a position to know whether the plaintiff has established a prima facie case, or to tell the jury what issues of fact they should decide, or to rule on questions of relevancy. He continued that, outside of the choice-of-law field, certain issues of fact are customarily resolved by the judge rather than the jury. Examples are jurisdictional

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11. *Fed. R. Civ. P. 20(a)* permits the joinder of persons as defendants if: . . . there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.
13. *Id.* at 168.
14. *Id.* at 171.
15. *Id.* at 168.
facts, such as the existence of diversity of citizenship, and preliminary questions of fact needed for a ruling on the admissibility of evidence.

Finally, Judge Weinstein stated that, in any event, Marra v. Bushee was distinguishable. This was because in Marra the purpose of the determination of the issue of fact was to decide the merits, whereas in the case before him the determination was being made only for the purpose of ruling upon the motions to sever and to transfer. Accordingly, he concluded that it was for him, and not for the jury, to determine whether there had been "substantial joint activities" by the defendants in New York.

III. THE RESPECTIVE ROLES OF JUDGE AND JURY IN GENERAL

A. Introduction

No attempt will here be made to examine in depth the respective roles of judge and jury. All that will be done is to sketch what are thought to be the highlights of the subject in order to provide a brief introduction to a more detailed examination of this issue in the choice-of-law area. It may be noted that, although much has been written on the right to trial by jury in general, the exact boundaries of this right have apparently never been the subject of systematic discussion. To that extent, we are treading upon virgin territory.

B. When Is There a Right to Trial by Jury?

In civil actions in federal courts, a right to trial by jury is guaranteed by the seventh amendment of the Federal Constitution, which provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."16 In addition, a right to trial by jury may be given by a federal statute.17 Rule 38(a) of the Federal Rules of Civil Procedure merely reaffirms such rights to trial by jury as may be guaranteed by the Constitution or statute. Although the trend of the decisions is to regard the right to trial by jury as procedural for Erie purposes,18 it may be that in diversity cases the federal courts

17. See, e.g., Galloway v. United States, 319 U.S. 372, 388-89 (1943), in which the majority stressed that a right to trial by jury existed only because of the statute.
must apply a state rule requiring submission of a particular issue to
the jury in situations in which at least one purpose of the rule is to
facilitate recovery.\textsuperscript{19}

The seventh amendment is generally construed as guaranteeing
the right to trial by jury as it existed in 1791, the year in which the
amendment became effective.\textsuperscript{20} So construed, it preserves the right
to a jury trial in all instances in which it was recognized at the criti-
cal time in England and by the original states. Application of the
constitutional provision has proved difficult with respect to problems
that did not arise until after 1791. The merger of legal and equit-
able proceedings into one form of action has occasioned most of
these problems. Deviating from a strictly historical test, the Su-
preme Court has favored recognition of a right to trial by jury as to
all issues that could reasonably be considered legal.\textsuperscript{21} Similar
problems have arisen in actions seeking vindication of rights that
did not exist at the historically decisive time. In those actions, the
courts have tended to look for the closest analogue that did exist at
that time, and have recognized a right to trial by jury if it was rec-
ognized in the analogous action.\textsuperscript{22} However, prominent authority
has advocated a more restrictive approach which would make the
needs of the modern age and procedure the relevant criteria.\textsuperscript{23}

The constitutions of most states guarantee a right to trial by jury
in terms similar to those employed in the seventh amendment.
These constitutions generally make the date of entry of the state

\textsuperscript{19} It has been held that in a Federal Employers Liability Act case a state
court must submit to the jury an issue of fraud that under its own practice
would have been decided by the court. Dice v. Akron, C. & Y.R.R., 342 U.S.
359 (1952). Conversely, it may be argued that a federal court in a diversity
case must follow state practice when the state grants the right to trial by jury
in order to further its substantive purposes. This argument is not precluded
by the Byrd decision and finds support in Justice Harlan's perceptive analysis

\textsuperscript{20} See M. Rosenberg, J. Weinstein, & H. Smit, \textit{Elements of Civil
Procedure} 706-09 (2d ed. 1970).

\textsuperscript{21} Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood,

\textsuperscript{22} See F. James, \textit{Civil Procedure} 339 (1965): "Where the legislature
says nothing about how a new remedy is to be tried, the courts fit it into the
nearest historical analogue to determine whether there is a right to jury trial."

\textsuperscript{23} See Damsky v. Zavatt, 289 F.2d 46, 57 (2d Cir. 1961) (Clark, J., dis-
senting), in which the majority considered an action in debt the closest histori-
cal analogue and recognized a right to trial by jury in an action by the govern-
ment for the recovery of taxes.
into the Union the decisive one.\textsuperscript{24} In addition, statutes in most states provide for a right to jury trial. One type of statute merely restates the historical test; the other type, prevalent in most code states, enumerates the actions in which a jury trial may be claimed.\textsuperscript{25} Finally, although the seventh amendment does not apply to the states,\textsuperscript{26} state courts may have to recognize a right to trial by jury granted by federal law when these courts are hearing a federal cause of action.\textsuperscript{27}

C. The Reach of the Right to Trial by Jury

The right to trial by jury recognized by federal or state law may extend to the whole action or only to particular issues. An example of the latter situation is an action in which, as the result of the merger of law and equity, both legal and equitable issues are raised.\textsuperscript{28}

When a right to trial by jury exists, whether in regard to the whole action or to particular issues, it is generally said that it covers only issues of fact and that issues of law are preserved for decision by the judge. This general rule is, however, subject to substantial qualifications. In the first place, whenever, as is generally the case, the judge allows the return of a general verdict, there can be no effective way of knowing whether the jury has properly understood the judge's charge on the law and has correctly applied the law to the facts.\textsuperscript{29} This circumstance warrants caution in extending the

\textsuperscript{24} F. JAMES, CIVIL PROCEDURE 337 (1965). \textit{But see} N.Y. CONST. art. I, § 2, which freezes the right to trial by jury as of 1894; N.Y. ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, SECOND PRELIMINARY REPORT 565 (1958).

\textsuperscript{25} \textit{See} N.Y. ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, SECOND PRELIMINARY REPORT 564-69 (1958).


\textsuperscript{28} \textit{See}, e.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). On these decisions and on their incompatibility with the historical test, see F. JAMES, CIVIL PROCEDURE 372-77 (1965). The Supreme Court has in the past been inclined to disregard the historical test in order to recognize a right to trial by jury in cases in which it could not have existed at the historically critical time. \textit{See} Ross v. Bernhard, 396 U.S. 531, 536-40 (1970) (derivative stockholders' action); Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) (claims for damages under Jones Act and for maintenance and cure under admiralty principles should both be tried by jury).

\textsuperscript{29} \textit{See} Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 57 (2d Cir. 1948), in which Judge Frank said: "Yet no amount of brave talk can do away with the fact that, when a jury returns an ordinary general verdict, it usually has
right to jury trial to situations in which instructions to the jury are likely to become complicated and opportunities for unchecked error correspondingly greater. Secondly, not all questions of fact arising in an action in which there is a right to trial by jury are submitted to the jury. Not only may the judge direct a verdict as to issues whose resolution is not subject to reasonable doubt, but, as a general rule, he will also decide all issues of fact that must be resolved in order for him to be in a position to charge the jury on the merits. In addition, some preliminary issues of fact will arise prior to the selection of a jury, and as will be discussed at greater length hereafter, the judge will usually decide issues of fact that bear upon the court's jurisdiction over the parties or the subject matter, upon venue, and upon the issue of forum non conveniens.30 Other issues of this sort will arise during the course of the trial. The judge will customarily determine issues of fact for the purpose of ruling on the competency of the witnesses or of the evidence.31 For example, he will decide whether a privileged relationship exists, such as that of doctor-patient, priest-penitent, and husband-wife, or whether an original document has been lost or destroyed with the result that a copy thereof is admissible into evidence.32 For the judge to do otherwise would seriously detract from the efficiency of trial administration. Clearly, it would be impractical to interrupt the course of the trial and have the jury decide the disputed questions of fact at the time when the admissibility of the evidence first comes into question. And it would be equally impractical to admit the evidence on a provisional basis and have the jury decide the issue of competency at the conclusion of the trial. In the first place, it may be unrealistic to expect the jury to ignore the evidence in the event that it decided the issue of fact in a way that would make the evidence incompetent. Second, for the judge to charge the jury on the

the power utterly to ignore what the judge instructs it concerning the substantive legal rules . . . .”


31. As used in this article, the phrase “competent evidence” designates evidence that does not violate one of the technical exclusionary rules and, if found to be relevant, will be admissible. See C. McCormick, Handbook of the Law of Evidence § 53, at 121 (2d ed. 1972) [hereinafter cited as McCormick].

32. See generally McCormick § 53; Maguire & Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv. L. Rev. 165 (1929); Proposed R. Evid. for U.S. Cts. & Magis. 104, 56 F.R.D. 196 (1972).
question of competency would make the charge more complicated and ordinarily less intelligible.

The problem becomes more complicated when the preliminary issue of fact on which the competency of the evidence depends also involves the merits of the case. An example used by Professor McCormick is a prosecution for bigamy, where the validity of the first marriage and accordingly the question whether the wife of the second marriage is competent to testify as a prosecuting witness against the husband depends upon the resolution of an issue of fact. A second example is where, in a suit on what is claimed to be a lost promissory note, the plaintiff offers an alleged copy in evidence and the defendant objects on the ground that no such note has ever existed. Authority is divided in such instances. The basic consideration, it is thought, should be whether charging the jury on the preliminary issue of fact would unduly complicate the judge's charge. If it would, as presumably would be true in the usual case, the judge should decide the issue himself. If it would not, the problem becomes more difficult. The obvious advantage of always having issues of competence handled in the same way would suggest that even in this situation the judge should decide the issue. On the other hand, in situations where the matter is simple enough to be dealt with in the judge's charge, there may be merit in having the jury pass upon an issue of competence when it will be required to pass upon the same issue in connection with the merits. A given person's response to this problem would, of course, be colored to some extent by his attitude toward the civil jury in general. One thing, in any event, is clear. The trial judge is in the best position to decide whether submitting a preliminary issue of competence to the jury would lead to undue complications in his charge. Hence, his actions in deciding the issue himself or in submitting it to the jury should rarely, if ever, be reversed on appeal.

The problem is different when the question involves the rele-

34. See, e.g., Matz v. United States, 158 F.2d 190 (D.C. Cir. 1946); Coleman v. McIntosh, 184 Ky. 370, 211 S.W. 872 (1919); authorities cited note supra.
35. It is unnecessary to take a position in this article on the question whether a trial judge necessarily commits reversible error whenever he submits to the jury an issue that is not triable by the jury as of right. See Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176, 1184-86 (1961); cf. United Press Ass'n v. Charles, 245 F.2d 21 (9th Cir. 1957); Annot., 64 A.L.R.2d 506, 582-84 (1959).
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vancy, as distinguished from the competency, of evidence. For example, the relevancy of evidence may depend upon the determination of a preliminary issue of fact in situations of "conditional relevancy," namely when the proposition for which the evidence is asserted is not relevant unless some other factual issue is also proven. As illustrations of conditional relevancy, Professor McCormick cites the relevancy of a writing which may depend upon proof of its authenticity, and the relevancy of evidence of an agent's acts which may depend upon proof of his authority. Taking these factual issues in the case away from the jury merely because the relevancy of other evidence is conditioned upon them would significantly restrict the function of the jury. Accordingly, the determination of such issues is almost invariably left to the jury once the judge has decided that more than one solution is reasonably possible. There can be no objection, similar to that which exists when the problem is competency, to having the questioned evidence come to the jury's attention. Also, the jury is presumably at least as well-equipped as the judge to decide such issues of fact relating to relevancy.

The general rule that the judge decides all questions of law is also subject to exceptions. In a criminal case, the question of innocence or guilt must be left to the jury even when there is no conflict in the evidence. Often, the jury plays a similar role in civil actions. Provided that reasonable men could differ on the issue, it is for the jury in a negligence action, even though the facts are undisputed, to determine whether the defendant's conduct measured up to that of the ordinary reasonable man. Likewise, al-

36. As used in this article, the term "relevancy" includes two considerations: (1) whether the evidence is offered to prove a proposition that is not a matter in issue; and (2) whether the evidence tends to establish the proposition for which it is offered. See McCormick § 185, at 434-35.


38. McCormick § 53, at 125.

39. Proposed R. Evid. for U.S. Cts. & Magis. 104, Advisory Committee's Note (b), 56 F.R.D. 198 (1972). Professor Morgan has pointed out that if the judge were to decide all factual issues of conditional relevancy, then a party, by selecting which of two conditionally relevant issues he would first introduce evidence on, could dictate which issues of fact would be tried by the judge. Morgan, supra note 32, at 167.

40. See authorities cited note 32 supra.


though authority is divided, the jury is usually called upon to determine in commercial law cases whether a party acted within the "reasonable time" required by a statute or common law rule.\textsuperscript{43} Further, by way of example, some courts leave to the jury the question whether a private person had probable cause for arresting or detaining another.\textsuperscript{44} On the other hand, and perhaps because of a dislike of the action and a fear of untoward liberality on the part of the jury, the great majority of cases hold that in an action for malicious prosecution it is for the judge, and not the jury, to determine whether the defendant lacked reasonable or probable cause to initiate criminal proceedings against the plaintiff.\textsuperscript{45}

By way of summary, it can be said that the generalization that in jury actions the judge decides the law and the jury the facts is subject to significant qualifications and exceptions.

The important points to note for purposes of this discussion are that even in jury-tried cases, many kinds of issues of fact are decided by the judge and that a principal consideration in favor of having the judge decide to do so is that undue complications would result from a different course of action.

IV. THE CHOICE-OF-LAW AREA

A. Introduction

As has already been stated, no authoritative answer has yet been given to the question whether the jury should decide issues of fact that are involved in the application of choice-of-law rules. An affirmative response to this question does not automatically follow from the fact that it is the jury which must usually decide issues of fact that arise in legal actions or as part of legal issues. Rather, issues of fact involved with choice of law might be considered as falling within the category of preliminary questions that are determined by the judge.\textsuperscript{46}

Unfortunately, no guidance can be drawn from application of a strictly historical test. By 1791, the English and colonial courts had barely begun to consider the possibility of applying the law of another country to determine the rights of the parties in civil litigation.\textsuperscript{47} Clearly, there was no precedent at that time for having the

\textsuperscript{43} Weiner, supra note 42, at 1895-910.
\textsuperscript{44} Id. at 1917-18.
\textsuperscript{45} Id. at 1910-16.
\textsuperscript{46} See text accompanying notes 30-40 supra.
jury determine issues of fact on which decision of a choice-of-law question would depend. Further, as far as is known, the question has never been raised in English law. Certainly, there appears to be no case in which an English court has held that a jury must pass on such issues of fact. The absence of historical precedent, of course, is not necessarily decisive, for in other cases in which such precedent was lacking, the courts have made the right to trial by jury depend upon whether such a right was recognized in analogous situations at the historically decisive time.  

Furthermore, in such cases the needs of modern and efficient procedure have also been stressed. We must therefore consider whether either of these approaches would require trial by jury of issues of fact involved in the application of choice-of-law rules.

As in the case of other issues of fact, issues on which decision of a choice-of-law question depends may arise at various stages of a lawsuit. They may require determination before the jury has been impanelled, during the taking of evidence, or after the close of the evidence.

B. Before the Jury Has Been Impanelled

Issues of fact that arise before a jury has been impanelled will usually relate either to: (1) questions concerned with the authority of the court to proceed with the action, such as jurisdiction, competence, service of process, venue, forum non conveniens, and indispensable parties, or (2) questions concerned solely with judicial administration, such as motions to sever or to consolidate, pre-trial discovery motions, and the like. Except in the rarest of circumstances, the judge should decide such issues of fact. This follows, almost of necessity, for lack of a reasonable alternative. It would put a great strain on the jury system and would be time-consuming as well if one or more juries had to be impanelled to decide these preliminary issues of fact and then another jury impanelled later to pass on the merits of the case. It would be almost equally impractical to require a single jury to decide these issues of fact and then to remain available, while awaiting the trial, during the time that motions and other preliminary matters are disposed of. It would usually, at least, also be impractical to defer determination of some of these issues until the close of the trial. First, it

48. Text accompanying note 22 supra.
49. Text accompanying note 23 supra.
50. See generally 5 J. Moore, Federal Practice ¶ 38.36 (2d ed. 1971).
would ordinarily make little sense to go through the entire process of trying the case on the merits only to decide at a later point that there should be a dismissal on some collateral ground, such as lack of jurisdiction. In addition, the need to instruct the jury both on the merits and on any preliminary issues of fact might serve to complicate vastly the judge’s charge and to make it more difficult for the jury to comprehend. Likewise, there would be the danger that the jury, having heard all of the evidence, would be tempted to disregard the preliminary issues in order to be able to render judgment on the merits in favor of one party or the other.

The judge, for the reasons stated above, will usually decide issues of fact that bear upon the court’s authority to proceed with the case. So, for example, the judge will usually determine whether a party is domiciled, or is doing business, in the state as a preliminary to deciding whether the party is subject to the court’s jurisdiction, whether the venue is proper, whether, if a federal court, the requisite diversity of citizenship exists, or whether there are enough contacts in the state to make it an adequately convenient forum. However, considerable authority suggests that the jury should decide such issues of fact in those relatively rare instances in which decision of essentially the same issue will be determinative both of the preliminary question, such as jurisdiction or venue, and of the merits of the case. So, if a long-arm statute were to require as a basis of jurisdiction that the defendant have actually committed a tort in the state rather than, as most of the statutes have been interpreted to require, that he merely have done in the state an act that is claimed to be a tort, the question whether the defendant’s act was tortious would go both to the jurisdiction and the merits.

51. Lehigh Valley Coal Co. v. Washko, 231 F. 42, 46 (2d Cir. 1916); Fleck v. Fleck, 47 Misc. 2d 454, 262 N.Y.S.2d 789 (Sup. Ct. 1965); see Canadian Pac. Ry. v. Wenham, 146 F. 206 (S.D.N.Y. 1906).
57. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 36 (1971).
In such a case, unless the evidence in point was so clear that reasonable men could not differ, the judge might well keep the jurisdictional issue in abeyance during the trial and have the jury determine it along with the merits. 58

For the same reasons it is the judge who should decide issues of fact that arise in connection with preliminary questions of judicial administration, such as motions to sever or to transfer. Judge Weinstein faced an issue of this sort in Chance v. E.I. duPont de Nemours & Co.; 59 namely, whether the “joint activities” of the defendants in New York were so “substantial” as to justify determining their liability under New York law. If not, the law of other states would be applicable and there would be no “common question of law” that would warrant joining the defendants in a single lawsuit. Clearly, Judge Weinstein was correct in holding that it was for him, rather than the jury, to decide whether the joint activities of the defendants in New York were sufficiently substantial. It would have been impractical to have the jury pass upon this issue before hearing the other evidence. And it would have made no sense to defer jury determination until after the close of the testimony. This would have required choice between unpalatable alternatives. The judge could have granted the motion to sever after trial in the event that the jury found that the defendants' joint activities in New York were not sufficiently substantial. To follow this course would in effect require the plaintiffs to start all over again by bringing separate actions against the defendants. The alternative would have been to seek a judgment on the merits by charging the jury on the various laws that would be applicable depending upon its finding with respect to the extent and the character of the defendants' New York activities. To do so not only would vastly complicate the charge but also would violate the rule that defendants should not be tried jointly in the absence of a common question of law or fact. 60

Another example of such a preliminary issue of fact is one that may be involved in a motion before a federal district court to have the case transferred to another district in the interest of justice and convenience. 61 Here again, it would be impractical to have the jury determine, before hearing evidence on the merits, any is-

61. 28 U.S.C. § 1404(a). So far as is known, no federal court has ever submitted to a jury an issue of fact relating to such a transfer.
sues of fact upon which the granting or denial of the motion might depend. And to have the jury determine such issues after all the evidence had been heard would force the judge to charge on matters not related to the merits and in effect would require the defendant to present his entire case in a forum that might be ultimately resolved to be inconvenient.

It seems extremely unlikely that issues of fact related to questions of judicial administration would ever involve the merits, as is true on rare occasions of issues of fact that bear upon jurisdiction and venue. Hence, it would seem that the judge, and not the jury, should always decide these issues.

C. During the Talking of Evidence

The judge's role at the trial is greatly facilitated by the fact that the law of the forum will be applied to determine most matters relating to the pleadings and conduct of the proceedings. Nevertheless, choice-of-law questions can occasionally arise with respect to the admissibility of evidence. Determination of such choice-of-law questions will sometimes depend upon the decision of an issue of fact, which, except perhaps in rare instances, should be made by the judge.

Privileges constitute probably the most significant exception to the general rule that the admissibility of evidence is governed by the law of the forum. The choice-of-law rules relating to privileges are complicated and will not be discussed at length. Suffice it to say that the applicable law is that of the state which has the most significant relationship with the communication claimed to be privileged. Hence, there will be occasions when a court will be required by its choice-of-law rules to apply the law of another state in determining whether a privilege exists. Sometimes, as has already been pointed out, the existence of a privilege will depend upon the determination of an issue of fact, as, for example, whether a privileged relationship, such as that between husband and wife or doctor and patient, exists. It has been stated above in the general discussion of the respective roles of judge and jury that the judge should decide these issues of fact except perhaps in those rare situations where the issue on which the competency of the evidence depends also in-

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63. Id. § 139.
volves the merits of the case. The question is whether the considerations are the same when a choice-of-law problem is involved.

One of the hypotheticals mentioned in the general discussion was a bigamy prosecution in which the validity of the first marriage as well as the competency of the second wife to testify as a prosecuting witness depended upon the resolution of the same issue of fact. It was there said that, in a situation where submission of the issue of competency to the jury would not unduly complicate the judge's charge, the argument can be made that the judge should permit the second wife to testify and then instruct the jury to disregard her testimony if it should resolve the issue of fact in a way that would make the first marriage invalid. To do otherwise might prevent the jury from passing on the merits of the case.

Is the case different when a choice-of-law problem is involved, the determination of which will depend upon the resolution of fact? Suppose, for example, that in the hypothetical stated above the issue was whether the husband and the first wife had entered into a common law marriage relationship in state $X$ or state $Y$; if in $X$ the marriage would be valid, but not if the relationship had been entered into in $Y$. Should the judge submit this issue to the jury if it could reasonably be resolved in more than one way? If he did not, he would in fact be passing upon the merits of the case. On the other hand, such submission would have distinct disadvantages. It would, first of all, add a complicating factor to the judge's charge. For he would not only have to instruct the jury on the meaning of a common law relationship, he would also have to make as clear as possible that the testimony of the second wife could be considered only if it were found that the relationship had been entered into in state $X$. There is also the question whether one could realistically expect the jury to disregard the second wife's testimony in the event that it were to determine that, although the husband and his first wife had entered into the requisite sort of relationship, they had done so in state $Y$ rather than in state $X$. To be sure, these difficulties might not be thought conclusive, and it must also be recalled that the hypothetical involves a criminal prosecution where it is of particular importance that the role of the jury should not be curtailed. Nevertheless, the hypothetical does illustrate that the existence of a choice-of-law problem presents a complicating factor which may become so intense that the judge should decide the

64. Text accompanying notes 33-35 supra.
65. See id.
issue of fact himself. In essence, the problem is one of balancing values. On one side of the equation is the notion that the jury should decide issues of fact that involve the merits. On the other side is the disadvantage of admitting, even on a tentative basis, evidence that may prove to be incompetent and the danger that the charge will become so complicated as to verge on the incomprehensible.

Issues of fact upon which the relevancy of evidence is conditioned present similar considerations. Such issues, as stated in the general discussion of the role of judge and jury, are usually determined by the jury. It seems preferable, however, that the judge should decide such issues himself when a choice-of-law problem is involved. Suppose, for example, that evidence of oral negotiations is offered in a suit on a written contract with contacts in states \( X \) and \( Y \). This evidence would be irrelevant and inadmissible if the law of \( X \) were applicable, since under this law the contract was fully integrated. The contrary would be true, however, under \( Y \) law. Suppose further that under the choice-of-law rule of the forum the question whether \( X \) or \( Y \) is the state of the applicable law would depend upon whether the parties had lived and negotiated their agreement in one or the other of these states. It seems probable that the judge should decide these issues himself as a preliminary to ruling on the admissibility of the offered evidence. To do otherwise would require him to admit the evidence on a tentative basis and then to instruct the jury to disregard it if it were to find that the parties had lived and negotiated in the state whose law would make the evidence irrelevant. In such a situation, the possible advantage of having the jury resolve issues of fact would seem outweighed by the danger of unduly complicating the charge and of making the jury aware of evidence that might prove to be irrelevant.

D. After the Close of the Evidence

Motions are often addressed to the judge after the close of the plaintiff's evidence or after both sides have rested. Sometimes a choice-of-law problem will be involved which will prevent the judge from passing on the merits of a motion, such as one for a directed verdict, without his first having determined which is the state of applicable law. There will be occasions when decision as to the identity of this state will depend upon the resolution of an issue of fact.

66. Text accompanying notes 36-40 supra.
The problem is whether the judge should resolve this issue of fact or whether he should deny the motion and leave the issue for resolution by the jury. The time that would be saved if the motion were granted is hardly an important factor. Also, by and large, the appellate courts have discouraged trial judges from granting motions for a directed verdict. Submission of the issue to the jury would, however, have the important disadvantage of requiring the judge to instruct the jury in his charge on the significance of the issue of fact and of thus making the charge more complicated. To a large extent, this question is part of the broader problem of whether, ideally, the judge should decide all choice-of-law questions himself before charging the jury. The remainder of this paper will therefore be devoted to a discussion of the problems that may occur in connection with the judge's charge.

One point should be made clear at the outset. This is that the great majority of choice-of-law problems present what are essentially questions of law which should be decided by the judge. This may not always have been so. At least there was a time when the presence of a single territorial contact was often determinative of a choice-of-law question. So, for example, it was said that rights and liabilities in tort depend upon the law of the place of injury, that the validity of a contract is governed by the law of the place of contracting, and that the transfer of interests in land is governed by the law that would be applied by the courts of the situs. Where an injury occurred, where a contract was made, and where land is situated are issues of fact that can readily be determined by a jury. They are, however, issues which in practice will rarely be in dispute, and undoubtedly it is for this reason that the question whether they should be resolved by judge or jury has arisen on so few occasions.

The situation today is quite different. A prevalent theory is that the law which should be applied in every case is that of the state which has the greatest interest in the determination of the particular issue. Whether a state is in fact interested must depend upon whether a policy underlying its potentially applicable rule would be served by the rule's application. Hence, ascertainment of the state of greatest interest requires isolation of the particular issue,

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68. Id. § 332.
69. Id. §§ 8, 215-24.
location of the significant contacts, identification of the policies underlying the potentially applicable rules of the states involved, disregard of those rules whose application would not further their underlying policies, and, if two or more rules survive this winnowing process, determination of which of these rules embodies the stronger policy and the policy most directly involved. Clearly, these steps, although they may occasionally involve an issue of fact, such as the location of a particular contact, raise what are primarily questions of law rather than of fact. Accordingly, they would seem to fall within the exclusive domain of the judge. Certainly, in this context, the location of a contact is a preliminary issue of fact of the sort that should be decided by the judge.

Likewise, there can be no role for the jury in the choice-of-law process in states, if any such there be, which follow the teaching of Professor Brainerd Currie. He believed, subject to minor exceptions, that a court should always apply its own rule, without regard for the interests of other states, if a policy underlying that rule would be furthered by the rule's application. As stated previously, ascertainment of what policy, or policies, underlie a rule involves primarily a question of law which should be decided by the judge and not by the jury.

Another modern theory, which is embodied in the Restatement (Second), is that the applicable law should be that of the state which, with respect to the particular issue, has the most significant relationship to the parties and the occurrence. The location of certain contacts, as will be discussed hereafter, may play a part in the identification of this state. Also involved in the task of identification, however, is a balancing of the following basic factors:

(a) the needs of the interstate and international systems;
(b) the relevant policies of the forum;
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
(d) the protection of justified expectations;

73. See text accompanying note 71 supra.
(e) the basic policies underlying the particular field of law;
(f) certainty, predictability and uniformity of result; and
(g) ease in the determination and application of the law to be applied.74

Although the ascertainment of the existence of these factors may involve inquiries of a factual nature, the problem of balancing these factors in an individual case is clearly one of law rather than of fact. Hence, this would again seem an area in which the judge should have the exclusive role.

As stated above, the location of certain contacts may play a part in the identification of the state of most significant relationship. A number of examples are found in the Restatement (Second). At one extreme are the initial sections in the chapters on torts75 and contracts76 which state that in its search for the state of most significant relationship the court should take several designated contacts into account and should evaluate these contacts "according to their relative importance with respect to the particular issue."77 Among the contacts to be considered in the case of torts are the place of injury, the place of the defendant's conduct, the place of incorporation, and the place of business of the parties. Contacts to be considered in the case of contracts include the place of contracting, the place of negotiation, the place of performance, and the location of the subject matter of the contract.

The location of these contacts raises almost surely an issue of fact, and it is to be expected that there will be occasions when reasonable men could draw different conclusions with respect to the place where a given contact is situated. Yet, it seems clear on grounds of practicality and necessity that the judge, and not the jury, should decide such questions. Rarely, if ever, will decision as to the location of a particular contact be more than a preliminary step in the choice-of-law process. Other contacts will also have to be located and their "relative importance" evaluated "with respect to the particular issue," and finally there will have to be a balancing of the basic choice-of-law factors mentioned in the next preceding paragraph.78 As a consequence, it is almost impossible to im-

74. Restatement (Second) of Conflict of Laws § 6 (1971).
75. Id. § 145.
76. Id. §§ 186, 188.
77. Id. §§ 145(2), 188(2).
78. See text accompanying note 74 supra.
agine a situation in which the judge could simply charge that judgment should be rendered for one party or the other if the jury were to find that a particular contact was situated in a particular state. Instead, he would have to resort to impractical alternatives. Either he would first have to ask the jury to determine the location of the contact and then, after having decided the choice-of-law question on the basis of their decision and of the evaluating and balancing process described above, he would deliver a second and final charge to the jury on the merits. Or he could deliver a single charge to the jury in which he would have to spell out the alternative judgments they should render depending upon their decision with respect to the location of the contact. The potential complexities of such a charge make clear the inadvisability of attempting it.

The Restatement (Second) also contains rules which provide that in certain instances a single contact should be given decisive weight in the choice of the applicable law unless it is determined, as a result of a balancing of the choice-of-law factors described above, that some other state is the one of most significant relationship with respect to the particular issue. Such contacts can be placed within one of two categories: those that may be briefly and easily defined, and those that require more extended and more complicated definition. An example of a contact of the first sort is the place of injury, which is of particular significance in the area of personal injuries and of damage to tangible things. A contact belonging to the latter category is the place "where the conduct complained of principally occurred" which may play a decisive role in the choice of law governing interference with a marriage relationship. This contact would require considerable definition in a charge to make clear the distinction between conduct that is potentially actionable and that which is not, as, for example, the distinction between conduct that is actively alluring and that which is essentially passive. It would also require definition of what is meant by "principally." The complexity of submitting such an issue to the jury would, as a general rule, seem to outweigh any virtue of doing so.

Nonetheless, there is authority to support the opposite conclusion. It will be recalled that judgment was reversed in *Marra v. Bushee* because of the trial judge's failure in an action for alienation of affections and criminal conversation to submit to the jury.

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80. *Id.* § 154.
81. 447 F.2d 1282 (2d Cir. 1971).
the question whether the defendant's conduct had "principally occurred" in New York or Vermont. This action of the court of appeals is thought to have been erroneous on two counts. First, it was based on a misunderstanding of the rule of section 154 of the Restatement (Second) which the court purported to follow. This section in essence provides that liability for interference with a marriage relationship shall be determined by the law of the state where "the conduct complained of principally occurred," unless some other state is found to have a more significant relationship to the occurrence and the parties with respect to the particular issue. The rule is based upon the notion that "the basic purpose of tort rules imposing liability for interference with a marriage relationship is not so much to compensate the plaintiff for his loss as to punish the defendant and thus to deter others from following his example . . . ."82 Accordingly, the state in which the defendant's conduct principally occurred will be the state of dominant interest and, for this reason, its law should usually be applied. The situation is different when the defendant's conduct was divided more or less equally between two states, and when accordingly there might arguably be a jury question as to which was the state of principal activity. In this situation, it would seem that no state could be the state of dominant interest on the basis of the defendant's conduct alone. The consequence is that, as is made clear by the Restatement (Second), the state of the applicable law should be determined without particular reference to this contact.83 Hence, in Marra v. Bushee, if in fact there was reasonable doubt as to which was the state in which the defendant's principal activity had occurred, the location of the defendant's activity was at best a contact of only marginal significance. Under the circumstances, there would be little purpose in submitting the issue to the jury, since it would already have been clear that from the standpoint only of the defendant's conduct neither New York nor Vermont had the substantially greater interest in the decision of the case. Accordingly, decision of whether New York or Vermont was the state of the applicable law should properly have been made to depend not upon the principal location of the defendant's activities, but rather upon a balancing of the basic factors underlying choice of law listed in section 6 of the Restatement (Second).84

82. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 154, Comment b (1971).
83. Id. Comment c.
84. See text accompanying note 74 supra.
The decision in *Marra v. Bushee* was, it is thought, also wrong on a second count. As has already been explained, submission to the jury of the question of the principal location of the activity of the defendant would have added to the complexity of the judge's charge. Almost surely this factor must have been in the trial judge's mind, although he did not explicitly mention it in his opinion, when he determined that he himself should decide where the defendant's activity had been principally located. And, as has already been said, the trial judge's decision on such an issue should rarely, if ever, be reversed on appeal.  

We now turn to contacts which can be easily and briefly explained in the judge's charge. Of these, the most important, together with their area of significance, are: the place of injury (in relation to personal injuries and damage to tangible property), the situs of land (in relation to transfers of interests in land), the place of celebration (in relation to the validity of a marriage), and the state of incorporation (in relation to internal corporate affairs). The question is whether the jury should be required to determine the location of such contacts whenever reasonable men could draw different conclusions on the subject from the evidence. On this point, it should first be stated that occasions of this sort will be rare in the extreme. It is almost impossible to imagine situations in which there would be any conflict in the evidence with respect to the location of land or the state of incorporation. And only in a most unusual case would there be substantial dispute as to the place of injury or the place where a marriage was contracted. In short, the question whether the location of such contacts should be decided by judge or jury might be thought not to be worth the attention of an appellate court, since it will arise in so small a number of situations.

Another point should be mentioned. With the exception of the situs of land, none of the contacts mentioned above is automatically decisive. More specifically, the state of injury or of celebration or of incorporation will not be the state of the applicable law if the court should determine that some other state is the one of the most significant relationship with respect to the particular issue. In other words, the court must first determine whether some state is

85. Text accompanying note 35 *supra*.
87. *Id.* §§ 223-43.
88. *Id.* § 283.
89. *Id.* §§ 302-10.
that of most significant relationship irrespective of the location of the particular contact. This determination must be made on the basis of a balancing of the basic choice-of-law factors described above and of an assessment of the policies underlying the potentially applicable rules of the state involved. Then, only after it has determined that there is no such state, would the court be in the position to charge the jury that disposition of the case will depend upon the law of the state where the jury finds that the particular contact is located. One cannot help but question the wisdom of requiring the court, after having proceeded so far by itself in the choice-of-law process, to submit the issue of a contact's location to the jury at this relatively late stage.

A requirement that the issue of a contact's location should on occasion be submitted to the jury would have further disadvantages. First of all, it would serve to complicate the judge's charge. At the least, he would be required to make clear that the proper disposition of the case should depend upon the place where the particular contact is found to be located. In addition, the judge would frequently have to do more than simply instruct the jury that their verdict should be for a given party if the contact in question was found to be located in a particular state. Sometimes, he would have to go further and actually inform the jury of the content of the relevant rules of all states in which the contact could reasonably be placed. Imposition of such a requirement would also lead to appeals, as is well illustrated by *Marra v. Bushee*, since it would be difficult, if not impossible, to draw a clear line of distinction between issues that are subject to jury determination and those that are triable by the court. Thus, an additional burden would be imposed upon the judicial system. Lastly, there is virtue in simplicity. Since in any event it would only be the rare case where an issue as to the location of a contact need be submitted to the jury, there would be advantages in imposing no such obligation at all.

91. Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), is an excellent example. In that case, New York was clearly the state of most significant relationship, even though Ontario was the state of injury.

92. An example would be a situation where (a) the place of injury is thought to be of crucial importance in the choice of the applicable law, (b) it is uncertain whether the injury had occurred in state X or in state Y, and (c) both of these states have different rules of comparative negligence. In order to permit the jury to render a general verdict in such a case, the judge would have to set forth the comparative negligence rules of both X and Y in his charge and make clear that the rule to be applied was that of the state where the jury found that the injury had occurred.

93. 447 F.2d 1282 (2d Cir. 1971).
These considerations support the conclusion that the question whether to submit the location of a contact to the jury after the close of the evidence should normally be answered in the negative. There may be occasions, however, when submission of such an issue to the jury would not unduly complicate the charge and when in the judge's opinion, the jury is better qualified than he to decide the issue. An example may be *Orr v. Sasseman*, discussed above, where the trial judge of his own volition charged the jury that the plaintiff could recover only if the jury found that the loss of consortium had occurred in Georgia. It may be argued that in such cases the issue of a contact's location should be submitted to the jury. In any event, the trial judge is clearly in the best position to determine whether submission of such an issue to the jury would be helpful to him and would not unduly complicate his charge. Accordingly, his decision on whether or not to submit the issue should rarely, if ever, be reversed on appeal.

V. Conclusion

It is only in the exceptional choice-of-law case that there will be an issue of fact as to the location of a contact. When there is such an issue, it should, almost invariably at least, be decided by the judge if it arises either before the jury has been impanelled or during the taking of evidence. When the issue need not be decided until after the close of the evidence, it should also usually be decided by the judge for the reason that submitting it to the jury would result in unduly complicating the judge's charge. The answer becomes more doubtful in those rare situations where the issue could be dealt with simply in the charge and where, in the trial judge's opinion, the jury is better qualified than he to decide the issue. The trial judge is in a better position than the appellate court to determine whether or not this is the case. Accordingly, his decision on whether to submit the issue to the jury or to decide it himself should rarely, if ever, be reversed on appeal.

94. 239 F.2d 182 (5th Cir. 1956); see text accompanying notes 1-2 supra.