ANNUAL SURVEY OF CANADIAN LAW

PART 1

CONFLICT OF LAWS

*John Swan**

I.

Previous surveys in Conflicts have focused principally on developments in the law as they have occurred in cases and in statutes. This survey will, instead, focus mainly on the theoretical or methodological changes that have occurred or are taking place. No excuse is needed for such a focus, for the pace of change in many areas of conflicts has been such that it is now necessary to see where we have come from and where we might be going.

The development of new approaches to the conflict of laws has never been absent from the thoughts of conflicts scholars and, at the moment, there are a wide variety of new ideas competing for consideration. The implications of most of the ideas have not yet been fully seen, let alone developed. The effect of such rethinking has been to clear away many so-called traditional theories, but nothing has yet developed which offers a completely satisfactory alternative method to all the problems or to all the critics. In other words, the effect of the arguments of people like Cook, Currie and Cavers has been to get rid of the conceptual strait-jacket of the ideas of Beale and Dicey, but it is still too early to see exactly what the appearance of conflicts will be ten years from now.

The starting place for an analysis of Canadian conflicts theory must be the classic English theory. This view of conflicts has recently been comprehensively restated in a long article by Dr. Lipstein [1] and it is convenient to examine this restatement to point up the significant features of this approach. The foundation of the English approach to the conflict of laws is that the English court always applies English law. Support for this view can be found in a statement of Lord Mansfield in 1775 in the case of *Holman v. Johnston*: [2] "Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances . . . the law of the country where the cause of action arose shall govern." [3] Lord Mansfield's

* B. Comm., 1962, LL.B., 1963, University of British Columbia; B.C.L., 1965, University of Oxford. Professor of Law, University of Toronto.

[1] Lipstein, *Conflict of Laws 1921-1971: The Way Ahead*, 31 CAMB. L.J. 67 (1972).

[2] 1 Cowp. 342, 98 Eng. Rep. 1120 (K.B. 1775).

[3] *Id.* at 344, 98 Eng. Rep. at 1121 *as quoted by* Lipstein, *supra* note 1, at 67.

view was adopted by Dicey in his work on conflicts. Dicey, himself, flirted with the vested rights theory, but this theory never had the same effect in England as it had elsewhere. The consequence of this position (when Dicey's flirtation with the "vested rights" theory had been removed from his theory) is stated by Lipstein as:

> The court in England is invited, not to ascertain and to apply foreign law on its own motion when faced with a factual statement of claim, but to decide whether a claim brought in the light of some legal system can be sustained. It is for the parties to submit a claim based on some legal system, and it is for the court in England to determine whether the claim as framed according to foreign law is framed in accordance with that legal system which applies according to the English rules of the Conflict of Laws. In the end, therefore, a choice of law must be made, and it must be made according to English Private International Law, but the initiative lies with the parties who submit claims, counter-claims or defences which rely not merely on facts but combine facts with reliance on some foreign system of laws. [4]

This way of stating the basis for the English Conflict of Law requires an answer to the problem of determining the scope for the application of English law, the *lex fori*, and foreign law. The answer to the problem suggested by Lipstein is that English law can be regarded as primarily restricted to situations having a connection with England on personal and territorial grounds. This means that the English rules of Private International Law determine what foreign rule is applicable. [5] This position is put forward as a contrast to the narrower (and older) view that English law is capable of offering a solution to every problem that arises but that its applicability is restricted by the rules of the English Private International Law. The process of invocation of foreign law—the proof of foreign law as a fact—preserves the universal character of the *lex fori*. The court will fall back on the application of the *lex fori* if the foreign law has not been proved. The difference in the two approaches is said to be that, in Lipstein's approach, the courts are more willing to consider foreign law even though it may be operating on principles unknown to English law. Lipstein suggests that bilateral rules of jurisdiction and choice of law, *e.g.*, those rules applied in cases of adoption and in the common law rules on the recognition of foreign divorces, bear this out. [6]

The consequence of starting in this way is that rules for determining the application of foreign law have to be found or developed. The application of any kind of rule requires a process of classification—"do these facts fit under this rule or that rule"? The relatively informal (and even unconscious) process of classification in which a lawyer, either as solicitor, counsel or judge, engages in in any legal situation is raised in conflicts analysis to the level of an essential and identified step in the process. This is known as the process of "characterization". It should be noted that there is no

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[4] *Supra* note 1, at 71.
[5] *Id.* at 76.
[6] *Id.* at 76-77.

logical necessity for the specific conflicts process of characterization to follow from Lord Mansfield's position. The process is necessary in English conflicts analysis because of the kind of conflicts rules which have been adopted. Ehrenzweig, for example, could accept the starting point of Lord Mansfield without accepting the kind of rules that were developed in England to determine the applicability of foreign law.[7] The fact that Lipstein regards the process of characterization as an essential first step is an illustration of the consequences of having the kind of rule that he sees as appropriate in choice of law issues. If the rules were different in operation then the process of characterization would be changed. So long as choice of law rules are expressed in the form, "The essential validity of a contract is governed by the proper law of the contract", it will be necessary to determine both what is a contract question (as opposed, say, to a torts question) and what is a question of essential validity (as opposed to a question of, say, remedy).

It is sufficient for our purposes here to see that in the theoretical model for the operation of conflicts rules put forward by Lipstein the process of characterization is expressly identified as a necessary step in the analysis. The justification for this is found in the following way. The plaintiff can only be presenting his claim on the basis of the rules of some legal system. If he is relying on the rules of some foreign legal system, then the court must be able to determine which rule of English Private International law applies so as to decide whether English law or the foreign law is applicable. English choice of law rules are framed in terms of legal categories, such as contracts, torts, immovable property, procedure, and the like, and so, to permit a "comparison" of English law, the *lex fori*, and the foreign law in terms that are equivalent, the issue presented by the case must be fitted into a single legal category. Each category, *e.g.*, contracts, automatically supplies the court with a rule expressed in terms of a "connecting factor"—a link with either English law or a foreign law—, *e.g.*, "the essential validity of a contract is governed by the proper law of the contract". Once the legal category is determined, all that remains is to discover the proper law. This will then determine what law will govern the contract. The process of allocating an issue to a legal category is the process of characterization. A great deal has been written about this process and disputes have raged for years over what it is that is characterized and with reference to what legal system should the process be carried on.

Lipstein rejects characterization by the *lex fori* or the *lex causae* and, instead, suggests that the process goes on in the following way:

> The courts analyse the nature of a claim (or defence) expressed according to foreign (or English) law in the light of the function (not the technical connotation) of that rule within the particular legal system. They relate

[7] A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW *passim* (1967).

> the claim so analysed to that among their conflicts rules, which, upon a broad interpretation (not restricted to notions of English domestic law), is capable of covering the claim in question.[8]

The result of the analysis which has so far been presented is in accordance with many of the writers who may be said to support the classical English view of the operation of Conflicts.[9] The process resembles in many respects the operation of a telephone system. A dispute is presented to a court. The parties put in evidence not only the operative facts—the contract, the injury or whatever might be in issue—but also the possible foreign rules. The court first chooses from among the possible labels available to characterize the claim, and, having done this, the process is then largely automatic. The characterization of the claim produces the choice of law rule and that leads to the application of the rules of one of the competing jurisdictions. The temporal sequence involved in this process is important. Lipstein emphasizes the fact that the parties must put in the evidence on which their claim that foreign law applies is based before the process can begin. Once this evidence is in, then, and only then, can the process of characterization be started and the choice of law be finally made.

The theoretical basis for conflicts just outlined makes it clear that the process of characterization is fundamental. In practice, of course, the process is implicit rather than explicit. This is because in the bulk of cases there is no need to worry about the applicable label since the whole case fits obviously into the slot called, say, contracts or torts. Or the issue is seen so clearly to be, for example, a matter of procedure, that no discussion ever occurs about an alternative label.

There remain a number of subsidiary problems which must be dealt with. Once the court has decided that the law of a particular jurisdiction should be applied, it is necessary to determine what the foreign law is. The problem is stated by Lipstein who says:

> If the parties lead conflicting evidence the court must determine the disputed question of foreign law. The evidence may be conflicting because one party proves foreign domestic law while the other proves foreign domestic law coupled with foreign Private International Law which leads

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[8] Lipstein, *supra* note 1, at 79. This process is said to have been followed by Uthwatt, J., in *Re* Cohn, 114 L.J. Ch. (n.s.) 97 (1944), and by Scarman, J., in *Re* Estate of Fuld (No. 3), [1968] P. 675, [1965] 3 All E.R. 776 (1965).

[9] *See* J. FALCONBRIDGE, ESSAYS ON THE CONFLICTS OF LAWS (2d ed. 1954), where he accepts the theoretical model put forward by Lipstein. He regards characterization as part of the sequence of events that must take place in any conflicts case. J.-G. CASTEL, CANADIAN CONFLICT OF LAWS (1975), and J.-G. CASTEL, CONFLICT OF LAWS, CASES, NOTES AND MATERIALS (3d ed. 1974), which adopts Falconbridge's analysis in large part. It is not possible to say whether Castel accepts Falconbridge's theoretical model, or Lipstein's, or one of the newer theories under which characterization as an essential and identified process ceases to exist, since his outline of the process does not acknowledge the link between the kind of choice of law rules adopted by Falconbridge and Lipstein but, for example, rejected by R. LEFLAR, AMERICAN CONFLICTS LAW (1968), and D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965) [hereinafter cited as CAVERS].

> to a reference back to the *lex fori* or on to a third legal system. In this situation, the English court is compelled to determine, as a question of English Private International Law, what is, in its view, the correct solution according to the foreign *lex causae*. Now it would appear that in principle the parties must prove how the particular dispute involving a foreign element which is before the English court, would be decided by the foreign law which is the *lex causae*. The parties are not called upon to prove how a similar case would be decided by the foreign *lex causae*, if no foreign element were involved. To hold otherwise would mean to allow proof of foreign law as applied to a hypothetical case, while what is required is proof of the hypothetical judgment of the foreign court in the actual case before an English court. In short, it would appear that an English court must accept that evidence which purports to show how a dispute involving identical facts, and therefore a foreign element, would be determined by the foreign law which is applicable according to English Private International Law. It follows that an English court is bound to accept foreign rules of Private International Law as part of the evidence of foreign law. English law is, of course, free to reject *renvoi* explicitly, and the question discussed above in what circumstances *renvoi* is admitted is only the reverse of the question when it is excluded. It is a question of practical convenience and not of legal theory. [10]

In regard to the "question of practical convenience" mentioned by Lipstein, the view has been that *renvoi* is applicable in regard to the validity of marriage, distribution of estates on death, including the validity of wills, but not in regard to contracts. Lipstein says no more than has been quoted on the scope of *renvoi* and on the reasons for its application, or invocation. As presented here, the doctrine would appear to be an inescapable consequence of the reference to foreign law. [11]

There are two further theoretical problems discussed by Lipstein, the Preliminary Question or *Datum* [12] and Conflict of Laws in Time. [13] The first of these is also referred to as the Incidental Question. We have, of course, in Canada, one of the classic cases involving this particular problem: *Schwebel v. Ungar*. [14] The facts were that a husband and wife, married in Hungary where they had been living, were divorced by a Jewish Rabbinical decree in a refugee camp in Italy on their way from Hungary to Israel. They both subsequently came to Israel where the divorce was recognized as valid. The wife came to Ontario and married. In proceedings for nullity of this marriage it was held by the Supreme Court of Canada and the Ontario Court of Appeal that even though, under the normal rules the divorce would not be recognized, the marriage was valid. An argument involving the incidental question could have proceeded along these lines: the main question facing the court was the validity of the wife's second marriage; her capacity to enter into this marriage would be governed by her ante-nuptial domicile.

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[10] *Supra* note 1, at 84.

[11] Objection to this point of view will be discussed later. See text *infra* between notes 33-43.

[12] *Supra* note 1, at 90-96.

[13] *Id.* at 96-100.

[14] [1965] Sup. Ct. 148, 48 D.L.R.2d 644 (1964).

If this were Israel, (either because she would, if a *femme sole*, have had one there, or, because being still married to her first husband, she had a domicile of dependence there), then that law could be regarded as determining the incidental question, *i.e.*, whether the divorce in Italy was valid. What has happened is that the question of the validity of the divorce which could have been governed by the normal conflicts rules (not formally choice of law rules) of Ontario is now governed by a different system of law.

The question of the validity of the Italian divorce is regarded as an incidental question because the Canadian courts are prepared to defer to the Israeli solution to that question since the main question is governed by Israeli law. It is clear that the determination of what is an incidental question involves some judgment, and Lipstein suggests that the question depends on how important the forum regards the issue and suggests that here the test is the same as that raised by the issue of *renvoi*, *i.e.*, the issue is one of practical convenience and not one of legal theory. The existence of the problem posed by the incidental question is very much an inevitable consequence of the approach put forward by Lipstein, just as the problem of *renvoi* is a logical consequence of the traditional formulation of choice of law rules. The problem arises in any particular case because the parties base arguments on the appropriate foreign rules.

The separation of issues into a main question and an incidental question can result in inconsistent results. If, for example, the wife's first husband had been living in Ontario when she remarried, the court would have had to face the issue of the validity of the Italian divorce directly and would not have been able to refer that question to a foreign law. The legal effect of the divorce will then vary depending on what legal system supplies the test of validity.

The way in which foreign law is made relevant in this approach differs from that when foreign law is relevant as a *datum*. There are two clear examples of cases where this can happen. [15] The first is where foreign rules of the road are made relevant to determine if a defendant in a tort action has been guilty of negligence to the plaintiff. The choice of law issue may determine whether the plaintiff has a cause of action if it is determined that the defendant was negligent, but the issue of negligence involves the consideration of foreign law as much as it involves the determination of the way, for example, the defendant was driving. The second is when foreign law becomes relevant under rules regarding frustration of contracts. An excusing condition might be the existence of illegality by a foreign law. Foreign law here is simply a relevant fact just as the outbreak of war, the closing of the Suez Canal or the burning down of a theatre is a fact to be taken into account in any ordinary contracts case. [16] The incidental question

[15] Lipstein, *supra* note 1, at 95-96.

[16] There might be some difficulties with this way of presenting the problem for, Lipstein states, in cases of contract, it can be argued that foreign illegality may only be relevant as a *datum* if the law governing the contract so requires. However, a case like Regazzoni v. K.C. Sethia (1944) Ltd., [1958] A.C. 301, [1957] 3 All E.R.

always involves a conflicts issue, either a choice of law issue or the issue of the validity of a foreign judgment.

The final theoretical problem discussed by Lipstein is that of the conflict of laws in time. [17] Lipstein divides the problem into three categories: "changes in the conflicts rules of the forum, changes in the connecting factor and changes in the *lex causae*". [18] The cases which have presented the problem have usually concerned the final category. The results of the cases has depended on whether the relationship between the parties is continuous or not. Changes in the *lex causae* should be given effect to if the relationship is continuing over the period of the change, but not if the relationship is one which existed for only a short period or is executed. [19] Thus a contractual relationship may be subject to changes in the *lex causae* which occur before the contract is executed. [20] The fact that a contract is executed does not necessarily terminate the effect of the foreign law if the connecting factor changes so that a new basis for the application of foreign law is available which brings in the foreign law after the change. [21] The example provided by Lipstein is *Starkowski v. Attorney-General*, [22] where a marriage in Austria, invalid when performed, was retroactively validated by Austrian legislation, passed while the parties were still domiciled in Austria, though actually taking effect only when they had left and were both domiciled in England. Austrian law would normally have been relevant only as the *lex loci celebrationis*, but the legislation validating the marriage was applied, since, at the time it was passed, the parties were still subject to Austrian law by virtue of their being domiciled in Austria. Lipstein suggests that the result would have been different if the parties had left Austria before the passage of the validating legislation [23] because in that case, they would not have been domiciled there at the relevant time.

It is possible to consider the developments that have taken place in the approach to conflicts as arising from defects and criticisms of this model. The wide variety of different approaches that one now finds will be examined against the background of this classical view of conflicts.

The single most influential work in conflicts in England and in Canada has been the successive editions of Dicey (now Dicey and Morris)—*The*

286, [1957] 3 W.L.R. 752 (1957), is regarded as laying down a new rule of the English conflict of laws, such that a rule like the Indian one in that case is always relevant no matter what laws should govern the contract: Lipstein, *supra* note 1, at 96.

[17] *Supra* note 1, at 96-100.

[18] *Id.* at 96.

[19] *Id.* at 97.

[20] Legislation governing contracts may, for example, change the terms of a contract made before the legislation was passed. The case cited by Lipstein, *supra* note 1, at 99, is R. v. International Trustee for the Protection of Bondholders, [1937] A.C. 500, [1937] 2 All E.R. 164.

[21] Lipstein, *supra* note 1, at 99-100.

[22] [1954] A.C. 155, [1953] 2 All E.R. 1272 (1953).

[23] *Supra* note 1, at 99-100.

Conflict of Laws.[24] The theoretical approach offered in the latest edition of that work provides some interesting contrasts to the classical theory of Lipstein. Part One deals with what are termed "Preliminary Matters". This part includes in Chapter Three a discussion of characterization, and is a brief summary of the problem, the suggested theoretical solutions to it and an examination of some practical solutions which have been adopted. Dr. Morris, however, appears far from convinced that he has offered any definitive solution, and indeed, he seems to go quite a way towards a position where characterization becomes a device for either reaching results which are obviously desirable, or, from the opposite point of view, avoiding results which are absurd. Thus he discusses a number of cases where the result of following the process of characterization to its logical extreme is to reach results which he describes as being "in varying degrees absurd".[25] These results would be avoided, Morris suggests, if the court were to recognize that there was no real difference between its domestic law and the foreign law, and was, therefore, justified in applying its own law.[26] The significance of this argument is that characterization must be regarded, not as a logical necessity, but as a process which is only to be resorted to when the result of doing so is not absurd and, in fact, avoids an absurd result. In his textbook, *The Conflict of Laws*, Dr. Morris gives a slightly condensed version of the discussion of characterization in Chapter 3 in *Dicey and Morris*, but ends by saying:

> The reader who has read thus far may be disconcerted to discover that this chapter poses problems but does not offer solutions. The author begs indulgence. If he could recommend a solution of the problem here discussed with any degree of confidence, he would certainly do so . . . . [T]he problem of characterization does seem to have practical importance as well as academic interest; and some knowledge of its nature is essential for any serious student of the conflict of laws.[27]

In *Cheshire's Private International Law*,[28] the issue is presented more simply. Characterization (or, as it is termed there, "classification") is essential:

> What is meant by the "classification of the cause of action" is the allocation of the question raised by the factual situation before the court to its correct legal category, and its object is to reveal the relevant rule for the choice of law. The rules of any given system of law are arranged under different categories, some being concerned with status, others with succession, procedure, contract, tort and so on, and until a judge, seised of a foreign element case, has determined the particular category into which the

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[24] A. DICEY & J. MORRIS, THE CONFLICT OF LAWS (9th ed. 1973) [hereinafter cited as DICEY & MORRIS].

[25] *Id.* at 29. J. MORRIS, THE CONFLICT OF LAWS 491 (1971) [hereinafter cited as MORRIS].

[26] DICEY & MORRIS at 29.

[27] MORRIS at 491.

[28] P. NORTH, CHESHIRE'S PRIVATE INTERNATIONAL LAW (9th ed. 1974) [hereinafter cited as CHESHIRE].

> question before him falls, he can make no progress, for he will not know what rule for the choice of law to apply. He must ascertain the true basis of the plaintiff's claim. [29]

Cheshire advocates a liberal approach to the solution of the problem when the *lex fori* and the foreign law have different classifications. It is conceded that the starting point may be the classification of the *lex fori.*

> But, since the classification is required for a case containing a foreign element, it should not necessarily be identical with that which would be congenial to a purely domestic case. Its object in this context is to serve the purposes of private international law and, since one of the functions of this department of law is to formulate rules applicable to a case that impinges upon foreign laws, it is obviously incumbent upon the judge to take into account the accepted rules and institutions of foreign legal systems. [30]

As an example of the appropriate kind of solution, *Cheshire* offers the decision in *De Nicols v. Curlier,* [31] where, it is suggested, the court, "by its readiness to recognize a foreign concept, widened the category of contracts as understood by English internal law". [32] *Cheshire* does not discuss the problem that bothers Morris, *i.e.*, where, as a consequence of following the process of characterization, the result of a case would be regarded as absurd. [33] For *Cheshire* the process appears both necessary and sufficiently manageable and predictable to be an integral part of the conflicts process.

The only concession that Lipstein makes to non-theoretical limitations upon the structure that he proposes is in connection with *renvoi.* [34] In the hands of Dr. Morris, this concession appears almost to have swallowed the doctrine of *renvoi* completely.

> Much of the discussion of the renvoi doctrine has proceeded on the basis that the choice lies in all cases between its absolute acceptance and its absolute rejection. The truth would appear to be that in some situations the doctrine is . . . inconvenient and ought to be rejected. In some situations the doctrine may be a useful means of arriving at a result which is desired for its own sake; but often this is because the English conflict rule is defective . . . . On the other hand, in all but exceptional cases the theoretical and practical difficulties involved in applying the doctrine outweigh any supposed advantages it may possess. The doctrine should not, therefore, be invoked unless it is plain that the object of the English conflict rule in referring to a foreign law will on balance be better served by construing the reference to mean the conflict rules of that law. [35]

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[29] *Id.* at 42-43.

[30] *Id.* at 44.

[31] [1900] A.C. 21, 69 L.J. Ch. (n.s.) 109 (1899).

[32] CHESHIRE at 45.

[33] It is, for example, quite easy to regard the decision in De Nicols v. Curlier, *supra* note 31, as bad, if not quite absurd. The result is to give the widow more than she would get under French or English law if either were applied alone. This is done at the expense of the children. Lipstein, *The General Principles of Private International Law, in* 1 RECUEIL DES COURS 209 (1972), mentions this problem, but does not refer to *De Nicols v. Curlier.*

[34] See quote in the text at note 10 *supra.*

[35] MORRIS at 476, and in similar terms DICEY & MORRIS at 60-61.

The conclusion that *Morris* reaches is that the doctrine should be abolished,[36] although there may be a few cases where the advantages of the application of the doctrine outweigh the disadvantages.[37]

Cheshire takes much the same position as *Morris* and lists a number of objections to the doctrine, although conceding that there are a few areas where the application of the doctrine may be justified.[38] Both *Cheshire* and *Morris* discuss whether the doctrine should involve partial *renvoi* (*i.e.*, single return to *lex fori*) or total *renvoi*—the foreign court doctrine—where the English judge must decide the case as the foreign court would. This can involve a return to the *lex fori* and then a further remission to the foreign law. The conclusion which *Cheshire* comes to on this aspect of the doctrine is straight-forward: "The burden of the following pages is that [the foreign court doctrine] is objectionable in principle, is based upon unconvincing authority and cannot be said to represent the general rule of English law."[39] The strongest argument against the doctrine of *renvoi* (for the argument would apply both to total and partial *renvoi*) is that the doctrine conflicts with the policy of a rule for the choice of law. The example which *Cheshire* gives is the English rule that succession to movables is governed by the *lex domicilii* of the deceased. *Cheshire* argues that if this reference to a foreign law were to include a reference to the foreign choice of law rules, then the policy of the English rule regarding succession to movables would be subverted.

> The truth is that such a rule is based on substantial grounds of national policy. It represents what appears to the enacting authority to be right and proper, having regard to the sociological and practical considerations involved. The English principle, for instance, that an intestate's movables shall be distributed according to the law of his last domicil is founded on the reasoning that rights of succession should depend upon the law of the country where the deceased established his permanent home.[40]

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[36] DICEY & MORRIS at 66; MORRIS at 481. The language is identical in both places. *See also* J. FALCONBRIDGE, CONFLICT OF LAWS ch. 8 (1947), and also at 158 where much the same conclusion is reached.

[37] The cases where Morris says that *renvoi* should be applied are: title to land and moveables situated abroad; formal validity; and certain cases of transmission, *i.e.*, when the law referred to by the English choice of law rule would "defer" to the law of the third jurisdiction. The examples given are all from the area of succession to moveables: MORRIS at 61-63, 477-78. The principal difficulties in the application of the doctrine are the unpredictability of the result, the problem of the national law of the British subject and the so-called *circulus inextricalibus* or the endless oscillation between the laws of two jurisdictions: *id.* at 63-66, 478-80.

[38] CHESHIRE at 75.

[39] *Id.* at 63.

[40] *Id.* at 65. This must be one of the most extraordinary statements ever made in a conflicts book. It is difficult to see how without any idea of the content of a foreign rule, its application can be "based upon substantial grounds of national policy". This statement is identical to that in G. CHESHIRE & P. NORTH, CHESHIRE'S PRIVATE INTERNATIONAL LAW 61 (8th ed. 1970), except that there it was said that "rights of succession *in the nature of things*", should depend on the *lex domicilii*.

The problem of the incidental question does not fare any better in Dr. Morris's analysis:

> [The] cases show that the problem of the incidental question is not capable of a mechanical solution and that each case may depend on the particular factors involved . . . . Like the problem of characterization, the incidental question is seldom discussed by courts, but it does seem to involve a fundamental problem which is necessarily present in certain types of case [*sic*]. [41]

Cheshire reaches the same conclusion, *i.e.*, that the problem of the incidental question is not capable of any precise or logical solution but, nevertheless, exists. [42]

None of the conflicts writers who have been discussed appear to doubt the validity of the general approach to conflicts problems that have been outlined. The heart of the traditional choice of law process, the jurisdiction-selecting rules, discussed by *Morris* and *Cheshire* and by almost all the English and Canadian courts which have ever dealt with conflicts problems, are accepted as valid. It is important to remember that the choice of law rules come first. The form in which they are stated requires characterization. The fact that they are jurisdiction-selecting involves *renvoi*. This, in turn, leads inexorably to problems like the incidental question and the time factor.

It is not my purpose at this point to argue that jurisdictional rules are likely to work unsatisfactorily in practice. The fact that the traditional rules lead us into the theoretical problems which have been discussed should force us to reconsider the wisdom, or utility, of having such rules. If both characterization and *renvoi* are admitted to be both essential and insoluble surely we should rethink the steps which have led us to such a position. The second part of this survey will focus on new approaches to the choice of law process. Perhaps the single most attractive feature of these approaches is that the insoluble aspects of both characterization and *renvoi*, for example, disappear.

II.

There are a great many new theories about conflicts competing for attention or application. No judge who is asked to decide any conflicts case can, for long, be unaware of the fact that the theory which might, at first sight, be obviously applicable has been subjected to criticism by academics and even by other judges. For example, several members of the House of Lords in *Chaplin v. Boys* [43] referred to judgments of the New York

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[41] DICEY & MORRIS at 38; MORRIS at 496.

[42] CHESHIRE at 54-57.

[43] [1971] A.C. 356, [1969] 2 All E.R. 1085 (1969). The judgments of Lords Hodson, Wilberforce and Pearson all contain references to alternative theories. The judgment of Lord Wilberforce is, perhaps, the one which treats these ideas with the most sympathy.

Court of Appeals [44] and to the ideas of competing theoreticians. [45] Canadian judges have occasionally referred to similar new ideas. [46] It is the purpose of this survey to examine some of the formulations of the new approaches, to see how, in a few cases, the courts have applied them, and to consider some of the consequences of the adoption of some of them.

It is first necessary to see what was the principal defect of the traditional rules and what alternatives were then seen as being available to remedy these defects. One major difficulty in dealing with the various competing theories in the Canadian context is that the new theories are nearly all American and these were developed in response to traditional rules and approaches which are not wholly applicable to either the Canadian or English setting. The initial objections, for example, of Cook were made in response to the vested rights theory of Beale and Dicey. [47] Beale's vested rights theory was ultimately enshrined in the *Restatement of Conflicts* in 1934. [48] Dicey's vested rights theory was replaced by the editors of the sixth edition of Dicey's work in 1949. [49] It is perhaps because of the "high profile" of the first *Restatement* that the criticisms of it were so widespread and savage. Since there was no comparable statement of the rules and approach to conflicts in England, the spur to criticism was lacking. In addition, the particular choice of law rules proposed by Beale were so much

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[44] *E.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Kilberg v. Northeast Airlines Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965).

[45] For example, reference was made to Currie's ideas by Lord Wilberforce; and to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (proposed official draft, May 1, 1968), the views of the Reporter Reese, and reference was made to several of the leading American cases by Lords Hodson, Wilberforce and Pearson: [1971] A.C. at 380, 389-93, 403-05, [1969] 2 All E.R. at 1094, 1102-05, 1114-15.

[46] One of the first was Currie, J., in Abbot-Smith v. University of Toronto, 49 Mar. Prov. 329, 45 D.L.R.2d 672 (N.S. Sup. Ct. 1964). Kirke-Smith, J., in the British Columbia Supreme Court has referred to these two theories in two cases: Gronland v. Hansen, 65 W.W.R. (n.s.) 485, 69 D.L.R.2d 598 (B.C. Sup. Ct. 1968), and LaVan v. Danyluk, 75 W.W.R. (n.s.) 500 (B.C. Sup. Ct. 1970).

[47] References to the various statements of the vested rights theory by both Beale and Dicey are to be found in Lipstein, *supra* note 1, at 67-71, in Lipstein, *supra* note 33, at 135-40, and CAVERS at 5-7.

[48] RESTATEMENT OF CONFLICT OF LAWS (1934).

[49] The statement made in that edition is:

> GENERAL PRINCIPLE No. 1—Any right which has been acquired under the law of any civilized country which is applicable according to the English rules of the conflict of laws is recognized and, in general, enforced by English courts, and no right which has not been acquired in virtue of an English rule of the conflict of laws is enforced or, in general, recognized by English courts: A. DICEY, CONFLICT OF LAWS 11 (6th ed. J. Morris 1949).

The significant addition is the words, "according to the English rules of the conflict of laws". These make it clear that the "rights" enforced are rights under the local law of the English forum. Dicey had earlier used the word "duly" as implying a limit on the vested rights doctrine by incorporating the limitation that the rights must "in the opinion of English courts" be enforceable in England: *see* Lipstein, *supra* note 1, at 67, and Lipstein, *supra* note 33, at 137.

more open to challenge than the equivalent English rules that the unsatisfactory nature of the latter were not so forcefully brought out.

For example, one of the most effective criticisms of traditional American choice of law rules was Currie's analysis of the famous case of *Milliken v. Pratt.*[50] In that case a married woman domiciled in Massachusetts offered to guarantee payment of a debt that her husband was about to incur for the price of goods. This offer was sent to her husband's creditor, a seller in Maine who, in reliance on the offer, shipped goods to the husband. The husband defaulted and the seller sued the woman in Massachusetts. Under Massachusetts law, a married woman could not enter into this kind of contract. Under Maine law, however, such contracts were enforceable. The court found that the contract had been made in Maine and that, under the applicable choice of law rule, Maine, as the place of contracting, governed the contract. The Court held that the plaintiff could recover on the contract of guarantee. Currie analysed the case in terms of the interests of Massachusetts and Maine and showed how the application of the traditional choice of law rules ignored the purposes of the competing rules of the two states.[51] It is easy to show that the use of the place of contracting as the connecting factor in the conflicts rule that contracts are governed by the place where the contract is made, operates in so haphazard a manner that the protection of the relevant interests of Maine or Massachusetts will be left almost entirely to chance. In contrast, the use of the English rule that the law to govern a contract is the proper law of the contract avoids some of the problems that Currie saw in the use of Beale's ideas. For example, the determination of the proper law—"the law with which the contract has its closest and most real connection"—gives a court sufficient flexibility that it could, under the guise of an objective determination of the proper law, protect one or other of the interests represented by the respective rules. The result of this is that it is less likely under the English rules that an absurd result will be reached in any contracts case.[52] By way of contrast to the rules in contracts, the operation of the English choice of law rules in marriage are as mechanical as Beale's rules in regard to contracts. For example, the rule is that the formal validity of a marriage is determined by the *lex loci celebrationis.* Courts have had to find ways to avoid the undesirable results which the application of this rule would involve.[53] The problem has been much less in contracts cases where the courts have had the

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[50] 125 Mass. 374 (1878). The analysis is found in Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method,* 25 U. CHI. L. REV. 227 (1958), *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 77 (1963).

[51] B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 119 (1963) [hereinafter cited as CURRIE].

[52] The capacity of English courts to reach sensible results in contracts cases is, I think, borne out by an analysis of the cases. This is not to say that the reasoning is always satisfactory.

[53] *See, e.g.,* the "common law" marriage cases like Taczanowska v. Taczanowski, [1957] P. 301, at 314, [1957] 2 All E.R. 563 (C.A.), *rev'g* [1957] P. 301, [1956] 3 All E.R. 457 (1956); DICEY & MORRIS rs. 33(2) & 33(3), at 234-35, 241-46.

necessary flexibility to justify the application of the "right" rule—or, at least, the application of the rule which would lead to the right result.

Much the same process occurred in torts. The vested rights view that the law of the place of the wrong must necessarily apply was never extensively applied in English or Canadian courts. Instead the *lex fori* was usually applied under the rules of *Phillips v. Eyre*,[54] with the foreign law only occasionally becoming relevant as a defence to a cause of action founded on English law.[55] The result of this was that the courts could justify their "homing instinct" and feel quite happy applying their domestic law and, again, the possibility of absurd results was reduced, though by no means eliminated.[56]

The actual choice of law rules which were developed by the English courts, and their application, often led to the reasonable resolution of the disputes that came before the courts—at least in the areas of contracts and torts. Because of this, the pressure for change was far less. This is, however, not to say that many of the criticisms which were developed against the first Restatement are not applicable to the English and Canadian rules, but merely to suggest that the English choice of law rules have always permitted a covert "result-selective" approach.

The arguments of Cook[57] against the vested rights theory and in favour of the "local law" theory—the theory that any court only applied its own law and not the law of the foreign jurisdiction—had a considerable influence on the theory of the conflict of laws. As has been mentioned, the vested rights theory is now dead. This particular argument did not have any direct effect on the basic approach to conflicts problems. Cook, for example, still adopted a method of analysis which used a jurisdiction-selecting rule like domicile.[58] His analysis of domicile, however, had the result of

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[54] L.R.6 Q.B. 1, 40 L.J.Q.B. (n.s.) 28 (Ex. Chambers 1870). The choice of law rule in torts is the "Rule in *Phillips v. Eyre*": "First, the wrong must be of such a character that it would have been actionable if committed in England . . . . Secondly, the act must not have been justifiable by the laws of the place where it was done": *id.* at 28-29, 40 L.J.Q.B. (n.s.) at 40. The development of this rule in the courts has given the predominant effect to the first part of the rule—actionability by the *lex fori*. Again, the cases bear out the contention that English domestic law will be applied in most torts cases.

[55] The Canadian cases of Walpole v. Canadian N. Ry., [1923] A.C. 113, 92 L.J.P.C. (n.s.) 39, 70 D.L.R. 201 (P.C. 1922), and McMillan v. Canadian N. Ry., [1923] A.C. 120, 92 L.J.P.C. (n.s.) 44, 70 D.L.R. 229 (P.C. 1922), are examples of the application of the Workmen's Compensation Act of a province in whose jurisdiction the cause of action took place being utilized to dismiss the action in another province.

[56] *See, e.g.*, Machado v. Fontes, [1897] 2 Q.B. 231, 66 L.J.Q.B. (n.s.) 542 (C.A.). It is interesting that the most absurd cases of all are two Scottish cases where the Court of Session refused to follow *Machado v. Fontes*, gave equal force to the *lex fori* and the *lex loci deliciti*, and thought that it was being progressive: M'Elroy v. M'Allister, [1949] Sess. Cas. 110 (1948), and Mackinnon v. Iberia Shipping Co., [1955] Sess. Cas. 20, [1954] 2 Lloyd's List L.R. 372 (1954).

[57] W. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).

[58] *Id.* at ch. 7.

making it much less of an abstract connecting factor. Cook suggests, for example, that "domicile" may mean one thing, or be interpreted in a particular way, in a case involving a marriage and quite another thing in a tax case.[59] The concept of domicile is then no longer unitary; it expresses the quality of an individual's connection with a certain jurisdiction *for a particular purpose* and there is no reason to assume that the same quality of connection is relevant or appropriate for another purpose. The consequence of this analysis is that the objections to domicile as an inappropriate device for determining the application of particular rules are diminished, since the concern for purposes of the inquiry permits the concept of domicile to be used in a "result-selective" way.

The attacks on the theory and methodology of the first *Restatement* were carried on by many writers almost from the time that it was first published. The arguments of Currie and Cavers as they were developed undercut completely the basis not only of the *Restatement*, but also any choice of law theory which involved a choice between the rules of jurisdictions, as opposed to a choice between the actual rules that were in conflict. It is this fact which makes their theories relevant in the Canadian context. I have shown that the traditional approach—the process of characterization, the selection of the connecting factor and the determination of the jurisdiction whose law *governs* the issue—involves the use of "connecting factors". These "connecting factors"—the proper law of a contract, the domicile of an individual, the situs of property—operate like a telephone exchange connecting the case to a particular jurisdiction. This kind of approach is termed by Cavers, a "jurisdiction-selecting" approach and his argument and that of Currie is that this kind of approach is wrong.[60]

The reason why the approach is wrong is that it obscures the policies behind the competing rules. Rules exist to serve social ends and these must be considered for a rational choice between two competing rules. There are two aspects to this problem. The first is that the examination of the competing policies behind rules may disclose that there is, in fact, no need to choose between them. This may be regarded as the negative contribution of the analysis of Currie and Cavers; it shows that the traditional choice of law process makes the problem of choosing far harder than it need be. For example, in the Canadian case of *McLean v. Pettigrew*,[61] (which is the exact equivalent of the most famous case in Conflicts, *Babcock v. Jackson*),[62] the choice between Ontario law and Quebec law could have been made on the basis that the purpose behind the Ontario rule regarding

[59] *Id.* at 197.

[60] CAVERS at 9, and the references therein cited; CURRIE at 119.

[61] [1945] Sup. Ct. 62, [1945] 2 D.L.R. 65 (1944). An action was brought in Quebec for injuries caused to a gratuitous passenger by the negligence of the driver of an automobile. The trip began and was to have ended in Quebec, but the accident happened in Ontario. At that date the Ontario Highway Traffic Act, ONT. REV. STAT. c. 288, § 47(2) (1937), gave complete immunity to the driver for any injuries suffered by a gratuitous passenger. Quebec had no such rule.

[62] 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

guest passengers [63] would not have been forwarded by its application in that case and so there was, quite literally, no need to worry about the application of Ontario law. The second aspect is the positive contribution of the new theories. How is the choice to be made when the choice has to be made, when the conflict is not a "false conflict", as in *McLean v. Pettigrew*, [64] but a "true conflict". An example of a "true conflict" is provided by the case of *O'Connor v. Wray*. [65] There the purpose behind the Ontario rule would have been forwarded by its application and the purpose behind the Quebec rule would have been forwarded by its application. The result was that the Quebec rule was applied because, under the relevant choice of law rule, the "Rule in *Phillips v. Eyre*", [66] *i.e.*, the *lex fori* was applied. [67] All the newer theories must, ultimately, be tested by how well they solve the problem of true conflicts, but I think that a great contribution can be made to conflicts analysis by showing the existence of false conflicts. This provides a method of resolving simply and satisfactorily the vast bulk of conflicts cases. The ones that will remain will be difficult, but there is no reason to assume that an approach which hides the difficulties is likely to offer any more defensible an approach than one which acknowledges them and brings them out for analysis.

Almost all variations of the alternative theories which have been offered as replacements for the traditional jurisdiction-selecting rules are agreed on the approach that should be taken to false conflict cases. Most of the leading cases in every choice of law area in conflicts are false conflict cases. It is, however, important to notice that this conclusion is shown by a variety of techniques or ways of comparing the competing rules.

A case that is too simple for argument is the Privy Council case of *Vita*

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[63] There has been much speculation about the purpose of the guest passenger provision of the Ontario Highway Traffic Act, ONT. REV. STAT. c. 202, § 132(3) (1970). The most recent discussion is by Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150 (1973). Baade points out that the section of this Act is the best known Canadian Act in the U.S.—outstripping by far the knowledge of the B.N.A. Act.

[64] *Supra* note 61.

[65] [1930] Sup. Ct. 231, [1930] 2 D.L.R. 899. An action was brought in Quebec for damages for injuries suffered by a pedestrian who had been knocked down in Ontario by a car driven by an employee of the defendant. The plaintiff's claim was based on the Ontario Highway Traffic Act, Ont. Stat. 1923, c. 48, § 42, which imposed vicarious liability on the owner in these circumstances. The law of Quebec had been amended in 1912 to remove such liability from the owner. The plaintiff was domiciled in Ontario and the defendant in Quebec. The purpose of the Ontario Act was to protect Ontario pedestrians and the purpose of the Quebec Act to protect Quebec owners.

[66] *Supra* note 54.

[67] The Supreme Court of Canada applied *Phillips v. Eyre* even though the action was brought in Quebec and though a different rule could have been followed in the civil law. The only cases referred to were the traditional English cases.

Foods Products, Inc. v. Unus Shipping Co. [68] That case is always cited for the proposition that the choice of governing law by the parties should be given effect to—the proper law of the contract is the law chosen by, or intended by, the parties. In fact, the court found that both of the possibly applicable laws—Newfoundland and England—agreed on the result that the bills of lading were not illegal. The choice was unnecessary because both rules were the same. No change in approach is necessary to reach this conclusion.

The case of *McLean v. Pettigrew*, [69] on the other hand, presents what might be regarded as a formal conflict. The Ontario rule appears to deny the plaintiff any right to recover. However the interpretation of the relevant statute discloses that there is no reason for its application to defeat the claims of the plaintiff for compensation from the negligent defendant. The case when litigated in Quebec will be analysed as a conflicts case and the "false conflict" disclosed. If the case were litigated in Ontario it is quite clear that the plaintiff's claim would be dismissed. This is quite illogical and should not follow. The purpose of the Ontario rules is not dependent on the forum. The trouble with the traditional approach in this case is that the significance of the conflicts aspects is hidden. The conflicts aspects would not be hidden but ignored if, through some misfortune, a Quebec plaintiff were to sue a Quebec driver in Ontario for an accident occurring in either Ontario or Quebec. Then the first rule in *Phillips v. Eyre* would apply to exclude any foreign facts and the case would be treated as if it were an entirely Ontario case. [70] The traditional approach thus allows different results to be reached when only the forum is changed.

The problem which these cases raise is analytically similar to the problems of *renvoi* discussed by the traditional theorists. *Renvoi* is presented as the problem of deciding the "amount" of foreign law that may be referred to. Lipstein, for example, regards the forum as "bound to accept foreign rules of Private International Law as part of the evidence of foreign law". [71] *Morris* and *Cheshire* regard *renvoi* with considerable disfavour and, in general, suggest that its application be severely restricted. [72] But if the in-

[68] [1939] A.C. 277, [1939] 1 All E.R. 513 (P.C.). An equally simple case is Sayers v. International Drilling Co., [1971] 3 All E.R. 163, [1971] 1 W.L.R. 1176 (C.A.). There the only issue before the court was the interpretation of an English Statute. The court had the simple job of deciding on the scope of the act. There could be no choice of law question. The act either applied or it did not, and if it did then the contract was unenforceable.

[69] *Supra* note 61.

[70] There are many cases supporting the proposition that, under the first rule in *Phillips v. Eyre*, the facts must be treated as if there were no foreign facts at all. This would appear to rule out even the possibility of, say, the domestic Ontario rule being interpreted in a restrained way so that it would not necessarily apply to a foreign plaintiff or defendant: *e.g.*, Gagnon v. Lecavalier, [1967] 2 Ont. 197, 63 D.L.R.2d 12 (High Ct.); Anderson v. Eric Anderson Radio & T. V. Pty. Ltd., 39 Aust. L.J.R. 357 (High Ct. 1965).

[71] *Supra* note 1, at 84.

[72] See text *supra* between notes 34-40.

terpretation of the Ontario law in a case like *McLean v. Pettigrew* be right, why is it not open to any court to conclude that the application of the statute should be limited to cases which do not have a foreign element? Or, to put it another way, why should foreign facts not be considered in the interpretation of a statute? If the reference to a foreign law discloses that, from the point of view of that law, its policies would not call for its application, why should a foreign court apply it? It makes no sense to say that under the doctrine of *renvoi* the foreign law won't be applied if the foreign court would not apply its own law in a few special cases—the cases where it is conceded that *renvoi* is possibly applicable—but will be applied in the majority of other cases. [73] In other words, the investigation of the Ontario rule in a case like *McLean v. Pettigrew* should disclose that in any case where its purposes are not going to be forwarded by its application, there is no reason to apply it and that this conclusion should follow no matter where the action is brought—Quebec, Ontario or British Columbia. So too, if the investigation of a case like *Re Annesley* [74] discloses that the French rule on succession is not intended to be applied and would not be applied by a French court to this testatrix, why apply it? In particular, why apply a rule which cuts down testamentary freedom for no good reason? *Renvoi* then can disclose a false conflict just as easily as the process of interpretation of a statute can.

A false conflict can also be disclosed by making foreign law relevant without going through a choice of law process at all. For example, the Canadian case of *Imperial Life Assurance Co. of Canada v. Colmenares*, [75]

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[73] The doctrine of *renvoi* has, as pointed out in the text *supra* between notes 38-39, two interpretations—partial or total *renvoi*. For the purposes of the argument here, I do not think that it matters much which of these is chosen, except that with partial *renvoi*, *i.e.*, remission or transmission once, the limited scope of the foreign rule is recognized. The problem is that the decision is made without any reference to the *effect* of the application of the doctrine.

[74] [1926] Ch. 692, 95 L.J. Ch. (n.s.) 404. The issue in this case was the extent of the testamentary freedom enjoyed by a testatrix who had died in France. French domestic law limited testamentary freedom by providing for fixed shares to go to the children of the testator or testatrix. English law had no such restriction. Russel, J., held that the testatrix was domiciled at her death in France, that by French law the relevant law to govern her capacity was her *lex patriae* (which was referred to as British law), that French law would accept the *renvoi*, and that, therefore, the testatrix's freedom is limited. The important point to notice is that the testatrix's freedom is limited without any good reason. The scope of the restrictive rule in French law did not extend to this testatrix. This could be justified on the ground that if the *lex patriae* allowed a testatrix to leave children destitute, that was fine with the French courts. The operation of the doctrine here cuts down a value normally forwarded by English law. This case is then quite different from the case where *renvoi* is used to make a marriage valid, *e.g.*, the arguments considered in Taczanowska v. Taczanowski, *supra* note 53.

[75] [1967] Sup. Ct. 443, 62 D.L.R.2d 138: An action was brought in Ontario for the cash value of two policies of life insurance issued in Cuba in 1947 by the defendant company on the life of the plaintiff, then a Cuban resident. The defence raised was that by Cuban law (passed after Dr. Castro came to power) payment to the plaintiff was illegal and could only lawfully be made in Havana from assets controlled by the Cuban National Bank.

was argued and decided on the basis of a choice of law process—what is the proper law of this contract? Most of the cases involving an inquiry into the proper law are cases where the validity of the contract is in issue, but the case did not involve any question of validity—no one was arguing that the contract was *invalid*. The only question before the courts was whether or not the prohibition on the payment of the cash value of the policies under Cuban law should be given effect. The relevance of Cuban law thus arises directly for, even if the contract was regarded as an "Ontario contract", the fact of the prohibition by Cuban law would be available to the defendant as an excusing condition. [76] The result in *Imperial Life Assurance Co. of Canada v. Colmenares* may well be right, but this will depend on the answer to the question whether Cuban law operates as an excusing event or not—not on whether the validity of the contract is "governed" by the law of Ontario or Cuba. The House of Lords did exactly what I have suggested should be done here in *Regazzoni v. K.C. Sethia (1944) Ltd.*, [77] where the foreign prohibition was made relevant, not through any choice of law process, but through the operation of the English doctrine of public policy. A case like *Imperial Life Assurance Co. of Canada v. Colmenares* presents the same kind of problem as that in a case involving the interpretation of a contract. In such a case there is no need for a choice of law in the traditional sense. [78] The process of interpretation involves the determination of the intention of the parties. It may well be that they have entered the contract in the context of the rules of one jurisdiction and that, therefore, these background facts must be considered in the investigation of their intention, but this is not the selection of the law of a jurisdiction to *govern* their contract; [79] it is simply relevant in the determination of what they intended the contract to mean.

If, in these cases, it can be shown that there is no need to resort to any choice of law process because, by examining the substance of the rules that might be relevant, we can see either that the application of one is not called

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[76] A. EHRENZWEIG, *supra* note 7, at 84, refers to the question of impossibility in contracts as involving the application of a rule as a *datum* and not by any choice of law.

[77] *Supra* note 16. The issue here was the applicability of provisions of an act of the Indian Government prohibiting trade with South Africa. The House of Lords held that the contract was unenforceable as being against English public policy. The proper law was held to be English, but it is difficult to see what that had to do with the question of the applicability of the Indian rule, since the Indian rule would have been applied whatever the proper law was.

[78] *E.g.*, R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 264 (1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204 (1971); A. EHRENZWEIG, *supra* note 7, at 82.

[79] DICEY & MORRIS r. 125, at 788: "The interpretation of a contract is to be determined in accordance with the proper law of the contract." Since the determination of the proper law, (for example under r. 146: *id.* at 721), is put in terms of the parties' express or implied intention unless no intention can be inferred, then r. 152 is likely to refer the court to the law against the background of which the parties may have intended to contract and by which they may have intended the interpretation of the contract to be determined.

for or that one becomes relevant no matter what the choice of law process may say, then we have found one way of making the analysis of conflicts cases far more simple. We have no need to go through the approach suggested by Lipstein, *Morris* or *Cheshire*. The process of characterization becomes nothing more than the normal (and largely unconscious) choice of categories as the basis for analysis, and cannot represent the logical and practical problems that have been mentioned. The doctrine of *renvoi* becomes part of the process of disclosing false conflicts in the same way that the process of interpretation of common law or statutory rules does this. [80]

In those situations where we can say that there is a false conflict, it is fairly easy to see that the correct result is obvious and that there is no need to go through a process of selecting some governing law. Surprisingly, the identification of true conflicts is not quite so easy. This is due to the fact that there is an intermediate stage between the simple "false conflict" and the "true conflict". The existence of this intermediate stage is found principally in the areas of contract and marriage. The reason for this intermediate stage is that in these areas most legal systems share a common basic approach. This is a presumption in favour of the validity of contracts and marriages. If a marriage or contract is to be held invalid then, generally speaking, the courts will in fact scrutinize the rule that would lead to invalidity very carefully. Therefore, if in a conflicts case a court has to decide whether a contract is valid or not, and it gives effect to an invalidating rule it will be subordinating the general concern for validity shared by both systems in favour of the particular concern represented in the invalidating rule. The traditional approach to conflicts has always formally ignored this fact and the proper law test, for example, makes no distinction between the choice of a validating or invalidating rule.

It has already been pointed out that the English choice of law rules in contracts are sufficiently flexible to allow the judge to find almost any law as the "proper law". [81] In almost all the classic cases in contracts where the question has been the issue of validity of either the whole contract or any clause in it, the courts have managed to uphold the agreement. [82] This

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[80] I have throughout made the assumption that, if in looking at a foreign rule, we find that it has a conflicts provision that would refer the particular case we are concerned with to another legal system (either remission or transmission), this represents a judgment as to the appropriate scope of that foreign rule. This is probably a reasonable assumption since we are allowing the foreign jurisdiction to interpret its own rule, and the *renvoi* issue is then nothing but the interpretation of a foreign rule by the standards of the foreign jurisdiction. That the doctrine of *renvoi* can have such a wide scope is exemplified by Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938).

[81] See text *supra* between notes 46-52.

[82] DICEY & MORRIS at 739, discusses very briefly the argument that the court will apply that law which would make it valid. In general, the conclusion is that the argument is of only very limited force. A very cursory survey of the cases discussed in DICEY & MORRIS as illustrations to the Rules contained in the section on "Contracts.

suggests that the courts are concerned about the different bases for the application of validating and invalidating rules. Sometimes the formal basis for the choice of the validating rule is put on the "fact" that the parties must have intended the contract to be valid. [83] If there were not such a tendency then the treatment of contracts in conflicts would be even more odd than it is, for agreements are, from the point of view of any legal system, going to be held to be valid if possible. [84]

The same policy or tendency is discernible in marriage. However, the conflicts situation is different there for two reasons. The first is that the choice of law rules are expressed in ways that cut down the discretion of the court to find an appropriate law to govern the issue of validity. [85] The second is that the problems which can arise from a marriage may not involve the orgiinal parties and may present issues that come up for decision many years after the marriage. But here, again, the courts have adopted a policy

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General Rules": *id.* at 721-806, suggests that DICEY & MORRIS is, in fact, wrong in its assessment of the significance of the argument in favour of the *lex validatis.* There are about 103 cases used as illustrations. Some of these are hypothetical and sometimes one case is discussed more than once. Of these 103, 35 do not raise any issue of validity, 21 present no need for any choice of law rule (many of these being cases of the application of English public policy or, like Vita Food Products, Inc. v. Unus Shipping Co., *supra* note 68, are cases where no jurisdiction wanted to hold the contract invalid). A further 18 are presented in such a way that it cannot be seen what kind of issue they raise. Of the remaining 29 cases, 22 are held to be valid and only 7 invalid. This is anything but a comprehensive analysis of the cases, but it does illustrate that there is a greater likelihood than not of the proper law being found such that the contract will be upheld.

CHESHIRE at 201-18, omits almost any reference to the presumption in favour of validity in the discussion of the doctrine of proper law. CHESHIRE at 211-12, lists twelve factors that the court must take into account and concludes by saying: "The fact that the contract, or a term thereof, is valid under one system of law . . . but void under another . . . is evidence, though not conclusive evidence, that the parties intended it to be governed by the law by which it was valid": *id.* at 212.

In the U.S., the argument has been frequently made that the courts should apply the *lex validatis. See, e.g.,* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 465 (1962); A. EHRENZWEIG, *supra* note 7, at 45; R. WEINTRAUB, *supra* note 78, at 284, 292.

[83] But in Ross v. McMullen, 21 D.L.R.3d 228 (Alta. Sup. Ct. 1971), the court said that the parties must have intended the law that made the contract *invalid* to be applied. That the parties "intended" any such thing is unlikely and to justify the application of the invalidating rule on this ground is absurd.

[84] It would be impossible for contracts to play the role they do in western society if there were not such a policy. To state the policy in these terms, however, is to avoid the problem of when the presumption may be said to arise. One can define a contract in a variety of ways ranging from a mere promise to a promise that satisfies the requirements of consideration etc. Obviously the more one puts into the definition the less scope one gives to the policy.

[85] The choice of law rules generally applicable here are that the *lex loci celebrationis* governs questions of formal validity and the *lex domicilii* of each party governs that party's capacity to marry: *see, e.g.,* DICEY & MORRIS rs. 33 & 34, at 234-35, 258.

in favour of upholding a marriage.[86] One must assume that this is an unconscious tendency, for it receives no support from the writers.[87]

The treatment of contracts and marriage cases must, therefore, be considered against a background which includes a strong policy in favour of validity. If this be acknowledged, then the problem of choosing between two competing rules becomes far easier. The question the courts must now ask is whether there is any good reason for holding a marriage or contract to be invalid. The onus is on the party arguing for the application of the invalidating rule to show that its application will forward the special concern of a jurisdiction to hold a contract or marriage invalid against the general pressure for recognition.

The major development of new theories has, of course, occurred in the area of torts. There the existence of basic common policies is far harder to find. However, even here arguments can be made that solutions to cases that, at first sight, involve a conflict, can be found by the use of common policies. It has been argued, for example, that the application of provisions like guest passenger statutes should be justified against a background policy of shifting losses caused by negligent conduct onto the defendant (or his insurance company).[88] Such an approach might offer a method for analysing a case like *O'Connor v. Wray*.[89] However, enough has been said to illustrate the scope of an analysis which focuses on the common policies of legal systems in the areas where it is most likely that common policies exist, and the problems in torts will be considered in the context of a discussion of the theories put forward to resolve true conflicts—the positive contribution of the new theories.

The analysis of true conflicts is the problem which has had to be faced by commentators and judges ever since the focus on competing rules that was developed after the first *Restatement* became familiar. There were relatively few true conflict cases that came before the courts, but the decisions in those that did, did not make the adoption of any one theory obviously the answer to all conflicts problems. There are two major themes in the theories

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[86] For example, CHESHIRE's suggestion that the choice of law rule to govern capacity is the law of the intended matrimonial house has only been applied by courts to hold marriages *valid*, not invalid: CHESHIRE at 335-39. *See, e.g.*, Radwan v. Radwan (No. 2), [1972] 3 All E.R. 1026, [1972] 3 W.L.R. 939 (Fam. D.), and the judgment of Van Camp, J., in Feiner v. Demkowicz, 2 Ont.2d 121, 14 R.F.L. 27, 42 D.L.R. 3d 165 (High Ct. 1973). Even Dicey's original rules have been distorted to allow for validation. For example, rule 34 is qualified by *Exception 3* to accommodate the decision in Sottomayer v. De Barros, 5 P.D. 94, 49 L.J.P. (n.s.) 1, [1874-80] All E.R. Rep. 94 (1879): DICEY & MORRIS at 272. *See also* Maddaugh, *Validity of Marriage and the Conflict of Laws: A Critique of the Present Anglo-American Position*, 23 U. TORONTO L.J. 117 (1973), and Swan, *A New Approach to Marriage and Divorce in the Conflict of Laws*, 24 U. TORONTO L.J. 17 (1974).

[87] CHESHIRE, for example, draws no distinction between the application of the "intended matrimonial home" theory to validate or invalidate a marriage: CHESHIRE at 337-39.

[88] Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, at 109 (1973).

[89] *Supra* note 65.

that have been developed. One theme—or set of theories—is derived from Currie's governmental interest analysis. The other, which also found some support in Currie, involves the application of forum law in every case unless it is displaced by an appropriate foreign rule. All these theories coincided in supporting the result in a false conflict case like *Babcock v. Jackson* [90] but they diverge once the cases move into more difficult problems.

The American cases have nearly all involved automobile accidents. The majority of these have raised problems of guest passengers. The remaining cases have concerned aircraft. It will be useful in testing the various theories which are competing for attention to examine in detail one Canadian case. The case is not recent but it does offer, I think, a better set of facts for analysis than most. The case is *O'Connor v. Wray.* [91] It is very easy to analyse this case as a true conflict on its facts. It can be made into an even more difficult case by altering the facts slightly by assuming that the defendant owner did not know that his employee was going to drive into Ontario. On the facts as they were presented to the Supreme Court of Canada and as the law was found by the majority of that Court, we have the Ontario rule providing that the owner of a motor vehicle is to be responsible for all violations of the Highway Trafic Act unless at the time of such a violation the vehicle was in possession of some person without the owner's consent. [92] The driver, Cochrane, had possession of the vehicle with the owner's consent. The rule in Quebec, as found by the majority of the Supreme Court, was that in such circumstances (assuming that all the facts had occurred in Quebec) the owner would not be liable. The application of *Phillips v. Eyre* resulted in the dismissal of the action. The first rule, actionability by the *lex fori*, could not be established.

What would happen under the various alternatives that now are available?

1. *Second Restatement.* [93] The provisions of this *Restatement* with respect to torts are as follows:

> § 145. *The General Principle*
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered. [94]

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[90] *Supra* note 62.

[91] *Supra* note 65.

[92] The Highway Traffic Act, Ont. Stat. 1923 c. 48, § 42.

[93] RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

[94] *Id.* at 414.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 6. *Choice-of-Law Principles*

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied. [95]

The section dealing specifically with vicarious liability is section 174 which merely provides: "The law selected by application of the rule of § 145 determines whether one person is liable for the tort of another person." [96] The application of sections 145 and 174 is given by Illustration 2 [97] which deals with the case facing the Supreme Court in *O'Connor v. Wray*, and suggests that the law imposing liability should be applied. The justification for this result depends on there being a relationship between the defendant and the other person which makes the imposition of vicarious liability reasonable and on whether or not there is a reasonable relationship between the defendant and the state whose local law is to be applied. The other cases discussed in the illustrations include not only the case (Illustration 2 [98]) where the owner authorizes the driver to go into the jurisdiction imposing liability, but also the case where the owner places no restrictions on the driver (Illustration 4 [99]) and the case where the owner forbids the driver to go into the other jurisdiction but knows that the driver has a pressing reason to go there (Illustration 5 [100]). In all these cases liability is imposed on the owner. The *Second Restatement* does not discuss the variation on Illustration 5 where the owner has no reason to know of the driver's pressing reason to leave the no-liability jurisdiction. In only one of the illustrations dealing with the situation where the "agent" moves to a liability state before committing a tort is liability not imposed on the "principal". This is the case where a husband is sued for a tort committed by his wife. The clue to this result is found in the description of the rule imposing liability on the husband for his wife's tort as the "almost universally discarded common law rule". [101]

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[95] *Id.* at 10.
[96] *Id.* § 174 at 518.
[97] *Id.* § 174, Comment *b*, at 519.
[98] *Id.*
[99] *Id.* § 174, Comment *c*, at 520.
[100] *Id.*
[101] *Id.* § 174, Comment *b*, at 519.

The focus of the *Second Restatement* method of approach to this problem is the reasonableness of the relationships between principal and agent and between defendant and the "liability" jurisdiction. How then can we decide if the relationships in *O'Connor v. Wray* are reasonable? To answer this question we must look at sections 6 and 145. Section 145 says little or nothing about this. The place where the injury occurred was Ontario, the place of the conduct causing the injury was Ontario, but the defendant is not being sued for his conduct but for that of Cochrane. The residence, domicile and place of business of the parties is divided. There was no relationship between the plaintiff and defendant. Section 6, on the other hand, directs attention to a far wider set of criteria. In the context of the issues raised by section 6, the respective policies of Ontario and Quebec are clear. Ontario wants to protect those who are injured by the negligent operation of cars on the roads of the province.[102] To this end, liability is put on the owner (as well as on the driver) presumably to find the person who might be expected to have insurance and, less directly, to force the owner to exercise care in how he allows his car to be used. Quebec, on the other hand, presumably does not care to provide for this particular method of loss shifting. Instead, a plaintiff in Quebec must show that the defendant was at fault.[103] The difficulty with this rule is that the policy behind it seems to be anachronistic even if it is looked at as of 1930. Presumably it would be for the protection of owners (and their insurance carriers) who have exercised due care in the entrusting of cars to others, but this would seem at best to be a weak concern. Vicarious liability is fairly deeply entrenched in most legal systems, and could hardly be regarded as fundamentally objectionable—certainly the Supreme Court of Canada (sitting on appeal from the Quebec courts) did not think so.[104]

Without going through all the heads of section 6, we can observe that the first, "the needs of interstate [inter-provincial] and international systems", bears on the facts of *O'Connor v. Wray*. The imposition of liability here could perhaps be justified on the basis that Quebec could properly allow the Ontario policy to govern *in this case*.[105] But is this what section

[102] It is not easy to cite conclusive authority for the purpose behind any legislation, but to attribute this purpose to this legislation is reasonable.

[103] This is supported in the judgment of Newcombe, J., in O'Connor v. Wray, *supra* note 65.

[104] It has been argued that the first rule in Phillips v. Eyre, *supra* note 52, the requirement of actionability by the *lex fori*, is nothing more than a rule of public policy. The decision in The "Halley", L.R. 2, P.C. 193, 37 L.J. Adm. (n.s.) 33 (1868), can easily be explained on this basis. *See, e.g.*, Kahn-Freund, *Reflections on Public Policy in the English Conflict of Laws*, 39 TRANSACTIONS OF THE GROTIUS SOC'Y 39 (1953). It is hard to see how the Supreme Court of Canada can reject as contrary to Quebec public policy a rule of Ontario like that found in O'Connor v. Wray, *supra* note 65.

[105] The forum, here Quebec, could properly take the view that the Quebec rule, while mandatory so far as Quebec courts are concerned in a case involving two Quebec people, is not necessarily applicable in a case with a foreign element. The Quebec rule must be interpreted and the foreign aspects of the case could be relevant in that

174 means when it uses the word "reasonableness"? This is when the temptation to "count contacts" [106] arises. It is easy to examine the respective contacts of Ontario and Quebec and then to decide which of them has the most. [107] The most significant thing about this case is the fact that the policy of Ontario to protect those who are injured by the negligent operation of motor vehicles, could properly be allowed to predominate over the Quebec policy no matter where the case should be litigated. This result is easier to reach since, on the facts, the defendant clearly authorized Cochrane to drive into Ontario. The case not discussed in the comment to section 174, *i.e.*, where the owner prohibits the driver from going into the liability state, and has no reason to expect that he will, would make this result harder to defend, for then it might be that Quebec's concern to protect its car owners should be allowed to govern. The trouble here is that one has to say that the imposition of vicarious liability is "fair and reasonable". Section 174, taken with both section 145 and section 6, does not give much of a basis for making this determination.

Suppose now that we were to have an Ontario driver go into Quebec and there injure a Quebec pedestrian. Is the imposition of vicarious liability now reasonable? This case is neither a true conflict nor a false conflict; neither rule is claiming to be applicable. [108] Do we just say to the injured plaintiff, "You have shown us no good reason why your loss should be shifted to the defendant, so there must be judgment for the defendant"? [109] The use of any

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process. This is, in fact, what Currie suggested, *i.e.*, that many potential true conflicts could be avoided by the forum's giving a restrained and enlightened interpretation of its own rule: *see* CAVERS at 73, and references therein cited to CURRIE.

[106] This phrase is used and the dangers of this process are discussed in A. EHRENZWEIG, *supra* note 7.

[107] A beautiful example of "contact-counting" occurred in The Assunzione, [1954] P. 150, [1954] 1 All E.R. 278, [1954] 2 W.L.R. 234 (C.A. 1953).

[108] CURRIE at 152, refers to this as the "unprovided case":

> It may be that the laws of neither state, nor of both states together, purport to dispose of the entire universe of possible cases. Identical laws do not necessarily mean identical policies, and different laws do not necessarily mean conflicting policies, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states: *id.* at 153.

This is quoted by Twerski, *supra* note 88, at 107, who refers to this as "shocking". Why should the "unprovided case" be any more shocking in a conflicts case than in a domestic case? The law always provides a solution that the court can fall back on, *e.g.*, the plaintiff has not shown that he has a cause of action.

[109] This kind of case is the same as Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454 (1972). A New York car driver had picked up a friend, an Ontario resident, in his car. The friend was killed in an accident in Ontario that occurred without the driver's gross negligence. The New York Court of Appeals, in a judgment by Fuld, C.J., held that the defendant could invoke the Ontario Highway Traffic Act, ONT. REV. STAT. c. 202, § 132(3) (1970), which prevented the injured guest from suing unless there had been gross negligence on the part of the driver. The case can be analysed as presenting no reason for the application of the Ontario law (the driver, and his insurance company, were from New York), or of New York law (which would compensate) since the injured guest came from Ontario. The case is well discussed in a symposium, *Neumeier v. Kuehner: A Conflicts Conflict*, 1 HOFSTRA L. REV. 93 (1973).

of the *Second Restatement* tests does not help to indicate what kind of result would be fair and reasonable in this kind of situation. Should Ontario motorists, through their insurance premiums, compensate Quebec pedestrians when in similar facts a Quebec owner would not have to do so? The answer when put this way may indicate that there is little reason to impose liability on the Ontario owner; but the *Second Restatement* does not give much guidance in reaching this result.

2. *Interest Analysis.* As has already been indicated, the late Brainerd Currie may be credited with the development of this approach. [110] Under his suggested approach the issue in *O'Connor v. Wray* [111] could be identified as a true conflict. In such a case, where one of the competing rules is a rule of the forum, Currie advocates that the *lex fori* should apply its own rule. [112] However he also suggests that it should give the rule a restrained interpretation so that, for example, its application is not forced into situations where there may be no need for it. [113] This, for example, might be exactly what one might hope for from a Quebec court—its rule respecting the liability of owners might be interpreted so as not to apply in those cases where the negligent act of the driver occurred outside the province, and at least where the owner knew that the car was to be driven out of the province into a jurisdiction where liability is imposed. The result of such an interpretation would be, of course, to make the case a "false conflict". For now the forum has decided that its rule does not apply to the facts before it and that there is no reason not to give effect to the foreign law. [114]

But this way out would not (or, certainly, may not) be available if the harder case were put, *i.e.*, the case where the driver disobeyed strict instructions not to leave Quebec and when the owner had no reason to foresee that he would go to Ontario. In this case such an "enlightened" policy of interpretation may not be open to the Quebec courts and, in this case, following Currie, they would have to apply the *lex fori.* It should also be noted that even in the easier case, *i.e.*, where the driver was authorized to go to Ontario, the Quebec courts might find that Quebec had an interest in the application of its own law and, in that case, the *lex fori* would also be applied.

By exactly similar reasoning, the results should be the opposite in Ontario. From the point of view of Ontario, the case would look like a true conflict and, in these circumstances, the law of Ontario would be applied as the *lex fori.* The difference between the approach of the *Second Restatement* and Currie lies in the attempt of the former to develop objective "rules" which might be applied in the same way no matter where the case were litigated. The difficulty, as we saw, was that a test that depends on

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[110] Currie's major writings are collected in CURRIE.

[111] *Supra* note 65.

[112] *See, e.g.*, CURRIE at 184.

[113] *Id.*

[114] CAVERS at 73, refers to this situation as an "avoidable" conflict rather than a "false" conflict. See also the text *supra* betwen notes 69-70.

what a court thinks is "fair and reasonable" [115] offers very little guidance to any judge and no more to the legal advisors to the parties. But under Currie's approach, so long as the forum sees any interest in the application of its rule, then that rule will be applied.

Currie's approach had its greatest impact in its destructive analysis of the classical, jurisdiction-selecting rules. Its contribution to the positive aspect of the new analysis could only be slight given the predominant role played by the forum and its inability to balance the competing claims for application of the rules of the forum and the foreign state. The interest analysis of Currie is carried forward and developed by Cavers, in particular in his suggested "Principles of Preference". [116] These are attempts, in *true-conflict situations*, to indicate how a court might resolve them. [117] Cavers does not specifically mention the problem of vicarious liability which I have selected as the issue for analysis, but much of what he says is applicable to our case. The principle particularly relevant here is the first:

> Where the liability laws of the state of injury set a *higher* standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing their relationship. [118]

Cavers considers the cases where the defendant, himself, has entered the state imposing the higher standard of conduct or of financial protection, but, on principle, there would seem to be little difference between the case of entry by the defendant himself and his authorization to another to do something on his behalf there or to go there with his property—particularly a kind of property known to be dangerous and in respect of which he has already taken out liability insurance (or may now be presumed to have done so). The harder case—the case where the driver has disobeyed limits on his rightful use of the vehicle set by the owner—is again going to be more difficult to fit into this principle. This case may raise the issue of the limits of any kind of rule like the first Principle of Preference when it runs close to the kind of concerns represented by public policy—in the words of Mr. Justice Cardozo, "some fundamental principle of justice, some prevalent

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[115] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 174, Comment *b*, at 518 (1971). See text *supra* between notes 95-100.

[116] Cavers has discussed and defended his approach in a great many books and articles. His principal constructive contribution is, however, still found in his book, CAVERS.

[117] The conditions under which the principles operate are narrowly defined. Like Currie, Cavers removes the false and avoidable conflicts, but, unlike Currie, Cavers argues that the courts could develop rules to help them solve, in a principled way, the true-conflict cases that remain. *See, e.g.*, CAVERS especially at 77-81. The approach of Cavers is similar to the kind of approach to law in general that one finds in other colleagues of his at the Harvard Law School, in particular, Fuller, H. M. Hart and Freund.

[118] CAVERS at 139.

conception of good morals, some deep-rooted tradition of the common weal". [119] When this point is reached there can be no possible escape from the application of the *lex fori* in the true conflict situation.

The reverse situation—where the car has been lent to the negligent driver in Ontario and the pedestrian has been injured in Quebec—is again not covered by Cavers. Principle number three could, however, be applied by analogy to justify a result in favour of the application of the Ontario rule. The third principle is:

> Where the state in which a defendant acted has established special controls, including the sanction of civil liability, over conduct of the kind which the defendant was engaged when he caused a foreseeable injury to the plaintiff in another state, the plaintiff, though having no relationship to the defendant, should be accorded the benefit of the special standards of conduct and of financial protection in the state of the defendant's conduct, even though the state of injury had imposed no such controls or sanctions. [120]

Cavers points out that this is not a general rule but one which "is designed for the implementation, in multi-state situations, of a specialized scheme of regulation imposing greater requirements or liabilities on a particular activity than would be provided by the general law of torts". [121] The justification for this position is based on the recognition that the law of torts has at least two functions—the regulatory and the compensatory. The purpose of the law under the former function is to control conduct that is regarded as requiring the extra deterrent effect of the law of torts. This purpose would be forwarded by the application of the liability imposing rule, even though injury occurred in another state. The justification for the application of the liability-imposing rule is less if the regulatory function is less important and the compensatory correspondingly more important. The example of a kind of rule with a strong compensatory function is a rule imposing strict liability for damage caused by blasting. [122]

By introducing this concern, Cavers has gone some way to meeting the problems which the reversed fact situation caused in Currie's analysis. Though Quebec may be said to have no "interest" in giving its pedestrians protection, the purpose of the Ontario rule may be forwarded by its application in this case, so long as the rule imposing vicarious liability on the owners of motor vehicles can be regarded as, at least in part, deterrent or regulatory and not solely compensatory. If we examine the Ontario rule we would have to conclude, I think, that the purpose of the Ontario statute is primarily compensatory. The act does not discourage people from lend-

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[119] Loucks v. Standard Oil Co., 120 N.E. 198, at 202 (N.Y.C.A. 1918).

[120] CAVERS at 159.

[121] *Id.*

[122] *Id.* at 162.

ing their cars; it only says that the owner remains liable if he does.[123] It could be argued then, that if Quebec wants to protect its pedestrians it can do so, but, on the other hand, the imposition of liability on Ontario car owners for harm done to Quebec pedestrians will not materially affect the premiums paid by Ontario owners. The result of this analysis might be that the Quebec pedestrian would remain uncompensated. The more difficult problem which Cavers briefly mentions is the issue of products liability. The question we can raise (but cannot answer here) is under what circumstances would the higher standard of care in, say, Ontario, be applied to protect the Quebec user of a consumer product, manufactured in Ontario.[124] The result in our case will probably be that liability could be imposed on the Ontario owner with some justification, but that an argument could be made to support the opposite conclusion.

There are several variations and qualifications on the Cavers' approach that have developed in the last few years. For example, Weintraub, after developing an interest analysis solution to conflicts cases that fairly closely follows that of Cavers, offers a method for the resolution of true conflicts.[125] This takes into account such factors as the furtherance of general policies discernible in the law. As an example, Weintraub suggests that the general trend towards loss distribution through insurance could provide a basis for resolving true conflicts in, at least, the areas of automobile and aircraft accidents.[126] But this solution has to be tempered by a concern that the defendant not be unfairly surprised by the imposition of liability.[127] Weintraub also suggests that anachronisms in the law could be generally avoided by courts in the resolution of true conflicts.[128] The result of the analysis is summed up in the following proposed rule: "An actor is liable for his conduct if he is liable under the law of any state whose interest would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise the actor."[129]

The application of this approach to the simple facts of *O'Connor v. Wray* would result in a decision in favour of the plaintiff. Such a result would certainly be consistent with the discernible trend in favour of loss distribution in automobile accident cases. The more difficult case, *i.e.*,

[123] The practice of the insurance business may have an indirect effect on the way cars are lent by owners. Most people know that a more favourable insurance premium can be obtained if young people are not allowed to drive the car at all. This may discourage loans. I would hesitate to attribute this purpose to the legislature.

[124] CAVERS at 164. Generally speaking, Cavers himself favours the imposition of liability in all cases under his third principle.

[125] R. WEINTRAUB, *supra* note 78, at 201-10.

[126] *Id.* at 204.

[127] *Id.* at 204-06. Care must be taken with this argument in torts cases. It is hard to see how a defendant who has been negligent can use the argument. The real defendant may be an insurance company and even here the surprise argument will be unconvincing. *See, e.g.*, Morris, *Enterprise Liability and Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961).

[128] R. WEINTRAUB, *supra* note 78, at 206-07.

[129] *Id.* at 209.

where the owner expressly forbade the driver to go into Ontario, might be a case in the unfair surprise category, except that, as Weintraub points out, since the real defendant is an insurer and not the individual car owner, arguments of unfair surprise are hard to maintain. [130] The inability of courts to consider the fact of insurance can cause as much problems in conflicts as anywhere else.

The case of the reversed facts, *i.e.*, where the Ontario driver goes into Quebec, would also result in liability under Weintraub's test since, presumably, it could advance the interests of Quebec to have a solvent defendant available for compensation for its pedestrian, even though as between Quebec owners of cars and Quebec pedestrians, the loss will not be distributed but will lie where it falls.

A more substantial variant of the interest approach is that of Leflar. [131] Leflar suggests that the resolution of true conflict cases requires a court to consider certain choice influencing considerations. These are:

a) Predictability of results;
b) Maintenance of interstate and international order;
c) Simplification of the judicial task;
d) Advancement of the forum's governmental interests;
e) Application of the better rule of law. [132]

These considerations are not put in any particular order and the importance of any individual consideration will depend on the particular controversy before the court. These five considerations were, for example, expressly relied on as the basis for decision in the case of *Clark v. Clark*. [133] In that case a wife was suing her husband in New Hampshire for injuries caused through his negligence in driving a car in Vermont. The parties were domiciled in New Hampshire, which state permitted a wife to sue her husband for a tort, while Vermont, the *lex loci delicti*, had a guest statute which would have barred such actions. The court observed that the consideration of predictability had little relevance in a tort claim since the element of planning was nearly absent. The second consideration was dealt with by the court's merely observing: "In terms of inter-state automobile trips and accident litigation growing out of them, no more is called for under this head than that a court apply the law of no-state which does not have a substantial connection with the total facts and with the particular issue being litigated." [134] The simplification of the judicial task was regarded as a relatively minor consideration. The court observed in connection with the fourth that: "In most private litigation the only real governmental interest that the forum has is in the fair and efficient administration of justice, which is usually true of automobile accident cases." [135] Cavers was invoked to

[130] See text *supra* at note 127.
[131] R. LEFLAR, AMERICAN CONFLICTS LAW (1968).
[132] *Id.* at 233-59.
[133] 222 A.2d 205 (N.H. Sup. Ct. 1966).
[134] *Id.* at 208.
[135] *Id.* at 208-09.

support the fifth—"the courts preference for what it regards as the sounder rule of law, as between two competing ones". [136]

Applying these considerations to the particular facts, the court had no problem applying the New Hampshire rule. The court applied New Hampshire law to forward its own governmental interests and, finally, said that the New Hampshire rule is preferable to the Vermont rule. If we try the same approach to the facts of *O'Connor v. Wray*, it is not easy to predict what might happen. The approach taken by Chief Justice Kenison in *Clark v. Clark* has been severely criticized for putting too much emphasis on the fifth consideration—the application of the better rule of law. [137] It is tempting to believe that under this approach a Quebec court would conclude the opposite. The case would be even stronger if the harder case were put. The reverse situation would certainly make it easier for the Quebec courts to apply Ontario law, but we might wonder if they would want to refer to it as a "better rule of law".

The question that remains after exploring Leflar's suggested method is whether we have progressed any further along the way towards finding usable techniques for resolving true conflicts. Cavers may be prayed in aid of Leflar's fifth consideration by Chief Justice Kenison, but it is fairly clear that the "Principles of Preference" Cavers suggests do carry us further than the simple preference for the "better rule of law" and do offer some more reasonable hope that both Quebec and Ontario courts could agree on the result in *O'Connor v. Wray*.

Interest analysis has been repeatedly applied by the New York Court of Appeals. This court has been in the forefront of developments in conflicts analysis ever since *Babcock v. Jackson* [138] in 1963. The most recent case there is *Neumeier v. Kuehner*, [139] which is one more case in a long line of guest-passenger cases to come before that court.

This case has been analysed as the same kind of case as the variation of *O'Connor v. Wray* where the Ontario driver injures the Quebec pedestrian, that is a case where the purposes behind neither law will be served by their application to the facts. On the *Neumeier* facts, New York has no interest in protecting an Ontario guest and Ontario has no interest in protecting a New York insurance company. This kind of case is seen by some commentators as the example which illustrates the inadequacy of interest analysis. [140] How can the court dispose of the case if neither of the concerned jurisdictions cares for what happens? One suggested method for solving this particular kind of problem has been to resurrect the territorialist ap-

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[136] *Id.* at 209.

[137] The criticisms have been numerous. One of the most cogent is Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEXAS L. REV. 141, at 152-55 (1967).

[138] *Supra* note 62.

[139] *Supra* note 109, where the facts are also set out.

[140] *See, e.g.*, Twerski, *supra* note 88, at 107.

proach which interest analysis had rejected.[141] On this basis the close (and predominant) links of the events and accident with Ontario would justify the application of Ontario law and an interest analysis would not be necessary as the sole determinant of the question of what law to apply. Another method of analysis would be to view the matter separately from both jurisdictions. On the *Neumeier v. Kuehner* facts, the insurance company behind the defendant would have been doing business in New York. A New York court could properly decide to apply the provisions of New York law and allow recovery even by an Ontario resident if the court felt that there was some advantage in encouraging New York drivers to be careful wherever they were, for, in so doing, the New York Court would be being generous with New Yorkers' money. On the other hand, an Ontario court could not properly do this for that court would be handing out someone else's money, when to do so would not be forwarding any policy of Ontario law.[142] Of course, once the New York court had allowed a plaintiff's claim in circumstances like *Neumeier*, an Ontario court could then do the same. The result of this would be that the case would be viewed as a "false conflict" problem—at least, from the point of view of New York. It would be a false conflict if New York were prepared to regard the basic policy of the law of torts as being applicable unless the policy of the Ontario statute would be forwarded by its application.

A case like *Neumeier v. Kuehner* may pose some problems for interest analysis, but even that case can be analysed so that the problems only arise at the very fringe. Most of the variations of *O'Connor v. Wray* that were discussed and the facts of the case itself can, through the kind of approach suggested by Cavers, be fairly simply analysed, and results reached which will be defensible. It cannot be denied that there will be problems but the number of real problems has been shown to be far fewer than might have been thought.

3. *Lex Fori.* A further alternative theory that has been developed to handle conflicts problems is the so-called *lex fori* approach mainly associated with Ehrenzweig. Ehrenzweig's approach has, like the others, two principal aspects. The first shares many of the features of the interest analysis approach which can be used to identify false conflicts and other ways of making foreign law applicable than through choice of law rules. The second is the method for resolving the problems that remain when false conflicts have been identified and removed.

The process of characterization is regarded by Ehrenzweig as a "Fascinating [but pernicious] intellectual exercise",[143] and one which the American (and, presumably, English and Canadian) courts would have done well

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[141] *Id.* at 122.

[142] Baade, *supra* note 63, at 162.

[143] A. EHRENZWEIG, *supra* note 7, at 114 (footnotes omitted). The writings of Ehrenzweig are voluminous. Since the purpose of this survey is the investigation of conflicts theory, one statement of Ehrenzweig's theory will be taken and it will not be exhaustively documented. *See also* Ehrenzweig, *Characterization in the Conflict*

to have ignored. For Ehrenzweig, characterization "is just another phase in that process of interpretation which is common to all legal reasoning. For, all interpretation, . . . is always that of the interpreter, the forum". [144] (Ehrenzweig admits the necessity of such devices as *dépeçage* which permits the division of a case into a number of separate issues each of which may be governed by a diferent rule of law.) [145] The docrtine of *renvoi* is also shown to be an unnecessary adjunct of conflicts theory. [146] Ehrenzweig believes that the correct approach to choice of law removes the need for *renvoi* which is only a device for avoiding undesirable rules under a traditional approach. [147]

Rules of a foreign jurisdiction (Ehrenzweig rejects the jurisdiction-selecting approach of either Lipstein or the first Restatement) may also be made relevant in a conflicts case through the process of interpretation of instruments—contracts and wills for example. [148] They may be relevant as "data", that is, as being applicable like foreign rules of the road in a torts case. [149] Ehrenzweig makes explicit a feature of conflicts analysis which is often passed over without comment and this is the application of forum law on what can be sometimes called "public policy" and which Ehrenzweig refers to as "moral data". [150] In this heading he includes topics like equitable defences and other rules of the forum which are not going to be displaced by foreign rules, and gives as an example of this the question in a torts case whether the defendant was negligent, that is, whether the defendant exercised reasonable care in the circumstances. This question, he suggests, will always be answered by the application of forum law. [151]

Ehrenzweig also identifies several areas where courts have consistently forwarded particular purposes and have therefore, in fact, developed choice of law rules. These are:

> references to the personal law in status questions (based on the assumed general need for uniformity); the "rule of validation", in fact applied to (non-adhesion) contracts, trusts and wills (based on the assumed general tendency to give effect to the parties' intention to be bound); and the regime of the *lex situs* in many situations involving real and personal prop-

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of Laws: An Unwelcome Addition to American Doctrine, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 395 (H. Nadelman, T. Von Mehran & J. Hazard ed. 1961).

[144] A. EHRENZWEIG, *supra* note 7, § 53, at 115.

[145] *Id.* § 56, at 119-21.

[146] *Id.* § 68-77, at 141-53. Ehrenzweig makes the point that the introduction of *renvoi* into conflicts theory was inevitable once jurisdiction-selecting rules were developed in the nineteenth century. It is vitally important to bear in mind that the theoretical model which involves such things as characterization and *renvoi* is based on jurisdiction-selecting choice of law rules of the traditional English kind. The rules come first, then the model is developed to handle them. This is shown by the fact that characterization and *renvoi* are said to have been "discovered": CHESHIRE at 42, n.4.

[147] A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 334-40 (1962).

[148] A. EHRENZWEIG, *supra* note 7, at 82-83.

[149] *Id.* at 84.

[150] *Id.* at 77-82.

[151] *Id.* at 80-81.

> erty (based on a probably receding preoccupation with the sovereign's "power") . . . . For the all important liabilities for hazardous enterprise, however, which are devices for the distribution of the plaintiff's loss rather than for the defendant's admonition, reasonable insurability and calculability (in contrast to actual insurance and calculation) are likely to supply the basis for other exceptions from the *lex fori*. [152]

These situations are therefore exceptions from the application of the *lex fori* which, under this approach is prima facie applicable. The governing concern is that the application of foreign law be justified by forum policies. This approach does not involve a balancing of forum policies and foreign policies. Foreign policy is relevant only if it is made relevant by some rule binding on the forum—as might happen under constitutional rules, or under true (formulated or unformulated) rules of choice. [153]

When this approach is applied to a set of facts like *O'Connor v. Wray*, the result will likely be no different from that under the interest analysis. A Quebec court could properly consider the application of the general policy on loss distribution. (A case of vicarious liability separates neatly the compensatory function of the law of torts from the admonitory function, since the basis for vicarious liability is not put on the presumed carelessness of the principal in employing the negligent agent). The court would then have to decide whether the imposition of liability on the defendant would forward the policy of Quebec. Ehrenzweig is one of the few writers to discuss at any length the problem of vicarious liability. [154] He suggests that on the facts of *O'Connor v. Wray*, the Quebec courts could properly impose liability. He makes important the fact that the defendant authorized Cochran to drive into Ontario and the fact that the risk he ran in so doing was both foreseeable and calculable. [155]

In many cases the result of the application of Ehrenzweig's theory and Cavers' (or Currie's) will be the same. The important difference between

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[152] This statement of Ehrenzweig's view is taken from a short piece contributed by him to E. CHEATHAM, CASES AND MATERIALS ON CONFLICT OF LAWS 478-79 (5th ed. 1964). It is very close to the view expressed in A. EHRENZWEIG, *supra* note 7, at 89-90.

[153] The kind of choice of law rules Ehrenzweig claims exists are illustrated in the quotation in the text at note 152 *supra*. A concise statement of *lex fori* approach is found in A. EHRENZWEIG, *supra* note 7, at 93:

> Unless application of a foreign rule is required by a settled (formulated or nonformulated) rule of choice, all choice of law should be based on a conscious interpretation . . . of that "domestic rule" which either party seeks to displace. If that interpretation does not lead either to the dismissal of the suit or to the application of a foreign rule, the forum rule, in a proper forum, applies as the "basic" or as I now prefer to call it, the "residuary" rule, as a matter of "nonchoice." . . . In this sense, then, there is no conflicts law because there can never be a conflict, true or false, between the rule of a forum and any other rule invoked by it. As Dicey has it: "The only 'conflict' possible is . . . that in the mind of the judge who has to decide which system of law to apply to the facts before him." (footnotes & references omitted).

[154] A. EHRENZWEIG, *supra* note 147, at 449-53.

[155] *Id.*

them is Ehrenzweig's contention that pure interest analysis offers no guides for the courts on any case. It throws overboard the kind of certainty which his analysis shows is available in the cases. Interest analysis, in any case, made the mistake of trying to develop its approach in the area of torts where, unlike contracts, for example, there is no hope of developing any rules: "in tort law dissatisfaction with *all* domestic rules precludes satisfactory solutions in conflicts cases".[156] In contracts, the only other area much developed in interest analysis, the operation of the *lex validatis* rule and the non-choice operation of the rules of interpretation leave a very restricted area for the development of conflicts analysis. Ehrenzweig has fought a long rearguard action against the *Second Restatement.*[157] He has argued that the kind of choice of law rules there are hopelessly unprincipled and will lead to such things as "contact-counting" and unthought out determination of the law "with the most significant relationship".[158] He has bitterly criticised the failure of the *Restatement* to distinguish between international and interstate (intranational) conflicts and points out that the *Restatement* can only possibly deal with interstate conflicts (or, in the Canadian situation, interprovincial conflicts).[159]

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[156] A. EHRENZWEIG, *supra* note 7, at 69.

[157] *See, e.g.*, Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal For Its Withdrawal*, 113 U. PENN. L. REV. 1230 (1965).

[158] *Id.* at 1235-36.

[159] *Id.* at 1232-35; A. EHRENZWEIG, *supra* note 7, at 20.