THE VERY LIVELY DISCUSSION of problems in the field of conflict of laws which has taken place in the United States in recent years has been closely followed by lawyers in other countries. If comparatively few Europeans have participated, it may be that the discussion among American scholars, particularly when it concerns conflict "theories," at first glance seems to relate to phenomena peculiar to the American scene. While this is not altogether true, American "theories" advanced in order to meet American problems do need to be translated into more general juristic language to be understood and tested for applicability to the solution of conflict problems of other countries. Professor Albert A. Ehrenzweig's writing, his many books and articles, have special attraction for the non-American reader because of the writer's profound knowledge of the conflict law in legal systems outside the United States. May I add that his "lex fori approach," recently "restated" in the Oklahoma Law Review, is especially appealing to lawyers in countries where the law is either domestic or foreign, and there is no third category (as in many modern federal states and in Italy of the Middle Ages); namely, rules of law which are at the same time both foreign and domestic (the law of "sister-states").

The following remarks, although not intended as a contribution to the American discussion of conflict law, do concern a problem widely discussed in recent American legal writing with respect to the decision by the Court of Appeals of New York in Babcock v. Jackson. The question

Babcock in Sweden

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2. 212 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Miss Georgia Babcock and her friends, Mr. and Mrs. William Jackson, all residents of Rochester, New York, left that city on September 16, 1960, in Mr. Jackson's automobile (Miss Babcock as a guest) for a weekend trip to Canada. While Mr. Jackson was driving in the Province of Ontario he lost control of the car; it went off the highway into a stone wall and Miss Babcock was seriously injured. Upon her return to New York, she brought an action against Mr. Jackson, alleging negligence on his part in operating his automobile. At the time of the accident, there was in force in Ontario a statute providing that the driver of a private car is not liable for loss or damage resulting from bodily injury to any person being carried in the car. The defendant moved to dismiss Miss Babcock's complaint on the ground that the law of the place where the accident occurred governs, and that Ontario's guest statute bars recovery. The court at Special Term, agreeing with the defendant, granted the allotment and the Appellate Division, over a strong dissent by Justice Halpern, affirmed the judgment of dismissal without opinion. The Court of Appeals of New York reversed the judgment and the matter was remitted to Special Term for further proceedings. In other
of interest can be briefly formulated in the following way: Is the *lex loci delicti* invariably applicable to all types of torts and to all phases of tort case? This question is of equally great importance in countries other than the United States, particularly in relation to traffic accidents where the circumstances are the same or similar to those present in *Babcock Jackson*.

What answer would a Swedish court give if faced with a case of this type? Let us assume that a Swedish married couple and a friend of the couple have decided to take a trip to Italy in a Swedish car belonging to the couple. They will have to secure from their insurance company an international “green card” proving that the car carries Swedish motor vehicle insurance. An additional premium must be calculated and paid if the Swedish policy is more restricted than those required by law in the countries likely to be visited. Beyond this the parties may wish to buy further insurance for risks not covered by the compulsory insurance. In order to make the necessary decisions and calculations, the insurance company and the parties must be able to predict which rules of law would be applied in the case of accidents in various countries and, in our case, particularly which law a Swedish court would apply to a claim directed towards the owner or the driver of the car. In the *Babcock* situation the question relates to the liability for injuries suffered by the passenger. If the passenger has been injured in Italy and wants to sue the driver, the owner or the insurer in Sweden, would the Swedish court apply the *lex loci delicti*, that is, Italian law, to this type of tort and to all its phases?

If the interested parties put this question to a Swedish lawyer before the tour to Italy, the lawyer (not too familiar, we assume, with problems of private international tort law or with insurance practices) will look first for an answer in a statute, as Sweden is a country where most law is statutory law. He will find that there is no statute dealing with the question. His next step would be to consult legal writing. He will find that the textbooks, generally without any qualification, state that the *lex loci delicti* applies to all types and phases of torts. He might, however, doubt the wisdom of the learned writers whom he has consulted and try to find cases involving the same facts—a Swedish driver and his guest who had an accident while traveling abroad in a Swedish-owned car. He might also look for cases where foreign groups of people in foreign-owned cars had accidents in Sweden, and where claims for damages have been disposed of by Swedish courts (in the case of the Court of Appeals repudiated the traditional rule that the law of the place of injury governs all substantive issues in tort cases. Commentaries on the case by Cave Cheatham, Currie, Ehrenzweig, Leflar and Reese are found in 63 Colum. L. Rev. 12 (1963).

3 In Sweden and most European countries, insurance is compulsory, but the scope of the insurance varies in different countries.

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with by Swedish courts. Our lawyer will, however, be disappointed by the meagre results of his search. He will find only three relevant cases, decided by the Swedish Supreme Court in 1932, 1933, and 1935. The lex loci delicti was applied.

In the case from 1935 a Swede, H, driving a Swedish-owned car, collided with another Swede, C, riding a motorcycle. The accident happened in Norway and H admitted that he had caused the accident by negligence but claimed that his negligence was not "grave." His insurance company had paid C for the monetary damages suffered but had refused to pay him damages for pain and suffering. Under Swedish law, C would have been entitled to the latter but not under Norwegian law unless H's negligence could be characterized as "grave." The court of first instance, consisting of a single judge, applied Norwegian law "as the collision had happened on Norwegian territory" and gave judgment against the claimant, as it had not been proven that H's negligence had been "grave." In the decision of the court of appeals, four judges participating, it was said that H's behavior constituted a misdemeanor under the Swedish Criminal Code and that questions concerning damages therefore must be decided under Swedish law. C was to receive 1,200 Swedish crowns from H as damages for pain and suffering. In the Supreme Court a minority consisting of two judges arrived at the same conclusion on similar grounds. The majority, consisting of three judges, stated flatly that Norwegian law should apply "as the collision had occurred on Norwegian territory." However, the majority was of the opinion that H was guilty of "grave" negligence (presumably according to Norwegian law) and that, therefore, he would have to pay to C 1,200 crowns as damages for pain and suffering.

There is no case from the Supreme Court after 1935 which has a bearing on the problem discussed. A study of decisions by the city court of Stockholm in cases concerning damages related to car accidents in the years 1959-1961 has shown that there was no case where both parties were foreigners, or where both parties were Swedes and the accident had

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4 1932 Nytt juridiskt arkiv 267. "Nytt juridiskt arkiv" contains abstracted reports of the most important decisions by the Swedish Supreme Court. Cases are not cited by reference to the names of the party or parties, but to the publication where a case is reported and the year of publication. Citations to reports in "Nytt juridiskt arkiv" indicate the page where the report begins.

5 1933 Nytt juridiskt arkiv 364.

6 1935 Nytt juridiskt arkiv 31.

7 The decision in the case of 1935 simply reaffirmed the earlier decisions. None of the cases can be described as a leading authority. It must be remembered that Swedish case law cannot be understood in the same way as the case law of common law countries. The doctrine of stare decisis is not a part of Swedish law. See Eex, THE SWEDISH CONFLICT OF LAWS 40 (1965). Cf. Lando, Scandinavian Conflict of Law Rules Respecting Contracts, 6 AM. J. COMP. L. 1, 7 (1957).
happened abroad. In fifteen to twenty cases where one party was of foreign nationality and the accident had happened in Sweden, the court had applied Swedish law.\(^8\)

The lawyer who was asked by the three Swedes traveling to Italy whether Swedish courts would apply Swedish law or foreign law when deciding a case concerning damages resulting from a car accident abroad, would have to reply that it is possible that a Swedish court might, under certain circumstances, apply Swedish law. At the same time, he would have to point out to the three persons who were planning to travel together in a Swedish car to Italy—and to their insurers—that they must base their actions on the presumption that Swedish courts would apply the *lex loci delicti*, for example, German law if an accident occurred while the car was passing through Germany, and Italian law if the accident occurred in Italy. Presumably, the *lex loci delicti* would be applied to all phases of the case, such as conduct and negligence, adequacy, exculpatory circumstances, limitation of liability and the assessment of damages. Thus, if the passenger were injured in Germany and German law contained rules similar to those of Ontario's guest statute, relevant in the *Babcock* case, she would not be able to recover in Sweden. Similarly, the driver or owner of the car might, if an accident caused by him occurred in Italy, find himself obliged by a Swedish court to pay damages assessed under more severe rules than those of the Swedish law of torts.\(^9\)

The foregoing would be the answer of a cautious lawyer. It is the only safe answer to give but there is not much authority for it and it is not, therefore, a satisfactory answer. The question must be put why the legal material is so scanty. First of all, we cannot assume that the number of car accidents has diminished since 1935. It is well known that in recent years more and more Swedes go abroad in their cars, and they may meet with accidents outside Sweden. As to the situation in Sweden the number of road traffic accidents reported to the police was 63,761 in 1964, of which 1,087 were fatal, against only 46,754 in 1955, of which 871 were fatal. The number of automobiles in Sweden was about 750,000 in 1955 and 1,809,536 at the end of 1964. The number of automobiles per 1,000 inhabitants was 235 at the end of 1964 against 104 at the end of 1955; the figure is higher only in the United States and Canada. We must assume that some of the accidents reported in Sweden involve foreign cars and foreigners, as the influx of tourists has rapidly increased through the

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9 The examples are hypothetical, just as when conflict writers refer to "Ruritania." I have been told, however, that Italian law, as it is applied, is more hospitable to recovery than Swedish law.
years. The number of non-Scandinavian persons entering the unified Scandinavian passport control area comprising Denmark, Finland, Norway and Sweden was around five million in 1960 and nearly ten million in 1964.

If accidents occur, property is likely to be damaged and persons injured. In many cases criminal proceedings have been directed against the responsible person or persons, and in others disputes have occurred with respect to liability and the amount of damages. Still, we find few court cases involving foreigners in Sweden or concerning “Swedish” accidents abroad, and no cases where the circumstances are similar to those present in *Babcock v. Jackson* even though group travel in various forms is very common. There seem to be two possible explanations. The first explanation is that the insurance companies settle the matters between themselves even in cases where the public prosecutor has initiated criminal proceedings. This is a possible solution when both parties are insured, the normal situation in the case of collisions. The second explanation is that when a settlement cannot be reached by agreement between insurance companies, practicing lawyers dissuade their clients from going to court because they regard the outcome as unpredictable.

Unpublished investigations carried out by law students at Stockholm University have shown that when insurance companies settle matters concerning accidents which have happened abroad, they apply—or seem to apply—the *lex loci* rule. When, for instance, an accident has occurred in Norway, Swedish companies often seek information from Norway concerning the amount of damages which would be paid according to Norwegian law. It has happened, however, that when measuring damages for accidents which have happened in Norway, Swedish companies have paid damages for pain and suffering even though they were not obliged to do so under the law they had themselves chosen in accordance with what they believed to be the Swedish choice of law rule.

The outcome of a recent dispute gives support to the contention that in *Babcock*-type cases practicing lawyers prefer a friendly settlement to a law suit in which the outcome is difficult to predict. Two Swedes, *W* and *R*, some years ago took part in the so-called Tulip Rally passing through Holland and France. *W* was the owner and driver of the car and *R* was responsible for map-reading. The car collided with a tractor in France and *R* was killed. *W* was, after his return to Sweden, summoned to a French court. He was given a suspended sentence for negligent driving and also ordered to pay a sum of 50,000 new francs to *R*'s father and sister. They were not dependent upon *R* but could, according to French law, be granted damages for their mental suffering caused by *R*'s death. Such damages cannot be granted under Swedish law. The French decision
became final, but $W$ did not pay. $R$'s father and sister sued him in a Swedish court, demanding the 50,000 francs.

Since the French decision was not directly enforceable in Sweden, a new action in Sweden was necessary. Many questions arose in the case. Should the French decision be recognized in Sweden, that is, should it be held by the Swedish court to be presumptively correct unless the defendant could produce facts to rebut the presumption? The court would have had to decide whether the *lex loci* rule should apply, even in a case where a Swede had caused injury to another Swede abroad and where the two persons had traveled together as a “closed group.” (The latter circumstance might also suggest the possible characterization of the case as contractual.) Moreover, if French law was applicable, would it be reasonable to set it aside as contrary to Swedish public policy (*ordre public*)?

In the beginning both parties seemed to have decided to carry the case to its end, but having exchanged views during a few preliminary meetings of the court, they decided to settle the case and the claim was withdrawn. It may be concluded that the lawyers on both sides felt that they could not predict the outcome in court with any kind of certainty and that a settlement was the best way out, as both parties were running a risk of having to pay very heavy costs in the end.

Another case, in which the defendant seems eager to obtain a court decision, should be decided by the city court of Stockholm at the end of 1966. A Swedish married couple were traveling through Holland in a Swedish car belonging to the husband. He was driving when the car collided with a Dutch truck. His wife was very badly hurt. The husband had, before starting the trip, bought special third-party liability insurance from a company in Sweden. The company thereby had accepted liability for “damages which the insured can be made to pay according to the law of the countries concerned.” The truckowner’s insurance company declared itself willing to pay one-third of the damages. The husband then claimed that his company should pay two-thirds of the damages suffered by his wife, corresponding to his share in the responsibility for the accident in Holland.

The wife could probably have sued the husband in Holland. There is

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10 The “closed group” situation can be exemplified by the circumstances mentioned in the text where two persons from one country travel together in a car from the same country for a common purpose, for instance, joint participation in a sports event abroad. Other such groups may be a group of tourists from country A traveling together abroad in a bus belonging to country A, or a group of schoolchildren from one country camping together in another country, or a group of alpinists from one country climbing a mountain in another country. When the activities of the members of the group are based on an agreement between them, or when travel presupposes the buying of a ticket from a transportation company, the relations between the participants or between the participants and the company might be characterized as contractual.
some authority for the assumption that Dutch courts would under the circumstances deviate from the *lex loci* rule and apply Swedish law. If the wife had sued the husband in a court in Sweden, the Swedish court would probably have applied the *lex loci* rule, that is, it would have applied Dutch law. Although Dutch courts in a similar case probably would apply Swedish law, Swedish courts normally do not accept renvoi and would therefore pay no attention to Dutch conflict of law rules.

In the case now pending the wife has sued the insurance company in Sweden. The dispute is not one between the injured person and the driver; and the amount of damages which a Dutch court might find the husband bound to pay, were he the defendant and his wife the plaintiff, arises in the Swedish case between her and the insurance company as what is called in conflict writing a preliminary or prejudicial question, a *Vorfrage*, possibly a datum. It is possible, therefore, that the claimant could avoid the renvoi issue by claiming that she is entitled under the terms of the insurance contract to obtain the sum the husband would have had to pay if she had sued him in Holland. But leaving this technicality aside, the parties' arguments concern the applicability in this case of the *lex loci* rule. The insurance company argues that the *lex loci* rule applies and the case must therefore be decided under Dutch law. The claimant says that as the parties are Swedes, and domiciled in Sweden, Swedish law should apply. The question is of practical importance, as, according to the substantive Dutch law, a wife's right to claim damages from her husband for personal injury of this kind appears to be limited, while no such limitation exists under Swedish law.

Problems such as those raised in the United States by *Babcock v. Jackson* and several other cases will certainly become increasingly important in Sweden and in Europe in general. There is obviously a need for predictability to make insurance arrangements and calculations possible. It is doubtful, however, whether solutions can be found by the Swedish courts.

The present attitude of the Swedish courts can be described as follows. In tort cases, as in other cases, the *lex fori* is normally applied. However, if the place of the tort is outside the country, this fact is still regarded as of such major importance that the *lex fori* ought invariably to be set aside, for all types and phases of torts, in favor of the *lex loci delicti*. The circumstances in some accident cases show, however, that the ap-

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application of the *lex loci* may lead to what are looked upon by both the informed public and the courts themselves as undesirable or meaningless results. We do not believe, however, that this will make the Swedish courts inclined to switch over to a "proper law" method for tort cases in general. The "proper law" approach, generally labelled the "individualizing" method in Sweden, has been accepted by Swedish courts in the field of contract.\(^\text{12}\) In each individual case where the contract does not include a *stipulatio juris* (which would in principle be accepted), courts try to find the "proper law of the contract"; it is believed that this approach does not preclude predictability, as in each contract there are always several typical facts or circumstances present which help to find the "center of gravity" of the contract, such as the *locus contractus*, the place of performance, the place of payment, the currency agreed upon, the language of the contract, and the nationality and domicile of the parties. Moreover, in the course of time, it becomes possible to conclude from the decisions of courts applying the "proper law" method and from prevailing mercantile views and customs that in contracts of type A, connecting factors of type B should be given decisive importance. Thus, the "proper law" method can be described almost with the precision of a firm rule. However, in torts no one is a party until the damage has been done, and no will or intention of the parties as to the applicable law can be deduced from their past relations, if any. Efforts by courts to apply the "proper law" method in tort cases will not achieve predictability, and predictability is still of great importance whenever a person endeavors to protect himself against liability by insurance and whenever an insurance company decides on the premiums to charge or on the need for buying re-insurance. It is not likely that Swedish courts would try in individual cases to characterize a relationship as contractual or "quasi-contractual"; such characterization, if undertaken, would certainly not achieve predictability. Nor is it likely that they will resort to public policy (*ordre public*) except in situations where the applicable rules of the foreign *lex causae* are obviously incompatible with the fundamental principles of the legal system of Sweden. The idea of "weighing" different state or governmental "interests" will probably not get much support. In conflict cases the parties are private persons, not states, and they fight for their own interests. The forum has an interest in solving the dispute between the parties in a just and reasonable manner, but that does not necessarily mean that it ought to apply its own law, if we do not accept the rather narrow view that the state has an interest in its rules of law being given the widest possible application the world over. Neither would Swedish courts regard it as

proper administration of justice to let the choice of law for solving disputes between private parties be influenced by other more specific governmental interests, for example, fiscal considerations, or the benefit that a certain choice of law would produce for the party who is a Swedish national or a resident of Sweden.

Tort problems of the kind discussed in this article will probably not find a final solution in Sweden through a series of court decisions qualifying and modifying the traditional *lex loci* rule. It seems more likely that future decisions in which the application of the *lex loci* rule produces an unsatisfactory result or those in which the court indulges in disturbing deviations from that rule, will be used as arguments for legislation. Those lawyers who hope for a gradual retreat from the *lex loci* rule may not like the idea of legislation, since by establishing statutory exceptions to the *lex loci* rule the legislator would confirm its applicability in principle as the choice of law rule for tort cases. But there are good reasons for this principle. At the same time, experience shows that for some types of torts such as maritime collisions or air collisions special rules are desirable, and they have been brought into being in some countries by legislation, conventions, or both. The same need is also felt with respect to accidents occurring within continental shelf installations and safety zones. Further, it would not be impossible to devise special choice of law rules for group travel and car accidents.

When and if legislation is contemplated, it would seem reasonable to study at the same time the possibility of distinguishing between different phases of torts. It should, for instance, be possible in car cases to limit the applicability of the *lex loci* to questions concerning causality and the degree of care required, while the amount of damages might be measured according to rules chosen by a "center of gravity" method. Questions concerning the limitation of liability might be decided according to the law of the place where the car is based and insured and, possibly, the question of the capacity to commit a tort might be decided under the personal law.