

CONFLICT OF LAWS

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I. TORTS

Since the last annual survey of the conflict of laws¹ *Chaplin v. Boys* has received the attention of the House of Lords;² and the arguments in the Court of Appeal have also been published.³ This, it will be remembered, was an action in England between two Englishmen in respect of a road accident in Malta, where both parties were temporarily stationed in the British armed forces. Judicial feathers were much ruffled by a rushing mighty academic wind, and their settling down without much change has not yet elicited from the commentators⁴ anything like a still small voice.

The nature of the difference between English and Maltese law—more exactly perhaps the analytical character of English law itself—had earlier been obscured (except for Lord Justice Diplock as he then was) by the distinction in *prima facie* remedial terms between general and special damages; but it became tolerably apparent in the Lords to everyone but Lord Guest, the solitary Scots law lord. Accurately expressed, pecuniary (in Scots patrimonial) loss creates liability according to both laws in the party whose conduct caused it; while the infliction of corporal injury (pain and suffering)

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¹ MacKinnon, *Annual Survey of Canadian Law: Part I: Conflict of Laws*, 3 OTTAWA L. REV. 131 (1968). Publications in 1968 included another textbook, P. NYGH, *CONFLICT OF LAWS IN AUSTRALIA* (assisted by E. Sykes & D. McDougall 1968). There were also new editions of two casebooks, J. CASTEL, *CONFLICT OF LAWS* (2d ed. 1968) and J. MORRIS, *CASES ON PRIVATE INTERNATIONAL LAW* (4th ed. 1968). In 1969, E. SYKES, *CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW* (2d ed. 1969) was published. It must also be noted that in October, 1968, the eleventh session of the Hague Conference on Private International Law dealt with: the recognition of divorces and legal separations; the law applicable to traffic accidents, taking the evidence abroad in civil or commercial matters; and, *inter alia*, the recognition and enforcement of foreign judgments. Canada was represented, as were the United States and the United Kingdom. For a complete report see Graveson, Newman, Anton & Edwards, *The Eleventh Session of The Hague Conference of Private International Law*, 18 INT'L & COMP. L.Q. 618 (1969).

² [1969] 3 W.L.R. 322 (H.L.).

³ [1968] 2 Q.B. 1, at 12-18 (C.A. 1967).

⁴ Since the decision in the Lords, see Notes in 85 L.Q.R. 452 (1969) and 18 INT'L & COMP. L.Q. 1014 (1969); Graveson, *Towards A Modern Applicable Law In Tort*, 85 L.Q.R. 505 (1969); Lazar, *Phillips v. Eyre Revisited*, 32 MODERN L. REV. 638 (1969); Fridman, "Foreign" Torts, 119 NEW L.J. 703 (1969); McGregor, *The International Accident Problem*, 33 MODERN L. REV. 1 (1970); Shapira, *A Transatlantic Inspiration: The "Proper Law of the Tort" Doctrine*, 33 MODERN L. REV. 27 (1970); North & Webb, *Foreign Torts and English Courts*, 19 INT'L & COMP. L.Q. 24 (1970); Karsten, *Chaplin v. Boys: Another Analysis*, 19 INT'L & COMP. L.Q. 35 (1970); Smith, *The Foreign Torts Act: Look Before You Leap*, 20 U. TORONTO L.J. 81 (1970); Baer, *A Blind Search for a "Proper" Law*, 48 CAN. B. REV. 161 (1970).

creates civil liability in English but not in Maltese eyes.⁵ Pecuniary loss in this case was only fifty-three pounds sterling, while pain and suffering was evaluated at 2250 pounds. It is a measure of the success of academic perseverance since 1935 that the plaintiff did not even attempt to rely on the criminal liability created by the infliction of corporal injury.⁶

Lord Guest⁷ approved earlier Scottish indications of opinion to the effect that civil actionability by the law of the place of wrong is necessary, and went on to treat the basis of civil actionability as conduct ("negligent driving") rather than as harm occasioned by conduct. He found that the defendant's conduct was actionable because an action against him in Malta would have yielded fifty-three pounds "special damages," and then characterized the measure of damages as procedural, and thus a matter for the *lex fori*. It would seem to follow from his reasoning that if there had been no special damages—and there might easily not have been⁸—the plaintiff would have recovered nothing, even in England. Or would a few shillings for a taxi to the hospital have sufficed? There is indeed a branch of the law in which conduct rather than harm is the basis of liability; but that branch is the criminal law, which Lord Guest, by the word "actionability," intended to exclude.

It was Lord Justice Diplock in the Court of Appeal⁹ who followed to its logical conclusion the premise that civil actionability at the place of wrong was necessary. Civil actionability depends on the harm caused by conduct, and if Maltese law denies damages for corporal suffering, it follows that that kind of harm is not actionable. He would, therefore, have awarded the plaintiff only fifty-three pounds. Where a conclusion is both logical and wrong, as this conclusion has now been declared to be, it follows that at least one premise is wrong. Of the two premises underlying this proposition, the first is that the relevant law under the second branch of the rule is *Phillips v. Eyre*¹⁰ is that of the place of commission; and the second is that that law

⁵ "Solatium" in Scots law means reparation in respect of both corporal and mental suffering. Where (in the latter sense) it is the only actionable harm, as in an action on the death of a near relative, it is a substantive claim. See *M'Elroy v. M'Allister*, [1949] Sess. Cas. 110 (1948), approving *Naftalin v. London, Midland & Scottish Ry. Co.*, [1933] Sess. Cas. 259. But where, referring to corporal suffering, it is only one part of a claim on negligence, Lord Guest approved Lord Sorn's view (obiter) in *Mackinnon v. Iberia Shipping Co.*, [1955] Sess. Cas. 20, at 37 (1954), that the claim is "comprised in an ordinary action of damages."

⁶ [1968] 2 Q.B. at 34 (Diplock, L.J.): "Whether the defendant was criminally liable for his driving under Maltese law, we do not know."

⁷ [1969] 3 W.L.R. at 333.

⁸ A point made by Lord Donovan, *id.* at 335 and by Lord Pearson, *id.* at 345, 346, and 356.

⁹ From his masterly analysis, [1968] 2 Q.B. at 40-41; see also Goodhart, Note, 84 L.Q.R. 149, at 151-52 (1968), one might demur only to the introduction, that the foundation for an action for breach of contract or for trespass is the defendant's conduct and not the harm caused. Despite textbook opinion to the contrary (founded on tort cases and occasional dicta), no action for breach of contract has ever succeeded without damage, and, in trespass, although the touching is conduct, the being touched is harm.

¹⁰ L.R. 6 Q.B. 1, at 28 (Exch. Ch. 1870).

must, if the plaintiff is to succeed, disapprove of the harm and not merely of the conduct. Which premise is wrong?

The four English law lords agreed with Lord Guest (and with Mr. Justice Milmo at first instance, and the majority of the Court of Appeal) that both special and general damages were recoverable, but disagreed with his view that the difference between the two was procedural. They were not, however, agreed between themselves on why English and not Maltese damages were recoverable in this case: two rejected one of the above premises and two the other.

Lord Donovan,¹¹ who incorporated by reference Lord Upjohn's judgment in the Court of Appeal,¹² and Lord Pearson¹³ considered that even in matters of substance the *lex fori* provides the basic test in tort. A defendant who would be liable by the court's own law may not escape by showing lack of actionability by the foreign law, but must show that his conduct was blameless by it. Lord Pearson emphasized the importance of this merely defensive impact of foreign law by pointing out that it allowed an action to be brought in England even if there were no law at all at the place of commission, whereas a requirement of actionability by foreign law would in such circumstances mean that no action could be brought. *Machado v. Fontes*¹⁴ was disapproved on its (assumed) facts because it was a case of forum-shopping, but specifically not on the basis that foreign criminal liability was irrelevant.

Lord Hodson¹⁵ and Lord Wilberforce¹⁶ thought that civil actionability in the strict sense was necessary under the second branch of *Phillips v. Eyre*¹⁷ so that the harm (and not merely the conduct) must be actionable. Under this principle in any ordinary case on an accident in Malta only Maltese damages would be due; but in this case, both parties being English and only temporarily in Malta, they held that the law of the place of commission was not the test under the second branch. They seem fairly clearly to have meant that the personal law of the parties was the test, rather than that the second branch dropped off so as to leave no answer to the *lex fori*; but they nevertheless specifically repudiate the "proper law of the tort," which Lord Denning in the Court of Appeal had made the basis of his judgment.¹⁸ They add that *Machado v. Fontes*¹⁹ should be overruled, specifically because it relies on criminal instead of civil liability, but would appear also to have been influenced by their view that it was a case of forum-shopping.

¹¹ [1969] 3 W.L.R. at 335-36.

¹² [1968] 2 Q.B. at 26-33. Lord Upjohn would have taken the same view as Lord Guest if, contrary to his opinion, the *lex loci delicti* applied to questions of substantive law.

¹³ [1969] 3 W.L.R. at 345-57.

¹⁴ [1897] 2 Q.B. 231 (C.A.).

¹⁵ [1969] 3 W.L.R. at 326-33.

¹⁶ *Id.* at 336-44.

¹⁷ L.R. 6 Q.B. at 1.

¹⁸ Despite the express disavowal of the "proper law" by counsel for the plaintiff (respondent) in whose favour he decided. See [1968] 2 Q.B. at 17.

¹⁹ *Supra* note 14.

If this analysis is correct it is hardly significant that the double rule enunciated by Mr. Justice Willes in *Phillips v. Eyre*²⁰ has not been shaken. In truth it was not attacked, for controversy was limited to the precise scope of its second branch. It would further seem that those who detest *The Halley*²¹ and *Machado v. Fontes*²² are respectively unduly depressed and unduly elated by the confirmation of the one and the overruling of the other.

*The Halley*²³ did indeed receive confirmation of its status as equivalent to a House of Lords decision²⁴ from a phrase in Lord Pearson's speech when he asked himself²⁵ whether it should be "not followed" in careful distinction from the "overruling" reserved for *Machado v. Fontes*.²⁶ But apart from this point of detail, *The Halley* was a decision on vicarious liability which was not in question here; and even if it had been, a case where actionability by the *lex fori* in fact exists cannot at first sight be authority for the proposition that it must exist. It is true that there was a rare unanimity for the primacy of the *lex fori*; and it is also true that in the view of Lord Donovan and of Lord Pearson without actionability by the *lex fori* there would in this action have been nothing to sue on. But this is not true for Lord Hodson and Lord Wilberforce, who required (and obtained) actionability by the second-branch law, which they took to be English law by reason of the parties. Actionability thus achieved, the action could stand up without actionability by English law *qua lex fori*. Lord Guest required actionability by the second-branch law, which he took to be the law of Malta; and he also, in his peculiar sense of actionability, obtained it. It might well, therefore, be argued, for what it is worth, that for three out of the five the requirement of actionability by the *lex fori* was obiter.

One may notice in passing a tantalizing example of an action on a claim unknown to the courts' own law which failed to surface. *In re L.H.F. Wools Ltd.*²⁷ was a bankruptcy petition founded on a judgment in favour of a Belgian bank against an English company on a dishonoured bill of exchange. The English company had in Belgian law a larger cross-claim against the bank for negligently extending credit to the Belgian drawer of the bill, thus enabling him to continue in business and so to involve the English company in large losses. This claim had at first been pleaded by way of counterclaim to the action on the bill, but was then abandoned—not, it is said, on the ground that it could not succeed in England, but because it would be cheaper

²⁰ *Supra* note 17.

²¹ L.R. 2 P.C. 193 (1868).

²² *Supra* note 14.

²³ *Supra* note 21.

²⁴ Contrary to the suggestion in A. DICEY, *CONFLICT OF LAWS* 920 n. 86 (8th ed. J. Morris 1967) that it is equivalent to a Court of Appeal decision. It is true that the Supreme Court of Judicature Act 1925, 15 & 16 Geo. 5, c. 49, § 26(2)(c) gives the Court of Appeal the jurisdiction of the Privy Council in admiralty appeals, but the decisions of the Court of Appeal are themselves subject to appeal, while those of the Privy Council in the exercise of that jurisdiction were not.

²⁵ [1969] 3 W.L.R. at 351.

²⁶ [1897] 2 Q.B. at 231.

²⁷ [1969] 3 W.L.R. 100 (C.A.).

and easier to prosecute in Belgium, where such a claim was understood. It appeared that consent to dismissal of the counterclaim would not make it res judicata in Belgium.

As for *Machado v. Fontes*,²⁸ the formal position is clear: since the decision in *Chaplin v. Boys*²⁹ would have been the same if *Machado v. Fontes*³⁰ had been followed—as it was at first instance—any expression of disapproval of the earlier case is purely obiter. Aside from the formal position, Lord Donovan and Lord Pearson approved of the principle, and disapproved of the particular decision only on the basis (as a matter of pure guesswork)³¹ that the plaintiff had been forum-shopping. Lord Hodson and Lord Wilberforce did indeed disapprove of the principle, but they too were influenced by the consideration of forum-shopping. Lord Guest did not expressly disapprove of the decision but approved earlier Scottish decisions which dissent from *Machado v. Fontes*.³² On the question of principle he required civil actionability by the foreign law—but this is civil actionability in his own peculiar understanding of the phrase. Verbally then three (including Lord Guest) out of the five demand civil actionability under the second branch; but substantially three (including Lord Guest) demand no more than disapproval of the defendant's conduct. This principle, that the law admitted under the second branch must judge of the defendant's conduct and not of the plaintiff's harm, is an essential part of the reasoning of three lords out of five: it is the only point in the whole case on which a majority can be mustered and which is not obiter. Since disapproval of conduct as such is in essence the function of criminal law, would it be malicious to suggest that the principle (as opposed to the actual decision) in *Machado v. Fontes*³³ has been approved?

Whatever the position in England after *Chaplin v. Boys*,³⁴ in Canada the relevance of foreign criminal law rests on the authority of the Supreme Court and not of a Court of Appeal. The application of the principle in *McLean v. Pettigrew*³⁵ is indeed open to question,³⁶ but that does not weaken the principle itself.

²⁸ *Supra* note 26.

²⁹ [1969] 3 W.L.R. at 322.

³⁰ *Supra* note 26.

³¹ *E.g.*, [1968] 2 Q.B. at 23 (Denning, M.R.): "It was a mere accident that Fontes happened to come here and thus be served with a writ here." There is nothing of this in the report, and in fact [private information], Fontes had a flourishing business in Manchester where the action against him was commenced, although it is true that he had another and larger business in Rio de Janeiro. His presence in England was certainly not an accident, and it would seem that there were English points of contact with the story itself: this is being pursued.

³² Lord Wilberforce, on the other hand, stated that the results of these Scottish cases "give me no satisfaction."

³³ [1897] 2 Q.B. at 231.

³⁴ [1969] 3 W.L.R. at 322.

³⁵ [1945] Sup. Ct. 62.

³⁶ On the ground that in *Machado v. Fontes* the conduct criminally disapproved was at least conduct towards the plaintiff, while in *McLean v. Pettigrew* it was conduct towards the public. No one will quarrel with the result of *McLean v. Pettigrew*, the facts being identical with those of *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

It is also by no means clear that *Chaplin v. Boys*³⁷ marks a defeat for the "proper law of the tort," although all five lords of appeal were against it verbally, and three substantially. Even of the three, neither Lord Donovan nor Lord Pearson would have applied their own rule as between two Maltese parties, although their ground was forum-shopping. But just where forum-shopping starts, and whether it has to be "bare-faced" to attract effective disapproval, has yet to be defined. In any event the advocates of the "proper law" should not be downcast, for it is probably correct to say that all this discussion was obiter; and in any case the facts were inappropriate to the principle as its advocates enunciate it. Even Lord Justice Diplock thought that in a case of a special relationship "there may be a plausible argument in favour of applying the law of the place where that relationship was created";³⁸ but there was no antecedent relationship between the parties to the accident in this case.

There have been two more cases here at the provincial appellate level between parties in the special relation of driver and guest-passenger; but in neither was the relation regarded as founding an argument, and in neither was *Babcock v. Jackson*³⁹ mentioned. In *Martin v. Marmen*⁴⁰ two young men whose homes were on the New Brunswick side of the border with Maine but who were employed in Toronto decided to drive home through Quebec. They had a girl passenger with them from Toronto, bound for her home just on the Maine side of the same border. An accident occurred while one of the young men was driving in Quebec; and on the assumption that his driving was negligent but not grossly so the other two sued him. By Quebec law gross negligence is not necessary to entitle a gratuitous passenger to recover, while in New Brunswick it is, and the action was brought in New Brunswick. The court, following *Gagnon v. Lecavalier*,⁴¹ insisted on its own law being satisfied on this point—that is, it was considering only the first branch of *Phillips v. Eyre*;⁴² and since it also found no negligence, not even simple, its decision even on this point was obiter. We are, therefore, not precluded by this case from suggesting that a trial court need insist on its own law only on the question whether negligence counts as a tort.⁴³ Under the second branch, the law of Ontario, where the special relationships were formed, was not apparently pleaded in this case.⁴⁴

In *Gauvin v. La Commission des accidents du travail de Québec*⁴⁵ the

³⁷ [1969] 3 W.L.R. at 322.

³⁸ [1969] 2 Q.B. at 44.

³⁹ 191 N.E.2d at 279.

⁴⁰ 6 D.L.R.3d 77 (N.B. 1969).

⁴¹ 63 D.L.R.2d 12 (Ont. High Ct. 1967).

⁴² L.R. 6 Q.B. at 1.

⁴³ *Gagnon v. Lecavalier* is not in accord with this, but that was a decision of a single judge, and there was an earlier dictum, not brought to his notice, in the other direction. See *Curley v. Clifford*, [1941] Ont. W.N. 154 (Weekly Ct.). And in any event, the parties in *Gagnon* must certainly have belonged in Ontario, though this is not the reason given in the judgment.

⁴⁴ If *Dym v. Gordon*, 209 N.E.2d 792 (N.Y. 1965) was wrongly decided, it was not relevant as between the young men, but it would still be in respect of the girl.

⁴⁵ [1969] Qué. B.R. 1183.

parties were from Quebec on a short journey into Ontario, where the guest-passenger was killed. The driver was held liable in Quebec despite the Ontario guest passenger defence, on the basis of the Ontario offence of driving "without due care and attention." *McLean v. Pettigrew*⁴⁶ was relied on, and no further consideration was given to the conflicts point.

Apart from a special relation, the "social environment" of a tort can differ from its geographical environment only where a party of foreigners is cut off from the "natives." In *Chaplin v. Boys*⁴⁷ the fact that the English defendant ran into an English and not a Maltese plaintiff in a public street in Malta, both being off duty,⁴⁸ was purely coincidental. This case does not even begin to be authority for the proposition that where there really is a closed community the law of the "social environment" is inapplicable. We may still hope for disapproval of the dictum of Lord Justice Somervell in *Szalatnay-Stacho v. Fink*⁴⁹ and the restoration of the judgment of Mr. Justice Henn-Collins in that case to the effect that an adverse official report wholly within the Czechoslovakian government exiled in England may be excused by the Czechoslovakian and not by the English law of privilege.

In Canada there has been a case of a closed community; but the flirtation with the "proper law of the tort" which was noted in the last annual review⁵⁰ was ignored at the appellate stage of *Gronlund v. Hansen*.⁵¹ There, all the relevant parties to a fatal accident on the high seas hailed from British Columbia;⁵² but since the action was also brought in British Columbia, all that needed to be found was that the British Columbia Fatal Accidents Act applied, as *lex fori*, to accidents anywhere in the world,⁵³ and that there was no other law by which the defendant could excuse himself. The Court of Appeal, however, went further and, in reliance on a remark by Chief Justice Duff in *Canadian National Steamships Co. v. Watson*⁵⁴ presumed, in the absence of evidence to the contrary, that the law of the place (meaning the high seas) was the same as that of British Columbia. This, with respect, was doubly unfortunate. In the first place, the high seas are not a "place" with a law of their own, and when we refer to the "law of the high seas" in the context of civil liability we mean only the rules governing incidents between ships. In the second place, the presumption of identity of foreign

⁴⁶ [1945] Sup. Ct. 62.

⁴⁷ [1969] 3 W.L.R. at 322.

⁴⁸ [1968] 2 Q.B. at 27 (Lord Upjohn).

⁴⁹ [1947] K.B. 1 (C.A. 1946).

⁵⁰ MacKinnon, *Annual Survey of Canadian Law: Part I: Conflict of Laws*, 3 OTTAWA L. REV. 131, at 152-53 (1968).

⁵¹ 4 D.L.R.3d 435 (B.C. 1969).

⁵² The vessel's port of registry being Vancouver did not help. This meant that the law of the flag was not that of British Columbia but rather the federal Canada Shipping Act, CAN. REV. STAT. c. 29 (1952), the wrongful death section of which (§ 726) is tied to an action in the admiralty court. This action originated in the county court.

⁵³ For which *Davidsson v. Hill*, [1901] 2 K.B. 606 was sufficient authority.

⁵⁴ [1939] Sup. Ct. 11 (1938).

law, despite its frequent reiteration, is against authority⁵⁵ and usually (as here) unnecessary. A better citation from Chief Justice Duff would have been the words with which he continued, namely, "[w]here a defendant relies on some difference between the law of the locality and the law of the forum, the onus is upon him to prove it In practice it appears to have been treated as matter of defence for the purposes of pleading as well as proof Statements of textwriters of a seemingly contrary import must be read in the light of this consideration."⁵⁶ Where the defendant omits to plead an essential ingredient of his case, there is no need to make any presumption against him. The position is that his case is incomplete, and he loses for that reason.

After all this has been said, there is some ground for the impression that the real issue raised by foreign torts has not been faced. Suppose two breakfast-table conversations over the morning newspaper, one in Malta and one in England. In Malta: "Did you see this dreadful accident?" "Yes, but it was only two of those English boys." In England: "Did you see this dreadful accident in Malta?" "In Malta? What does that matter?" "But they were both English." Is this in concrete terms what is meant by asking which social order is disturbed? Or which "governmental" interest is affected? If one may rely on intuition, such a consideration seems to have been in the background of the speeches of Lord Hodson and Lord Wilberforce, and perhaps also of Lord Denning's judgment. Be that as it may, such a principle would give rise to insuperable difficulties in any but the simplest case. For example, the driver of the motor-scooter on which the plaintiff was riding pillion was in fact also English;⁵⁷ but what if he had been Maltese and (a) uninjured, or (b) injured but bought off, or (c) injured and a party to the action? What happens if he is a common-law Canadian or civil-law Brazilian?

II. CONTRACTS

To turn from the proper law of a tort to the proper law of a contract, the English Court of Appeal has twice reaffirmed the strength of the "inference" that arises from a provision for arbitration in a specified place—London in both cases. In *Tzortzis v. Monark Line A/B*⁵⁸ the contract was between Greek and Swedish parties for delivery of a ship in Sweden: there was no connection with England apart from the arbitration clause. Both Lord Denning and Lord Justice Salmon found that the contract's "closest and most real connection" was with Sweden; but Lord Justice Salmon stated that "the law by which the contract is to be governed depends on the intention

⁵⁵ *Purdum v. A. E. Pavey & Co.*, 26 Sup. Ct. 412 (1896); *Gray v. Kerslake*, [1958] Sup. Ct. 3 (1957).

⁵⁶ [1939] Sup. Ct. at 14.

⁵⁷ [1969] 2 Q.B. at 19 (Lord Denning).

⁵⁸ [1968] 1 W.L.R. 406 (C.A.).

of the parties.”⁵⁹ Lord Denning said that “if there is an express clause in a contract providing what the proper law is to be, that is conclusive Where there is no express clause, it is a matter of inference;”⁶⁰ and where there is a provision for arbitration at a particular place the correct inference is that the law of that place was intended. It was insisted that this did in fact represent ordinary businessmen’s intentions.

In *Compagnie Tunisienne De Navigation S.A. v. Compagnie D’Arma-ment Maritime S.A.*,⁶¹ the contract was for carriage of crude oil by a French company for Tunisian shippers from one port in Tunisia to another. Again there was no connection with England except the arbitration clause and an inappropriate English printed form: it was conceded⁶² that the “closest and most real connection” was with French law. The circumstances of this case were perplexing, and the decision went the other way at first instance;⁶³ but in the end it was the inference from the provision for arbitration that prevailed.

The second of these two decisions only applies the first, and it is in the first that we find the statements of principle, a ringing affirmation, which no one could call obiter, of the parties’ freedom to choose an “irrelevant” law if they so desire.⁶⁴ That their choice is free whether it be express or implied is a principle of complete generality, the only “special” point being that in the absence of an express choice a provision for arbitration implies a choice almost inevitably. This might seem to be the death knell of the objectivists, if it had not been tolled so many times already.

There is, however, one restriction on freedom. Lord Denning, after saying that an express clause is conclusive, added “in the absence of some public policy to the contrary.” He did not specify the court’s own country’s public policy, and the probability is that he was echoing Lord Phillimore’s well-known phrase: “except in some instances where positive mandatory or prohibitive provisions are dictated as matters of public policy by the state.”⁶⁵ There is no support here for Lord Wright’s willingness⁶⁶ to allow parties to contract out of the Hague Rules by the simple expedient of stipulating for another law. The point at issue in *Tzortzis* was remoteness of damage, which

⁵⁹ *Id.* at 412.

⁶⁰ *Id.* at 411.

⁶¹ [1969] 1 W.L.R. 449 (Q.B.). See also Note, 86 L.Q.R. 13, at 14-16 (1970).

⁶² [1969] 1 W.L.R. at 454.

⁶³ [1969] 1 W.L.R. at 449.

⁶⁴ Lord Reid (obiter) in *James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd.*, [1970] 2 W.L.R. 728, at 732 (H.L.), stated: “The general principle is not in doubt. Parties are entitled to agree what is to be the proper law of their contract There have been from time to time suggestions that parties ought not to be so entitled, but . . . I see no good reason why, subject it may be to some limitations, they should not be so entitled.”

⁶⁵ *Kwik Hoo Tong v. James Finlay & Co.*, [1927] A.C. 604, at 609.

⁶⁶ Obiter in *Vita Food Prods., Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.). Schmitthoff is, with respect, wrong to say in *New Light on the Proper Law*, 3 MANITOBA L.J. 1, at 13 (1968), that this dictum was followed in *Tzortzis*: all that was there approved was a single paragraph referring to arbitration clauses.

is not a question of "public policy": this seems to have slipped under the reporter's guard,⁶⁷ and in *Compagnie Tunisienne* the substantive issue is successfully concealed.⁶⁸

*Miller v. Whitworth Street Estates*⁶⁹ was an arbitration case of a different kind. Here the arbitration clause formed part of a contract for building by a Scots firm at an English firm's Scottish premises. The contract was finally concluded in Scotland; but the Scottish builders had come up (in Scots "down") to London to negotiate the contract, which was in the English R.I.B.A.⁷⁰ standard form: there was in existence a standard Scots form, but they used the English one. The arbitration clause was in general terms, and, differences having arisen, the President of the R.I.B.A. had under it appointed an arbitrator (in Scots arbiter) who was a Scotsman living in Glasgow, and who without objection proceeded in Scots fashion. His award being against the English firm, as a result of certain findings of law to which they objected, they asked him to state a case for the decision of the English High Court under section 21 of the English Arbitration Act.⁷¹ Here arose the conflict of laws, for in Scots law a decree arbitral is final, and not subject to review by the courts on the ground of error in law. It was held in the Court of Appeal that the finality or otherwise of the decree depended on the proper law of the contract; but in the Lords, counsel for the English firm conceded that this was a question of arbitration *procedure*. In view of this admission, and the failure to object to the Scots mode of proceeding at any earlier stage, it was perhaps inevitable that Scottish law should decide this point, whatever the "proper law" might be held to be. None of their lordships doubted the propriety of the concession; but it is right to say that the case is not a decision on the point.

In this view, and the House being unanimous that the "procedure" of the arbitration could be governed by a law other than the proper law, it was strictly unnecessary to decide what the proper law was; but their lordships all indicated preferences, Lord Reid and Lord Wilberforce for Scots law, Lord Hodson and Viscount Dilhorne for English law. Lord Guest was "on balance . . . not disposed to differ from the majority of your Lordships"; and although he went on to specify "who think that the proper law of the contract is English," the best interpretation is probably an even split.

Lord Denning in the Court of Appeal might have seemed to close the door on a fruitful source of sophistic argument by admitting⁷² to a "slip" in his famous question: "[With] what country has the transaction the closest

⁶⁷ See [1968] 1 W.L.R. 406, at 409 (C.A.).

⁶⁸ For discussion of a similar omission see *The Assunzione*, [1954] 2 W.L.R. 234 (C.A. 1953). See also Clarence Smith, *The Assunzione Revisited*, 18 INT'L & COMP. L.Q. 449 (1969).

⁶⁹ *James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd.*, [1970] 2 W.L.R. 728 (H.L.), *rev'g* [1969] 1 W.L.R. 377 (C.A.), see also Note, 86 L.Q.R. 13 (1970), *rev'g* Mr. Justice Eveleigh who had reversed Master Elton.

⁷⁰ Royal Institute of British Architects.

⁷¹ 14 Geo. 6, c. 27 (1950).

⁷² [1969] 1 W.L.R. at 380.

and most real connection?"⁷³ The question should be, he now says, what it had always been before: "What is the system of law with which the transaction has the closest and most real connection?" But on appeal Lord Hodson and Lord Wilberforce thought there was no difference, and Lord Reid thought the country of connection to be more important than the system of law. The others did not notice the point. Lord Denning found⁷⁴ (as did Lord Reid) that the country with which the contract was most closely connected was Scotland, but the law of the closest connection was England, because the parties deliberately used the R.I.B.A. form which has so many connections with English law—in other words they had contemplated English law although they had not expressly stipulated for it. Viscount Dilhorne quoted with approval the way in which Lord Justice Widgery had set the point in its general context. After the introductory point that "[t]he proper law of the contract is the law which the parties intend should govern its operation,"⁷⁵ Lord Justice Widgery went on to discuss three stages. First, they may expressly provide for a governing law; secondly, in default of express provision, "[i]f the parties' conduct shows that they have adopted a particular view with regard to the proper law, then it may be inferred that they have agreed that that law shall govern the contract accordingly."⁷⁶ Thirdly, and only if the parties never applied their minds to the question at all, one goes to the law of the closest connection. He agreed with Lord Denning that in this case there was a real, if not express, submission to English law. The reason for Lord Reid's and Lord Wilberforce's contrary preferences for Scots law was that they did not find the R.I.B.A. contract to be so peculiarly English. It is perhaps not a matter of mere curiosity that Dumoulin, after discussing situations in which the place of contracting is not significant, found the principal instance of its significance to be where one party had gone to the other's place to seek the contract.

A case in which it was not possible to infer any common intention in the parties from what they had said was *Re Modern Fashion Ltd.*⁷⁷ The dispute there was whether the "proper law" of a sale of goods was the law of Quebec or that of Manitoba. The contract had been concluded by long-distance telephone between Montreal and Winnipeg with no mention of a governing law; and an indirect stipulation for Quebec law on the invoice which accompanied the goods from Montreal was held to be ineffective on the ground that it had been added after the contract was concluded. It was found that the contract provided for performance in Manitoba by delivery of the goods at Winnipeg, (although in fact the contract was f.o.b. Montreal);⁷⁸ and also that Winnipeg was the place of contracting, on the ground that the offer had come from Winnipeg, and the place of acceptance

⁷³ *Tomkinson v. First Pennsylvania Banking & Trust Co.*, [1961] A.C. 1007, at 1068.

⁷⁴ [1969] 1 W.L.R. at 381.

⁷⁵ *Id.* at 383.

⁷⁶ *Id.* at 384.

⁷⁷ 71 W.W.R. (n.s.) 238, 8 D.L.R.3d 590 (Man. Q.B. 1969).

⁷⁸ I have been favoured by counsel for the seller with a copy of his arguments.

(in the case of a telephone conversation) is where the offeror hears the acceptance, not where the offeree speaks it. For this proposition Dicey⁷⁹ was cited; but that text-book's only support for it comes from a case⁸⁰ where service *ex. juris.* was sought on the ground of the contract's having been "made within" England, and it is deprecated as a test of "proper law" except in the last resort.⁸¹ The decision that the law of Manitoba was the proper law of this contract would seem to be in direct opposition to *Benaim & Co. v. Debono*,⁸² where the technical place of contracting was Malta, but the law of Gibraltar was held to be the proper law, since the contract was for delivery f.o.b. Gibraltar. Earlier cases⁸³ would also indicate (in the absence of a better test) the seller's law. There is no space here to develop a thesis that a seller, when selling to buyers in many places, is one special instance of a dominant party; but this case is a good illustration of the singular unreality as test of both the place of contracting and the place for performance.

The point at issue in *Re Modern Fashions*⁸⁴ was whether the unpaid seller could retake the goods after delivery in Winnipeg and the buyer's subsequent insolvency there. An unpaid seller in Quebec law has the right not merely to retain goods not yet delivered, but to repossess them after delivery, so long as they have not been transferred to a third party; and in the case of transfer on insolvency to a trustee in bankruptcy he has the right not merely to stop in transit, but to retake within thirty days of delivery. The seller in this case did not take any steps within thirty days of delivery, but it seems to have been assumed that if Quebec law applied he would be entitled to retake because the buyer had filed its assignment in bankruptcy twenty-two days after delivery. The parties agreed that the Quebec rule applied if Quebec law was the proper law of the contract; and in this they were (with respect) probably right, since a trustee in bankruptcy takes neither a greater nor a lesser right than his bankrupt had: even in England there is no question of "reputed ownership" in the winding up of a company.⁸⁵ This was decided for Ontario in *Re Hudson Fashion Shoppe Ltd.*⁸⁶ in respect of the same Quebec "thirty day rule."

There is no doubt that the country where the goods are situated may, if it desires, protect people there against such hidden defects of title: Ontario, after the above decision, provided that without registration in the same way as conditional sales such rights would be ineffective in respect of goods in Ontario against third parties, and third parties include the buyer's creditors

⁷⁹ See A. DICEY, *CONFLICT OF LAWS* 744 (7th ed. J. Morris 1958).

⁸⁰ *Entores Ltd. v. Miles Far East Corp.*, [1955] 2 Q.B. 327 (C.A.).

⁸¹ Where it is a question of jurisdiction, which is not exclusive, one is not barred from the true position that the contract is made "in" both countries, but one cannot say that when looking for a proper law.

⁸² [1924] A.C. 514 (P.C.) apparently not cited here.

⁸³ *Rogers v. Mississippi & Dominion Steamship Co.*, 14 Qué. L.R. 99 (Super. Ct. 1888); *Sanitary Packing Co. v. Nicholson*, 33 West L.R. 594 (Man. K.B. 1916).

⁸⁴ *Supra* note 77.

⁸⁵ R. WILLIAMS, *BANKRUPTCY* 323 (18th ed. M. Hunter & D. Graham 1968).

⁸⁶ [1926] 1 D.L.R. 199 (Ont. 1925).

where the goods were purchased for re-sale.⁸⁷ But in Manitoba even ordinary conditional sales require no registration for this purpose, so that any limitation on the bankrupt's title would bind his trustee as much as himself.

New Brunswick, like Ontario, requires⁸⁸ registration of any right under the Quebec "thirty-day rule" in the same way as a foreign conditional sale; and this has now been held, in *Re Maritime Heating Co.*,⁸⁹ to defeat a Quebec seller who had not registered in New Brunswick, despite the proper law of the contract being found to be that of Quebec.

III. CONFISCATION AND TAXATION

*Juelle v. Trudeau*⁹⁰ has held that a confiscation in Cuba of race horses belonging to Cuban exiles did not enable the government of that country to sell them in Toronto, and that the original owners could claim them back from Canadian purchasers as stolen goods. This decision is not contrary to *Luther v. James Sagor & Co.*⁹¹ (which was not cited), because it was found that by Cuban law itself no title passes to the government unless it has obtained possession by due process of law and upon payment of indemnification. There was evidence of neither. Those who sympathize with Castro will wonder whether other evidence of Cuban law might not have been obtained.

On the ground that a foreign government may not claim its taxes in our courts, an application by an executor to bar the claim of the state of California to succession duty on the Alberta assets of a Californian has been granted:⁹² no point was taken on impleading a foreign sovereign, the Californian government having been notified but simply not appearing. It has also been held in Scotland,⁹³ at the instance of a residuary legatee, that the executor would normally have had to replace a sum remitted from the Scottish assets⁹⁴ to the administrator in the Swedish domicile of the testatrix in order to pay Swedish "inheritance tax" on the whole estate.⁹⁵ There was, however, a peculiar circumstance which saved him. There were three legacies to Swedes "free of tax," and it was found that by Swedish law the government could collect from the legatees whatever was paid to them, so that

⁸⁷ Conditional Sales Act, ONT. REV. STAT. c. 42, § 5 (1927), now Conditional Sales Act, ONT. REV. STAT. c. 61, § 12 (1960) (read with § 2(3) for creditors).

⁸⁸ By § 6 of the Conditional Sales Act, N.B. REV. STAT. c. 34 (1952).

⁸⁹ 2 D.L.R.3d 471 (N.B. 1968).

⁹⁰ 7 D.L.R.3d 82 (Qué. Super. Ct. 1968).

⁹¹ *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, [1921] 3 K.B. 532 (C.A.).

⁹² *Re Dwelle Estate*, 69 W.W.R. (n.s.) 212 (Alta. Sup. Ct. Ch. 1969).

⁹³ *Scottish National Orchestra v. Thomson's Exor*, [1969] Scots L.T.R. 325 (Outer House).

⁹⁴ There had also been considerable assets in Saskatchewan, all swallowed up (without complaint) by the Swedish treasury.

⁹⁵ Reliance was placed on *In re Lorillard*, [1922] 2 Ch. 638 (C.A.), as approved by Viscount Simonds in *Government of India, Ministry of Finance (Revenue Division) v. Taylor*, [1955] A.C. 491, at 509.

until full tax was paid they would not get their legacies "free of tax," or indeed at all.

The principle is that an executor may not part with what could not be exacted from him under the law of his administration, meaning the site of the property at death.⁹⁶ If the principle was bent in the last case because protection of the legatees was implied in the provisions of the will itself, there is yet no reason to protect a trust company at the expense of a residuary legatee from a foreign government which has it in its power. In fact the courts have not infrequently preferred the possibility of a defendant having to pay twice to permitting the triumph of a foreign government over a helpless plaintiff.⁹⁷ In *Re Reid*,⁹⁸ however, Judge Hinkson (as he then was) refused an order against a trustee company to pay over the residue of a deceased Englishman's British Columbian assets in its hands without deduction of United Kingdom estate duty, on the ground that the trust company, being an English company and at the mercy (so it said) of the British government, was regarded in English law as personally liable for the duty: if its surrender to the United Kingdom government were "proper," it would be entitled to an indemnity out of the estate. The judgment concluded: "Depending upon future developments in this matter the trustee may or may not be entitled to indemnity in the event it pays the tax now being demanded In these circumstances it is not appropriate to make the order in the terms sought."⁹⁹ A form of words which may have been a veiled invitation to the plaintiff to sue for the administration of the trusts, and in particular for replacement of the trustee.

A practical warning. Any Canadian who has received in Canada a gift of, say jewellery from another Canadian must beware of wearing it on a trip to England within five years of the gift: if the donor dies in Canada while the jewellery is situated in the United Kingdom, United Kingdom succession duty will be due.¹⁰⁰

IV. ADMINISTRATION AND SUCCESSION

The convenience of re-sealing has been held in Saskatchewan¹⁰¹ to be available only to the executors themselves under an out-of-province grant of probate, and not to a deceased executor's executor. The latter, though

⁹⁶ *Cook v. Gregson*, 2 Drewry 286, 61 Eng. Rep. 729 (Ch. 1854) was cited.

⁹⁷ *Rossano v. Manufacturers' Life Ins. Co.*, [1963] 2 Q.B. 352 (1962), was cited with apparent approval in *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] Sup. Ct. 443, and in the courts below. The latter was not itself a tax case, but the defendant was equally between the hammer and the anvil.

⁹⁸ 2 D.L.R.3d 155 (B.C. Sup. Ct. 1968).

⁹⁹ *Id.* at 159.

¹⁰⁰ *In re Kettle's Gift*, [1968] 1 W.L.R. 1459 (Ch.), concerned shares not jewellery. These were probably not the circumstances contemplated by the draftsman's tortuous indirection, but it is the consequence of what he said.

¹⁰¹ *Re Fixter*, 4 D.L.R.3d 529 (Sask. Q.B. 1968), not following *Re O'Gorman*, 51 D.L.R.2d 284 (B.C. Sup. Ct. 1965).

undoubtedly entitled to administer the property in Saskatchewan, must take an independent grant of letters of administration with the will annexed.

It was held in *Sanderson v. Halstead*¹⁰² that a Quebec widower does not need an Ontario grant of administration to enable him to sue in Ontario in right of his intestate wife's estate. The object of his action was money due on an insurance policy on her life which had been paid out to her mother, the widower claiming that the estate was entitled. It must be assumed that the branch of the insurance company, which would be the site of the money at death, was in Quebec, for the need for a grant of administration depends on the site at death, not on domicile.¹⁰³

In *re Henry*¹⁰⁴ was an application in Quebec (by whose conflict rules the form of a will is governed by the place of execution) for probate of a will executed by Quebec testators in Prince Edward Island where by the law of Prince Edward Island it was valid. It was, however, a joint will, and joint wills are forbidden by Quebec law.¹⁰⁵ The question, therefore, arose whether the prohibition was a matter of form, and so inapplicable here, or a matter of substance and, therefore, applicable to Quebec testators. In order to answer this question the reasons for the prohibition were sought, and recourse to the classic work of Mignault¹⁰⁶ revealed that a joint "will" violated the essential definition of a testamentary disposition, namely, that it should depend on the testator's will alone, and be gratuitous and capable of variation by him at any time. A joint will savours more of a contractual arrangement, where one testator's dispositions are by way of consideration for the other's; and it seemed here that neither could change without defeating legitimate expectations in the other. The prohibition was, therefore, held to be substantial and probate was refused.

A puzzling problem connected with the beneficial succession to movables arose in *Re Canada Permanent Trust Co.*,¹⁰⁷ where a testator domiciled at his death in British Columbia and having his estate there left a legacy to a child taken from him by his wife on divorce, and later adopted by her and her second husband in Manitoba. The question was whether this child paid a lower rate of succession duty under the British Columbia act either as the deceased's "child" or as a "person to whom during his infancy the deceased stood in loco parentis." It was held that up to the moment of adoption the deceased was his parent, and, therefore, could not have stood "in place of" his parent. On the other hand at the moment of death he was, by reason of the adoption, not the deceased's "child." Neither basis

¹⁰² 67 D.L.R.2d 567, at 570 (Ont. High Ct. 1968).

¹⁰³ Reliance was placed on A. DICEY, *CONFLICT OF LAWS* 1102-03 (8th ed. J. Morris 1967), for the proposition that the *lex causae* determines who has a right; but it was not noticed that the *lex causae* (if that be the right expression) in a question of representation to an estate is the law of the site of each bit of property at death, *Crosby v. Prescott*, [1923] Sup. Ct. 446, and A. DICEY, *supra* at 584.

¹⁰⁴ [1968] Qué. C.S. 389.

¹⁰⁵ Qué. CIVIL CODE art. 841.

¹⁰⁶ P. MIGNAULT, 4 *DROIT CIVIL CANADIEN* 272 (1899).

¹⁰⁷ 8 D.L.R.3d 569 (B.C. 1969), *rev'g Re Carper*, 4 D.L.R.3d 106 (B.C. Sup. Ct. 1969).

for reduction of duty was, therefore, made out. The same reasoning would have disqualified him, one imagines, from claiming as the deceased's "child" on intestacy.

The result was arrived at by the application of the British Columbia statutory provision for recognition of out-of-province adoptions, namely: "An adoption effected according to the law of any other Province of Canada, or of any other country or part thereof, has the same effect as an adoption under this Act."¹⁰⁸ Although this provision had existed only since 1957,¹⁰⁹ it was held to cover the adoption in Manitoba in 1949, so as to give this Manitoba adoption the effect of a British Columbia adoption, (namely, to transfer the child from one family to the other "for all purposes")¹¹⁰ without any inquiry into the effect in Manitoba law. In fact the law of Manitoba provided,¹¹¹ and still provides, that adoption transfers a child for all purposes except that "an adopted child shall not lose the right to inherit from his natural parents or kindred."¹¹² One asks when this right, reserved by the adoption itself, was lost: when the testator acquired his British Columbia domicile? When the British Columbia provision was passed in 1957? The answer probably is that the only relevant date is that of the testator's death, and that the Manitoba reservation, since it refers to succession, governs only cases—but if so all cases—where the deceased was domiciled in Manitoba at his death, regardless of anyone's position at the time of adoption. On this hypothesis, the rules in respect of adoption would, it seems, be different from those for legitimation.

Apart from that consideration, there must surely be some limitation on the very general words of this statute. "Adoption" must mean something at least fairly similar to a British Columbia adoption; and there must be some limitation of jurisdiction. The law neither of British Columbia nor of Manitoba restricts in any way the jurisdiction of their own courts; but if there is no limitation in respect of foreign jurisdiction it would be possible for parties, all belonging to British Columbia, but wishing to avoid the troublesome safeguards of their own province's procedure, to do so by a trip to a state which has none, and then come straight back to British Columbia and claim recognition of the new status. Perhaps the section should be read subject to the requirements suggested in *Re Jensen Estates*,¹¹³ though Mr. Justice Collins expressed the opinion in that case that they were no longer applicable after the 1957 legislation. These requirements are that the adoption must be recognized by (even if not effected under) the law of the adopted child's domicile, and also by at least the residence of the adopting parent.¹¹⁴

¹⁰⁸ Adoption Act, B.C. Stat. 1957 c. 1, § 11.

¹⁰⁹ *Id.*

¹¹⁰ 8 D.L.R.3d at 571-72.

¹¹¹ Child Welfare Act, MAN. REV. STAT. c. 32, § 96(1)(a) and 96(2) (1940).

¹¹² Child Welfare Act, Man. Stat. 1961 c. 6, § 2.

¹¹³ *Re Martin, Bertha, and Fleming Jensen Estates*, 40 D.L.R.2d 469 (B.C. Sup. Ct. 1963).

¹¹⁴ The English Adoption Act, 14 & 15 Geo. 6, c. 26 (1950) requires, for an English adoption, English domicile of the adopter, § 1(1), and English residence of both

V. FAMILY LAW

There have been two more cases of children kidnapped by one parent, in each by the mother from a father in Alberta. In one case the Alberta courts had already decided custody against the kidnapping wife, and an appeal by her was pending when she removed the children to British Columbia and commenced proceedings there. Judge Kennedy declined jurisdiction to decide the application, or to investigate the welfare of the children.¹¹⁵ In the other case¹¹⁶ there had been no proceedings at home; the mother, who was originally English, fled to England with the two children of the marriage while their father was away on a hunting trip, and immediately made them wards of court there. The father followed, and the court eventually said he could take them back and cancelled the wardship order—but he needed every day of six months' leave of absence from his work to achieve this, and he recovered not a penny of his costs, since his wife had been granted legal aid. Two sentences from the judgment of Lord Justice Harman deserve (with respect) quotation: "[T]he removal of children from their home and their surroundings by one of their parents who happens to live in or have connections with another country is a thing against which the court should set its face, and . . . unless there is good reason to the contrary it should not countenance proceedings of that kind"; and later he stated that "[it was] in the interests of these children, being Canadian children with a Canadian father and a Canadian grandfather, that they should go back to their home in Canada and that if there are going to be disputes between the parents about their custody and control, the proper court to decide that was the Alberta court."¹¹⁷

It has been held again, both in Canada and in England, that a "potentially polygamous" marriage is valid where the parties' personal law at the time allows it. In *Re Quon*,¹¹⁸ a Chinese testator had married in China under Chinese law, and after acquiring a domicile in Canada had taken another "wife" in Canada. Both ladies claimed against the estate under the Family Relief Act, and the first succeeded while the second failed. The reason was that the first marriage was valid, though potentially polygamous, and the second was invalid by reason of the validity of the first. The order in favour of the first wife looks at first sight like matrimonial relief in respect

adopter and adopted, § 2(5). If the child has a foreign domicile, there is jurisdiction nevertheless, but in the interests of the child it may not be exercised where the country of his domicile would not recognise the adoption. See *In re B(S.) (An Infant)*, [1968] Ch. 204 (1967), and Blom-Cooper, *English Adoption of Foreign Children*, 31 MODERN L. REV. 219 (1968).

¹¹⁵ *Re Lyon Infants*, 72 W.W.R. (n.s.) 156 (B.C. Sup. Ct. 1969). Leatherdale v. Ferguson, 50 D.L.R.2d 182 (Man. 1964), would have been useful in that case. Where there are proceedings properly pending elsewhere, children will be allowed to be taken there against one parent's objections, even if not kidnapped from there, e.g., *In re (J.D.M.) (An Infant)*, [1969] 1 W.L.R. 1001 (Ch.).

¹¹⁶ *In re T. (Infants)*, [1968] Ch. 704 (C.A.), and see Note, 85 L.Q.R. 12 (1969).

¹¹⁷ *In re T. (Infants)*, [1968] Ch. at 715-16.

¹¹⁸ 4 D.L.R.3d 702 (Alta. Sup. Ct. 1969).

of a polygamous marriage, a point not considered by the court; but the explanation is available that the marriage became monogamous when the testator changed his domicile.¹¹⁹

*Alhaji Mohamed v. Knott*¹²⁰ was a case of a marriage celebrated under Muslim law in Nigeria. While the parties were temporarily in England the authorities removed the wife from her husband on the ground that she was in "moral danger"; this meant, and meant only, that she might have sexual intercourse with her husband at the age of thirteen, a prospect which the magistrates found "repugnant to ordinary Englishmen." The Divisional Court told them to keep this sort of repugnance for English girls who had been brought up differently, and gave her back to her husband because he was her husband. In other words, the marriage was recognized as valid, though the husband would no doubt have been unable to petition directly for (e.g.) restitution of conjugal rights.

It is trite law that sufficiency in the form of a marriage is a matter for the law of the place of celebration. It has now been held again that retrospective validation of a marriage originally defective in form is competent to the legislature of the province of celebration, the solemnization of marriage being a provincial subject. Thus the wife by a Chinese ceremony in Saskatchewan which had been cured (probably unintentionally) by Saskatchewan legislation was allowed to claim in British Columbia as widow under the Testators' Family Maintenance Act of the latter province.¹²¹

Want of parental consent to an infant's marriage has again been classified in passing as a defect of form rather than lack of capacity. In *Reed v. Reed*¹²² two British Columbians had wished to marry, but, the girl being under age and parental consent not forthcoming, they had had to elope to the State of Washington where parental consent was not necessary. By Washington law their marriage was (unknown to them) void for consanguinity since they were first cousins; and this was the ground on which twenty years later a petition for nullity was brought in British Columbia. The court found the marriage unaffected by the Washington incapacity because of the parties' British Columbian domicile,¹²³ and unaffected by the British Columbian requirement of consent because the ceremony had taken place in Washington. So, "by a jumble of the laws of both countries," the marriage was given a validity which it "would not have obtained either by

¹¹⁹ *Ali v. Ali*, [1966] 2 W.L.R. 620 (Prob. Div. 1965).

¹²⁰ [1969] 1 Q.B. 1 (Divorce Ct. 1968), and see Karsten, *Child Marriages*, 32 MODERN L. REV. 212 (1969).

¹²¹ *Re Louis Estate*, 69 W.W.R. (n.s.) 194 (B.C. Sup. Ct. 1969), following *Starkowski v. Attorney-General*, [1954] A.C. 155 (1953).

¹²² 6 D.L.R.3d 617 (B.C. Sup. Ct. 1969).

¹²³ On this point dissenting from the view expressed in G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 277 (7th ed. 1947) which by the way was omitted in later editions from the corresponding paragraph, now page 278 of the 7th edition, and dissenting also from the doubts in A. DICEY, *CONFLICT OF LAWS* 268 (8th ed. J. Morris 1967).

one law or the other";¹²⁴ and the petition was dismissed.

If we are to take seriously the elaborate obiter dicta in *Padolecchia v. Padolecchia*,¹²⁵ capacity to remarry after a divorce may be denied by the personal law at the time of remarriage, even though by the personal law at the time of divorce the divorce was effective: a divorce, good when granted, may thus become bad by a later change of personal law. This view was explicitly inspired by the converse case, *Schwebel v. Ungar*,¹²⁶ where (it will be remembered) a divorce which was invalid by Ontario conflicts law when granted was recognized by the parties' subsequently acquired domicile in Israel, so that the parties had capacity to remarry—presumably from the moment of acquiring Israeli domicile. In *Padolecchia*¹²⁷ the divorce had been obtained in Mexico while the husband was resident in Venezuela, and Venezuela would recognize it. On the assumption (but the contrary was held) that his residence there amounted to domicile, the divorce would have been recognized in England, but he lost that domicile on leaving Venezuela and reverted to his Italian domicile of origin—and Italian law does not recognize a Mexican or any other divorce for its subjects. He then married a Danish girl in England, and was subsequently held on his own petition to have been incapable of so doing. It was also thought relevant that Danish law would not recognize the Mexican divorce, which can only mean that the "wife" lacked capacity to marry a Mexican divorcee. This would be analogous to *Pugh v. Pugh*¹²⁸ where an Englishman had married a Hungarian girl: by her own law she was old enough to marry, but by English law she was not, and English law was held to have deprived the "husband" of capacity to marry a girl of her age.

In the same direction is *Arias*,¹²⁹ where a Swiss divorce was held not to have liberated a husband domiciled in Switzerland, although it liberated the wife who was Swiss by both domicile and nationality, on the ground that the court which had granted it would hold him still bound by the law of his Italian nationality. Thus incapacity by the law of his domicile (with the aid of *renvoi*, though this was studiously not mentioned) was held to be an impediment to his marrying in England a Spaniard who was also of Swiss domicile. The probability¹³⁰ that the English marriage would not be recognized in Switzerland was also thought relevant.

It would seem that to regard capacity to marry after divorce inde-

¹²⁴ *Egerton v. Forbes*, [1812-14] Fac. Dec. 17, at 28 (2d Div. Ct. of Session 1812) (Robertson, L.J.).

¹²⁵ [1968] P. 314 (1967).

¹²⁶ [1964] 1 Ont. 430 (1963), *aff'd*, [1965] Sup. Ct. 148 (1964).

¹²⁷ [1968] P. at 314.

¹²⁸ [1951] P. 482.

¹²⁹ *Regina v. Brentwood Superintendent Reg'r of Marriages, Ex parte Arias*, [1968] 2 Q.B. 956 (Divorce Ct.), and see Chesterman, *A "Limping Divorce"*, 32 MODERN L. REV. 84 (1969). *Padolecchia* was relied on in the argument at page 962 of *Brentwood* but not in the judgment.

¹³⁰ Reliance was placed on *Caliaro's* case in the Swiss Federal Supreme Court on exactly similar facts, noted in 5 INT'L & COMP. L.Q. 144 (1956).

pendently of the validity of the divorce is contrary to the authority of the House of Lords in *Shaw v. Gould*,¹³¹ although the facts there were the other way around. The point was not, however, taken in either case.

Indyka v. Indyka, which was discussed in detail in the last annual review,¹³² has now been published with the arguments.¹³³ In subsequent cases at first instance this decision has generally been taken to establish that the English courts will recognize divorces granted in a jurisdiction with which the parties have a "real and substantial connection"—a ground nowhere advanced in argument in *Indyka* for recognition. On this basis English husbands have been granted seven reported declarations of the validity of divorces from originally foreign wives who had stayed, or gone back to stay, in their original homes, four¹³⁴ where the wife had been the petitioner there, and three¹³⁵ where the husband himself had been the petitioner, having followed his wife there for that purpose. Naturally there has been no appeal in any of these cases. Recognition was refused where both had gone back to their original country with no intention of staying there longer than was necessary for the divorce proceedings;¹³⁶ but there too no appeal was necessary because the English court itself granted the alternative prayer for a divorce. The rule in *Armitage v. Attorney-General*¹³⁷ has also been combined with the new rule, so as to recognize a divorce obtained in Nevada by a wife of Pennsylvanian origin who had gone back to Pennsylvania.¹³⁸ So far as appears from the report of this undefended petition, *Armitage*¹³⁹ was not actually cited, nor was any mention made of *Mountbatten v. Mountbatten*,¹⁴⁰ where a combination of *Armitage* with *Travers v. Holley*¹⁴¹ had

¹³¹ L.R. 3 H.L. 55 (1868).

¹³² MacKinnon, *Annual Survey of Canadian Law: Part I: Conflict of Laws*, 3 OTTAWA L. REV. 131 (1968).

¹³³ [1969] 1 A.C. 33 (1967).

¹³⁴ *Angelo v. Angelo*, [1968] 1 W.L.R. 401 (Prob. Div. 1967), doubted by Mann, *Recognition of Foreign Divorces*, 84 L.Q.R. 19, at 21 (1968) and by North, *Recognition of Foreign Divorce Decrees*, 31 MODERN L. REV. 257, at 278-80 (1968); approved by Webb, *Recognition of Foreign Divorces—The Post-Indyka Position*, 17 INT'L & COMP. L.Q. 209 (1968); *Tijanic v. Tijanic*, [1968] P. 181 (1967); *Brown v. Brown*, [1968] P. 518; *Alexander v. Alexander*, *The Times*, April 1, 1969, at 12, col. 3, and 119 NEW L.J. 344 (1969).

¹³⁵ *Blair v. Blair*, [1969] 1 W.L.R. 221 (Birmingham Assizes 1968); *Mayfield v. Mayfield*, [1969] P. 119 (1968), and see Note, 85 L.Q.R. 324, both doubted by Wade, "To be Resident Or Not To Be Resident"; *Recognition of Foreign Decrees of Divorce*, 32 MODERN L. REV. 441 (1969); *Turczak v. Turczak*, [1969] 3 W.L.R. 1046 (Prob. Div.)—a case where the validity of the divorce was admitted, but another matter contested—and see Karsten, *Maintenance and Foreign Divorces*, 33 MODERN L. REV. 205 (1970).

¹³⁶ *Peters v. Peters*, [1968] P. 275 (1967), approved by Webb, *Recognition of Foreign Divorces—The Post-Indyka Position*, 17 INT'L & COMP. L.Q. 209, at 212-15 (1968).

¹³⁷ [1906] P. 135.

¹³⁸ *Mather v. Mahoney*, [1968] 1 W.L.R. 1773 (Prob. Div.), and see Webb, *Recognition of Foreign Divorce Decrees—A Further Postscript To The Indyka Case*, 18 INT'L & COMP. L.Q. 453 (1969).

¹³⁹ [1906] P. at 135.

¹⁴⁰ [1959] P. 43 (1958).

¹⁴¹ [1953] P. 246 (C.A.).

been refused,—a refusal which gained the approval of Lord Pearce in *Indyka*.¹⁴²

Some of these cases refer to reciprocity (meaning the rule in *Travers v. Holley*)¹⁴³ as an alternative reason; but reciprocity does not work in reverse. It seems that at least in some circumstances the courts will decline jurisdiction for themselves where they would recognize it in a foreign court.¹⁴⁴ There have been two cases of Englishwomen leaving their foreign husbands and returning to England—just the circumstances in which a foreign divorce granted to a foreign wife would now be recognized—but in the former¹⁴⁵ it was said explicitly that *Indyka*¹⁴⁶ was no guide to the English court's own jurisdiction; and in the latter *Indyka*¹⁴⁷ was not even referred to, although the section defining jurisdiction begins: "Without prejudice to any jurisdiction exercisable by the court apart from this section . . ."¹⁴⁸ In the former case the wife obtained only judicial separation, and in the latter it was necessary to strain the three years' residence in England (prescribed by statute as necessary for jurisdiction to entertain a wife's petition) by counting in residence before marriage: this device seems not to have occurred to the wife's advisers in the earlier case.

In Canada the court's own jurisdiction¹⁴⁹ can hardly depend on anything but statute, now that it is exhaustively defined in sections 5 and 6(1) of the new Divorce Act.¹⁵⁰ There have been conflicting decisions on the requirement that the petitioner must have been "ordinarily resident" in a province for a year and "actually resident" there for ten months before presenting a petition there. It has been held in Manitoba¹⁵¹ that the ten months may be made up out of the whole period of residence (nineteen years in that case), but in Ontario¹⁵² it was held that the ten months must be found in the year of "ordinary residence" immediately preceding the petition. As a matter of grammatical construction the latter seems preferable.

In addition to residence the petitioner must be domiciled in Canada.

¹⁴² [1969] 1 A.C. 33 (1967). This point was discussed in note 132, at 141-42.

¹⁴³ [1953] P. at 246.

¹⁴⁴ Incongruous though this may seem, see MacKinnon, *Annual Survey of Canadian Law: Part I: Conflict of Laws*, 3 OTTAWA L. REV. 143 (1968). *LeMesurier v. LeMesurier*, [1895] A.C. 517 (P.C.), has then been repudiated only in respect of a foreign divorce with which it did not deal, and is still the law, subject to statute, for the domestic jurisdiction which it was in fact defining.

¹⁴⁵ *Sinclair v. Sinclair*, [1968] P. 189 (C.A. 1967).

¹⁴⁶ *Id.* at 218 (Willmer, L.J.), relying on the converse sentiments of Lord Reid in *Indyka*, [1969] 1 A.C. at 65, where he said: "But I would draw a distinction between the rules which govern the jurisdiction of our courts and the rules which determine the extent to which we should recognise foreign decrees. The former are statutory; . . ."

¹⁴⁷ *Navas v. Navas*, [1969] 3 W.L.R. 437 (Prob. Div. 1968).

¹⁴⁸ Matrimonial Causes Act, 1965, c. 25, § 40(1).

¹⁴⁹ There has been no decision on recognition of a foreign divorce except *Re Lesser*, 66 D.L.R.2d 486 (Ont. High Ct. 1968), appeal allowed by consent in 67 D.L.R.2d 410 (Ont. 1968), where the issue was estoppel.

¹⁵⁰ The Divorce Act, Can. Stat. 1967-68 c. 24.

¹⁵¹ *Wood v. Wood*, 2 D.L.R.3d 527 (Man. Q.B. 1968).

¹⁵² *Hardy v. Hardy*, 7 D.L.R.3d 307 (Ont. High Ct. 1969).

It has been held that where the petitioner is the wife it is not enough that her husband is domiciled in Canada: ¹⁵³ the independent domicile given her by section 6(1) ¹⁵⁴ is not a mere alternative to her husband's domicile. Thus a Frenchwoman coming to Canada to marry had to show (and did) that she herself then meant to stay in Canada forever. Since at the time of the petition she meant to leave Canada for good and go back to France, she was well advised to have waited, because once she had left in pursuance of her intention her Canadian domicile would have disappeared, in spite of her husband being Canadian.

Jurisdiction in nullity has once more been asserted by an English court ¹⁵⁵ on the ground of celebration in England—at least where the “marriage” was not voidable but void ¹⁵⁶—but engagingly, “since the jurisdiction is . . . anomalous, I cannot expect my decision to command international recognition.”

The suggestion in Dicey ¹⁵⁷ that the court's jurisdiction to grant a judicial separation may be derived from residence at the time of *de facto* separation has been repudiated by the English Court of Appeal; ¹⁵⁸ but residence at that time may be very material to a decision on the point which is essential to jurisdiction, namely the respondent's residence at the time of institution of proceedings. It was held that presence in the jurisdiction at that moment was not necessary, nor need the principal residence be there: a man may have only one domicile at a time, but any number of residences. Conversely, presence in the province of Quebec and personal service there will not give jurisdiction to a Quebec court to grant judicial separation where the respondent husband is domiciled in Ontario, and the last common residence was also there. ¹⁵⁹

The Supreme Court of Canada has held ¹⁶⁰ that jurisdiction to make a “provisional order” under the (Uniform) Reciprocal Enforcement of Maintenance Orders Acts ¹⁶¹ is founded on the residence of the petitioner alone, regardless of the respondent's residence or the place of the matrimonial offence. That was a case of a provisional order made in Toronto (where the wife had gone) which was refused recognition in Winnipeg, where the husband stayed and where (if at all) he had committed the constructive desertion founded upon. Chief Justice Cartwright pointed out that the statutory procedure was merely to save the wife from travelling to her

¹⁵³ Geldart v. Geldart, 3 D.L.R.3d 277 (N.S. Sup. Ct. 1969).

¹⁵⁴ The Divorce Act, Can. Stat. 1967-68 c. 24.

¹⁵⁵ Padolecchia v. Padolecchia, [1968] P. 314 (1967).

¹⁵⁶ For a voidable marriage Sir Jocelyn Simon P. submitted with some doubt to the authority of *Ross-Smith v. Ross-Smith*, [1963] A.C. 280.

¹⁵⁷ A. DICEY, *CONFLICT OF LAWS* 336 (8th ed. J. Morris 1967).

¹⁵⁸ *Sinclair v. Sinclair*, [1968] P. 189 (C.A. 1967).

¹⁵⁹ *Lawy v. Lawee*, [1969] Qué. B.R. 1146.

¹⁶⁰ *Bailey v. Bailey*, [1968] Sup. Ct. 617.

¹⁶¹ Man. Stat. 1961 c. 36, § 17. The Manitoba and the Ontario (ONT. REV. STAT. c. 346 (1960) also in question) Reciprocal Enforcement of Maintenance Orders Act are substantially the same.

husband's residence, and that "[t]o hold that a provisional order can be made only by a court which has jurisdiction to make a final and binding order of maintenance against the husband would be to defeat the whole purpose of this part of the legislative scheme."¹⁶² The court at Winnipeg had, therefore, to accept the Toronto proceedings as valid to that point, and continue from there.

*Morrissey v. Morrissey*¹⁶³ was a case where no objection was taken to British Columbian jurisdiction to make the "provisional order" in respect of a child; but when it came to the husband's Saskatchewan residence "confirmation" of the order was refused because the child was over sixteen. By the law of British Columbia¹⁶⁴ the husband was liable until his daughter was twenty-one, but by Saskatchewan law¹⁶⁵ he was not. Judge Frieze took the trouble to quote verbatim the provision that the husband "may raise any defence that he might have raised in the original proceedings if he had been a party thereto, *but no other defence*";¹⁶⁶ so his decision amounts to a finding that even in British Columbia the husband could have relied on the law of his own residence, namely, Saskatchewan.¹⁶⁷ The duty to maintain, then, is a substantive obligation, and not a mere creation of the court, with the result that it depends on the residence of the husband, and not on that of his wife or child.

VI. FOREIGN JUDGMENTS

Under the (Uniform) Reciprocal Enforcement of Judgments Acts¹⁶⁸ registration may be resisted by a respondent who would have "a good defence if an action were brought on the judgment."¹⁶⁹ This does not mean "a good defence to the original cause of action"; and at least in those provinces where a foreign judgment may not be challenged on the merits in an action brought on it, registration may equally not be resisted on that ground.¹⁷⁰ Where, however, the foreign judgment is erroneous on the face of it, an action on the judgment may be defended on that ground, and equally registration may be resisted. An example of this was found in a

¹⁶² [1968] Sup. Ct. at 625.

¹⁶³ 7 D.L.R.3d 174 (Sask. Dist. Ct. 1969).

¹⁶⁴ An Act to Amend the Wives' and Children's Maintenance Act, B.C. Stat. 1963 c. 53, § 2.

¹⁶⁵ Deserted Wives' and Children's Maintenance Act, SASK. REV. STAT. c. 341, § 2(1) (1965).

¹⁶⁶ 7 D.L.R.3d at 176, *quoting* the Reciprocal Enforcement of Maintenance Orders Act, Sask. Stat. 1968 c. 59, § 7(2).

¹⁶⁷ The "provisional order" set out, under § 5(3)(a)(i), the grounds—one ground only—on which an order might be opposed, and this was not included; but Judge Frieze relied on the explicit dictum of Chief Justice Cartwright in *Bailey v. Bailey*, [1968] Sup. Ct. at 625, that such a list is not exclusive.

¹⁶⁸ Note that all provinces have substantially the same act.

¹⁶⁹ Reciprocal Enforcement of Judgments Act, B.C. REV. STAT. c. 331, § 3 (6)(g) (1960).

¹⁷⁰ *Re Guildhall Ins. Co.*, 69 D.L.R.2d 137 (Alta. Sup. Ct. 1968).

default judgment for capital and contractual interest before and after due date, only legal interest being due after due date,¹⁷¹ but not in a mere assertion that of two defendants, one personal and the other corporate, only the corporate defendant was liable.¹⁷²

Provided that the defendant was resident or doing business within the first court's territory, personal service on him of that court's process is not necessary to found registration elsewhere: "due" service is all that the act requires,¹⁷³ and this includes substituted service¹⁷⁴—presumably in any way authorized by the first court's rules. Conversely, if he is not so resident or doing business, personal service on the defendant even within the territory will not found jurisdiction—still less will service on him out of the territory.¹⁷⁵ The alternative ground of submission to the court is not available in Canada for registration proceedings unless it is in the face of the court—"during the proceedings."¹⁷⁶ In an action on a judgment, on the contrary, jurisdiction in the former court may be founded on an antecedent submission, though mere agreement to be governed by a country's law does not imply submission to its courts.¹⁷⁷ The question arose in *Hughes v. Sharp*¹⁷⁸ whether an Ohio judgment on cognovit could found an action in British Columbia, the defendant having by his agent guaranteed another's promise, and by the same document authorized "any attorney-at-law" to confess judgment in any court "of Ohio or elsewhere."¹⁷⁹ It was, however, denied by the defendant that his agent had authority to add such authority to confess judgment; and all that has been decided so far is that this is not a fit case for summary judgment.¹⁸⁰ There seems to be no difficulty over the principle that such a blanket submission gives jurisdiction, and that a resulting judgment, without actual notice to the defendant, will be respected.¹⁸¹

¹⁷¹ *Re Gacs*, 68 D.L.R.2d 345 (B.C. Sup. Ct. 1968).

¹⁷² *Re House of Colour v. Expert Decorators*, 70 D.L.R.2d 527 (B.C. Sup. Ct. 1968).

¹⁷³ B.C. REV. STAT. c. 331, § 3(6)(c) (1960).

¹⁷⁴ *Re Gacs*, 68 D.L.R.2d 345 (B.C. Sup. Ct. 1968).

¹⁷⁵ B.C. REV. STAT. c. 331, § 3(6)(b) (1960), or Reciprocal Enforcement of Judgments Ordinance, N.W.T. Ord. 1956 c. 82, § 3(3)(b). See *Traders' Group v. Hopkins*, 69 D.L.R.2d 250 (N.W.T. Terr. Ct. 1968), *aff'd*, 1 D.L.R.3d 416 (N.W.T. 1968).

¹⁷⁶ This was not noticed in *Traders' Group v. Hopkins*. Both Mr. Justice Morrow and the Court of Appeal found unnecessarily, and with respect, unconvincingly, that there had been no antecedent submission.

¹⁷⁷ This was not disputed in *Dunbee v. Gilman*, [1968] 1 N.S.W. 577, a proceeding under an identical statutory provision, except for the words "submit or agree to submit." The unsuccessful argument for registration was that in the phrase in the contract on which the action was brought—"This agreement is governed by and construed under the laws of England"—"governed" referred to the courts and "construed" referred to the laws.

¹⁷⁸ 70 D.L.R.2d 298 (B.C. Sup. Ct. 1968), *rev'd*, 5 D.L.R.3d 760 (B.C. 1969).

¹⁷⁹ *Id.* at 763-64.

¹⁸⁰ This was also the only decision in *Capital Nat'l Bank v. Merrifield*, [1968] 1 Ont. 3.

¹⁸¹ *Ritter v. Fairfield*, 32 Ont. 350 (Div. Ct. 1900); *Metropolitan Trust & Savings Bank v. Osborne*, 6 Ont. W.N. 226 (1910); both followed in *Harbican v. Kennedy*, [1937] 2 D.L.R. 541 (Man. K.B.).

Another point in the same case was whether moving to set aside the judgment obtained without knowledge of the defendants constitutes submission. It has been held in England¹⁸² that appealing in these circumstances does not constitute submission, by analogy from the principle that it is not submission to appear at first instance to protest the jurisdiction and no more.¹⁸³ This is in line with Canadian precedent,¹⁸⁴ but against a dubious English dictum:¹⁸⁵ none of this was noticed.

Consideration has twice been given in British Columbia to the effect of service on an agent of an out-of-province defendant as establishing the court's own jurisdiction. In the case of a corporation, so long as the agent is in the habit of doing the defendant's business within the province, it is immaterial that he did not represent it in the transaction in question.¹⁸⁶ In the case of a partnership, a mere employee may have "the control or management of the partnership business" in the province; taking photographs of race-finishes under a contract to do so is carrying on business; and the place where equipment is stored and photographs processed is a "place . . . of the business of the partnership," and the "principal place" if it is the only one.¹⁸⁷ Service on the employee at this place was, therefore, held good service.¹⁸⁸

Jurisdiction once obtained by the courts of New York over a defendant domiciled in Jamaica has been held to persist after his death against "temporary administrators" appointed by the New York Surrogate's Court. The appointment included permission to the plaintiffs to continue against them, and the trial court had then ordered that the action should so continue. The result was that judgment against them bound the estate in the hands of English administrators:¹⁸⁹ would a judgment in proceedings commenced against a representative in one country bind representatives in another?

Jurisdiction has been assumed in England to order specific performance by a purchaser of his contract to buy Scottish land—apparently the first reported instance in England of equity's action on the conscience of the defendant in a contract of purchase and sale of foreign land,¹⁹⁰ although it is common enough on this continent. Lord Justice Harman took occasion to explain that jurisdiction was taken because "the defendant is domiciled within

¹⁸² *N.V. Daarnhouwer & Co. H. M. v. Boulos*, [1968] 2 L.R. 259 (Q.B.), an action on a Sudan judgment.

¹⁸³ Preferring *In re Dulles' Settlement*, [1951] Ch. 842 (C.A.) to *Harris v. Taylor*, [1915] 2 K.B. 580 (C.A.), in so far as they differ: the discussion adds nothing to our understanding of this problem.

¹⁸⁴ *M'lean v. Shields*, 9 Ont. 699 (C.P. 1855); *Esdale v. Bank of Ottawa*, 51 D.L.R. 485 (Alta. 1920).

¹⁸⁵ *Guiard v. de Clermont*, [1914] 3 K.B. 145.

¹⁸⁶ *Destree v. Kamloops Moving & Storage*, 66 D.L.R.2d 710 (B.C. Sup. Ct. 1967).

¹⁸⁷ *Id.* at 716-17.

¹⁸⁸ *Miller v. Turf*, 8 D.L.R.3d 383 (B.C. Sup. Ct. 1969) applying B.C. Sup. Ct. R. O.48A, R.3.

¹⁸⁹ *In re Flynn* (No. 2), [1969] 2 Ch. 403.

¹⁹⁰ *West v. Dick*, [1969] 2 Ch. 424 (C.A.).

[the court's] jurisdiction. I say nothing about a case where the defendant is domiciled outside."¹⁹¹

But even where both parties were domiciled in Greece, and the dispute concerned Greek land, jurisdiction has still been assumed, even jurisdiction nakedly to declare title¹⁹²—unless indeed, in these proceedings under the Married Women's Property Act, it was meant that the husband in whose name the land stood was a trustee for his wife with whose money he had bought it. Personal jurisdiction was assumed on the ground of the parties' residence for a year and a half in England before the summons, and of the husband's presence in England when the summons was served on him. It was thought (without any ground in the report) that the decision would be respected and enforced in Greece.

The anomalous jurisdiction to bind persons who are not parties to the proceedings by a declaration that named persons are the heirs to an intestate domiciled in the territory¹⁹³ has found fresh expression in *Senkiw v. Muzyka*.¹⁹⁴ There the intestate died domiciled in Wisconsin, and his brother from Saskatchewan honestly informed the Wisconsin court that there had been other relatives in the formerly Polish Ukraine, but that he had not heard of them since the events of 1939. Without being asked to do so, the court presumed their death, and declared the applicant brother to be the sole heir. After the property had been brought to Saskatchewan, and this brother had died in his turn, claims were made against his estate by a sister and children of brothers who had not in fact been liquidated; but their claims were repelled. In the absence of fraud their only remedy, it was said, was to reopen proceedings in Wisconsin. And since they could no longer do that they were without a remedy.

An application by a defendant to stay proceedings on the ground that the plaintiff had bound himself to litigate elsewhere was thought in Ontario not to lie after unconditional appearance,¹⁹⁵ while in England¹⁹⁶ it was thought on the contrary that conditional appearance was inconsistent with such an application, for unlike an application to set aside service, a request for stay recognizes the court's jurisdiction. Both cases agreed that this was not like an application for stay based on a stipulation for arbitration,¹⁹⁷ and that the

¹⁹¹ *Id.* at 436.

¹⁹² *Razelos v. Razelos* (No. 2), [1970] 1 W.L.R. 392 (Prob. Div. 1969) and see *Chesterman, Foreign Land and English Equity*, 33 MODERN L. REV. 209 (1970).

¹⁹³ *Jones v. Smith*, 56 Ont. L.R. 550, [1925] 2 D.L.R. 790, where the plaintiff had been erroneously presumed dead in the previous proceedings in California. The origin of this principle is *Doglioni v. Crispin*, L.R. 1 H.L. 301 (1866), which was cited with *In re Trufort*, 36 Ch.D. 600 (1887); but in both cases the parties had been parties to the previous litigation, albeit (in *Doglioni*) in a different capacity.

¹⁹⁴ 72 W.W.R. (n.s.) 314 (Sup. Ct. 1970), *affg* 4 D.L.R.3d 708 (Sask. 1969), *affg* 65 D.L.R.2d 717 (Sask. Q.B. 1967).

¹⁹⁵ *May v. Reford*, 6 D.L.R.3d 288 (Ont. High Ct. 1969) (stipulation for Yugoslav law and courts on shipment from Yugoslavia).

¹⁹⁶ *The Eleftheria*, [1969] 2 W.L.R. 1073 (Prob. Div.) (shipment from Greece in Greek bottom, stipulation for Greek courts)—leave was given to appeal.

¹⁹⁷ *Despite The Cap Blanco*, [1913] P. 130 (C.A.).

court had, therefore, discretion;¹⁹⁸ but that normally stay should be granted. Mr. Justice Brandon in England gave a reason which falls strangely on modern ears accustomed to "justice in all the circumstances": the plaintiff had promised and he should be held to his contract. A mere balance of convenience will not displace this initial rule; but (in Ontario) the fact that there are other defendants (the stevedores) who are Canadian, and who are *prima facie* the parties responsible, was held to justify refusal to stay. In England it was thought to fortify the initial rule that the contract was governed by the law of the foreign court, which differed on the point at issue from English law. The foreign court, and particularly the foreign appellate court, would be in a better position to do justice.

The principle that a *lis pendens* abroad will found an application to stay the court's own proceedings if the continuance of both would be vexatious has received further special illustration in *The Putbus*,¹⁹⁹ where after a collision in Dutch waters the defendants had limited their liability by proceedings in Rotterdam, and had paid the amount into court there: English limitation proceedings would have produced the same figure. The plaintiff then arrested a sister ship in England and the defendants, after obtaining her release by furnishing security, now moved to release the security. The motion was resisted on the ground that the money in Rotterdam would be taken by the Harbour Authority, whose claim for clearing the channel was not liable to limitation. Once this was out of the way, the unfairness of holding two securities for the same debt was apparent, and the English security was released. On the other hand, no vexation was seen in a plaintiff proceeding simultaneously both in France, where he had obtained security by an interim attachment, and in England where he might hope for a speedier decision.²⁰⁰

In *Pasen v. Dominion Herb Distributors*²⁰¹ an action had been brought in Quebec between Quebec parties to restrain the marketing of certain medicines in Ontario and Manitoba. After an application for an interim injunction had been refused, the plaintiff tried again in Ontario, and the defendant replied by moving for a stay. Mr Justice Wilson in Ontario gave the defendant his stay, but only after granting the plaintiff his interim injunction. One would have supposed the plaintiff to be only too glad to have his action stayed on those terms; but he appealed, and the Ontario Court of Appeal, while unanimous in continuing the interim injunction (the defendant had also appealed, presumably first) continued the stay only by a majority.

Although there are no proceedings elsewhere, and no contract to submit to another court, it is not in doubt that the court has not merely discretion to stay, but power to dismiss an action before itself in "a very clear case of planned and deliberate vexation, harassment and oppression, and a

¹⁹⁸ *The Fehmarn*, [1958] 1 W.L.R. 159 (C.A. 1957).

¹⁹⁹ [1969] P. 136 (C.A.). The judgments contain devastating condemnation of the drafting of the English statutory provisions on the limitation of liability.

²⁰⁰ *Ionian Bank v. Couvreur*, [1969] 1 W.L.R. 781 (C.A.).

²⁰¹ 69 D.L.R.2d 651 (Ont. 1968), *affg* 67 D.L.R.2d 405 (Ont. High Ct. 1968).

plain attempt to abuse the process of [the] court";²⁰² but where the plaintiff belongs to the province in which he sues, it is not enough that the defendant belongs elsewhere, and has its records elsewhere, and the contract sued on is governed by the defendant's law, or even that other litigation on a different cause of action is in progress between the same parties in the defendant's court. One must not forget the basic principle that it is the right of every Canadian to have ready access to the courts and a man should not have to go a thousand miles or more to state his claim and present his case—at least where the defendant does business and has been served where it is proposed to sue it.²⁰³

²⁰² *Van Vogt v. All-Canadian Group Distribs. Ltd.*, 60 W.W.R. (n.s.) 729, at 738 (Man. Q.B. 1967) (Tritschler, C.J.), *aff'd*, 61 W.W.R. (n.s.) 704 (Man. 1967).

²⁰³ *Van Vogt v. All-Canadian*, 71 W.W.R. (n.s.) 535 (Man. 1969).