CONFLICT OF LAWS

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I. INTRODUCTION

This survey covers the period of approximately two years from the summer of 1970 to the spring of 1972. During this period there have been very few major cases of other important developments but in many areas the consequences or recent changes and important cases are beginning to be seen and, in addition, some new problems seem to be appearing which will, before long, require solutions. So far as Canadian courts are concerned, the areas of torts in the conflicts of laws, and the recognition of foreign divorces have provided the most stimulating models, and we are now producing some of our own cases. The problems raised by the issue of *forum conveniens* and *non conveniens* have just begun to face Canadian courts and may be expected to increase in the future.

II. DOMICILE

The concept of domicile is one of the most basic in the whole area of conflicts. It is generally believed that the rules are easy to state and there have been very many cases on the topic. The situation in Canada, however, is in fact, far from clear and the cases are in great confusion. The Supreme Court of Canada has given conflicting judgments and several provincial courts of appeal have gone different ways. There are two contradictory statements of the rule that are the source of much of the confusion. One formulation is as follows:

> The principles which ought, I think, to be kept steadily in view and rigorously applied in this case are, first, that a domicile of origin cannot be lost until a new domicile has been acquired; that the process of the acquisition of a new domicile involves two factors, — the acquisition of residence in fact in a new place and the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says, 'for the rest of his natural life,' in the sense of making that place his principal residence indefinitely.[1]

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[1] Trottier v. Rajotte, [1940] Sup. Ct. 203, at 207, [1940] 1 D.L.R. 433, at 436 (1939) (per Duff, C.J.).

The other, more liberal view is:

> That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special or temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.[2]

The view of Mr. Chief Justice Duff was based mainly on the view of Lord Cairns in *Bell v. Kennedy*.[3] It represents essentially the same views as that of Lord Macnaghten in *Winans v. Attorney-General*[4] and of the House of Lords in *Ramsay v. Liverpool Royal Infirmary*[5] which have been regarded as the traditional English and, to some extent, Canadian view of the intention necessary to acquire a domicile of choice. The difficulty arises from the fact that *Lord v. Colvin* went on appeal to the House of Lords[6] where, though the result was unchanged, the House not only adopted much stricter views of the intention necessary, but Lord Chelmsford expressly disapproved of Vice-Chancellor Kindersley's definition. The result is that, at least under the strict doctrine of *stare decisis*, *Lord v. Colvin* is not good law. However, *Lord v. Colvin* has been quoted by the Supreme Court of Canada in *Wadsworth v. McCord*[7] in the same judgment as *Moorhouse v. Lord* without comment (though the point for which the latter case was quoted in support did not involve a direct conflict with Vice-Chancellor Kindersley's definition). Both *Lord v. Colvin* and *Moorhouse v. Lord* were ignored by the Supreme Court of Canada in *Trottier v. Rajotte*.[8] *Lord v. Colvin* was revived and relied on by the Saskatchewan Court of Appeal in *Gunn v. Gunn & Savage*.[9] *Trottier v. Rajotte* was quoted, but the change made by Duff in the words Lord Cairns actually used, "ending his days in that country", not "for the rest of his natural life," was taken as support for the more liberal view of Vice-Chancellor Kindersley. *Gunn v. Gunn* was quoted and approved of by the Supreme Court of Canada in *Osvath-Latkoczy v. Osvath-Latkoczy*,[10] though this was only a two page unreserved judgment in an appeal where no one appeared for the respondent.

The facts of both *Gunn* and *Osvath-Latkoczy* raise the problem in its clearest form. Both of these cases involved divorce petitions. In both, the husband's domicile was crucial for both were, of course, before the 1968 Act. In *Gunn* the husband was the manager in Saskatchewan of a Famous

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[2] Lord v. Colvin, 4 Drew 366, at 376, 62 E.R. 141 (1859) (per Kindersley, V.C.).

[3] Bell v. Kennedy, L.R. 1 Sc. & Div. 307 (1868).

[4] [1904] A.C. 287.

[5] [1930] A.C. 588.

[6] Moorehouse v. Lord, 10 H.L. Cas. 272, 11 E.R. 1030 (1863).

[7] 12 Sup. Ct. 466 (1886) (per Ritchie, C.J.). (This case was affirmed by the Privy Council, *sub. nom.* McMullen v. Wadsworth, 14 App. Cas. 631 (1889).

[8] *Supra* note 1.

[9] 2 D.L.R.2d 351, 18 W.W.R. 85 (Sask. 1956). The judgment of the court was given by Mr. Justice Gordon. *Applied* in Waggoner v. Waggoner, 20 W.W.R. 74 (Alta. Sup. Ct. 1956) where *Lord v. Colvin* was again quoted.

[10] [1959] Sup. Ct. 751, 19 D.L.R.2d 495 (per Judson, J.).

Players cinema and he admitted in evidence that he would move elsewhere in Canada if his job required. On this admission the trial judge had held that he was without jurisdiction as the husband had not acquired a domicile of choice in Saskatchewan and was therefore domiciled in Manitoba, his domicile of origin. In *Osvath-Latkoczy* the husband was a Hungarian refugee who had come to Ontario in 1956. He, too, had admitted that if the Russians left Hungary he might return. On his admission the Ontario courts had held that he had not acquired a domicile of choice in Ontario. Both the Saskatchewan trial judge and the Ontario courts had relied on the statement already quoted from *Trottier v. Rajotte*. The Saskatchewan Court of Appeal and the Supreme Court of Canada disagreed with the lower courts and held that each husband had acquired a domicile of choice.

The Saskatchewan Court of Appeal in *Gunn* at least attempted to reconcile *Lord v. Colvin* and *Trottier v. Rajotte*, however difficult that task might appear. The Supreme Court of Canada in *Osvath-Latkoczy* did not even mention *Trottier v. Rajotte*. In neither court was any notice taken of *Moorhouse v. Lord*, in spite of the fact that *Lord v. Colvin* had been appealed to the House of Lords. The problem was even more confounded when in *Stephen v. Stephen*[11] the New Brunswick Supreme Court, Appeal Division, quoted *Trottier v. Rajotte*, referred to *Moorhouse v. Lord*, *Bell v. Kennedy*, but not to *Osvath-Latkoczy* or *Gunn*. The facts in *Stephen* involved a divorce petition from a soldier in the Canadian Army who was posted to Camp Gagetown in New Brunswick. He, like *Gunn* and *Osvath-Latkoczy* admitted that he might have to move if the Army posted him elsewhere, though he stated that the chances of his being posted elsewhere were slight. The New Brunswick courts, however, held that the strict test required to acquire a domicile of choice had not been satisfied. *Osvath-Latkoczy* was also ignored in a subsequent decision of the same court. In *Beaman v. Beaman*[12] the Appeal Division referred to *Udny v. Udny*[13] and *Trottier v. Rajotte*, and held that a domicile of choice in Quebec had not been abandoned by a husband (the respondent to the petition for divorce) so that his domicile of origin in New Brunswick would have revived.

Since then there have been two other cases where the same problem has arisen. The Nova Scotia Supreme Court in *Khalifa v. Khalifa*[14] in a divorce case involving a husband from West Pakistan the judge referred to *Trottier v. Rajotte* (quoting the passage already set out) and *Osvath-Latkoczy* (quoting the passage from *Lord v. Colvin*). The patent contradiction in the two passages was not noticed. In the result, the husband was held to have acquired a Canadian domicile. In *Armstrong v. Armstrong*[15] the Ontario High Court referred to *Wadsworth v. McCord*[16] and *Trottier v. Rajotte* only. No mention was made of *Osvath-Latkoczy* in spite of the

[11] 51 Mar. Prov. 65 (N.B. 1961).
[12] 63 D.L.R.2d 457, 53 Mar. Prov. 205 (N.B. 1967).
[13] L.R. 1 Sc. & Div. 441 (1869).
[14] 19 D.L.R.3d 460 (N.S. Sup. Ct. 1971).
[15] [1971] 3 Ont. 544, 21 D.L.R.3d 140 (High Ct.) (Grant, J.).
[16] 12 Sup. Ct. 466 (1886).

fact that that decision had reversed a decision of the Ontario Court of Appeal. In *Armstrong* the court refused to take jurisdiction in a divorce petition presented by an Australian husband who had come to Canada to obtain post graduate degrees and who had remained as dean in a community college.

These cases raise two quite separate issues. The first is the simple issue of what the law is. The second is the suitability of the rules that are the law. It is clear that the latest carefully considered judgment of the Supreme Court of Canada was *Trottier v. Rajotte*. That was an appeal from the courts of Quebec but the cases referred to by Mr. Chief Justice Duff were the leading English cases of the nineteenth century. *Trottier v. Rajotte* was also a case involving a change of domicile from a Canadian province to one of the states of the United States. This point was behind the reasoning of Mr. Justice Gordon in *Gunn v. Gunn* when he pointed out how insignificant was a change of domicile from one province to another (at least, particularly so between Manitoba and Saskatchewan when the same divorce law could be applied in both).[17] It could therefore be argued that *Trottier v. Rajotte* should not be regarded as authority when the change of domicile occurs within Canada. *Gunn v. Gunn* attempted to reconcile *Trottier v. Rajotte* with the view of Vice-Chancellor Kindersley in *Lord v. Colvin*, but even so, the authority for the latter view is weak, to say the least. Both *Gunn* and *Osvath-Latkoczy* may be regarded as *per incuriam* judgments since neither court was aware of what had happened in *Moorhouse v. Lord*. In any case, *Osvath-Latkoczy* by ignoring *Trottier v. Rajotte* is weak authority, and could clearly be reconsidered by the Supreme Court of Canada, though, as has been suggested, *Trottier v. Rajotte* could be distinguished. The law at the moment would therefore appear to be that the most recent pronouncement of the Supreme Court of Canada, *Osvath-Latkoczy*, should govern in cases where the change of domicile is between Canadian provinces,[18] but that in other cases, *Trottier v. Rajotte* has either to be reconciled with *Osvath-Latkoczy* (a difficult task) or else got out of the way by being distinguished, or regarded as no longer good law. It is clear, at least that no court can ignore the contradictions between *Osvath-Latkoczy* and *Trottier v. Rajotte*, and it is to be hoped that the Supreme Court of Canada will soon clarify the law.

The second issue cannot really be answered unless it is known what domicile is used for. Domicile has been relied on to answer three questions in conflicts: first, what court has jurisdiction to grant a divorce (or more narrowly, has a particular court jurisdiction to dissolve a marriage between a particular couple)?; second, how is the estate of a particular deceased to

[17] This view may be contrasted with the view that a domicile of choice can be lost more easily than a domicile of origin. *See, Re* Flynn, [1968] 1 All E.R. 49. The only comment that can be made is, why?

[18] The 1968 Divorce Act makes inter-provincial changes of domicile far less important. Such changes are now only important in cases of succession or, possibly, some aspects of capacity, *e.g.* capacity to marry or to make a will.

be distributed?; and third, has a particular person capacity to marry or make a will? The unitary idea of domicile was that a person had at any one time only one domicile and this was presumably the same no matter which question was being answered. More recent formulations have said: "Every person has a domicile at all times and, at least for the same purpose, no person has more than one domicile at a time."[19] An example of different domiciles for different purposes is said to exist when, for example, a person may be domiciled in Canada for purposes of divorce but domiciled in, say, Ontario (or maybe even outside Canada) for purposes of succession or capacity. Such a difference is not, however, what is really implicit in the splitting of the concept of domicile, for the same formulation for the rule is used in both. In other words, the unitary concept is preserved so long as the same test is used, the change in reference jurisdiction does not change the use of the concept. Such a change would occur if the test for divorce jurisdiction were different from that for succession, when, for example, a different kind of connection were required with a province to have its succession laws applied, than would be required with Canada to give a Canadian court divorce jurisdiction. Such different tests have, in fact, been applied by courts though covertly and only occasionally. The traditional English view has been that the strict tests of *Winans v. Attorney-General*[20] and *Ramsay v. Liverpool Royal Infirmary*[21] are the rule. But if, for example, the insignificant case of *May v. May*[22] is considered it is quite clear that the test is very different. In *May v. May* the husband whose domicile was in issue had his name down as a prospective immigrant to the United States even while he claimed to be domiciled in England so that he could get a divorce. What is a sufficient connection for divorce purposes is, apparently, not sufficient for taxation or succession purposes. If this kind of situation is what is envisaged by the *Restatement of Conflicts* formulation then the problem of deciding what the rule should be becomes a very different problem from that normally handled by the traditional tests.

The reason is that it is now necessary to decide what criteria are relevant to distinguish the domicile test for divorce from that for succession or capacity. The test to be used in divorce, for example, has to take account of the fact that some way must be found for sorting out a marriage that has gone wrong when there may be no jurisdiction with a unique claim to concern. The problem with divorce is that there is no separate choice of law issue relevant. If the Canadian courts take jurisdiction they apply Canadian law. The real objection to a Nevada divorce is not that the respondent may have been unfairly treated, but that the Nevada court applied Nevada law. The analogy to simple judgments in personam is relevant. The submission of

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[19] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11(2) (1963). This was also adopted by DICEY & MORRIS, CONFLICT OF LAWS 82 (8th ed. 1967) [hereinafter cited as DICEY & MORRIS]. *See also*, J.H.C. MORRIS, CONFLICT OF LAWS 16 (1971) [hereinafter cited as MORRIS].

[20] [1904] A.C. 287.

[21] [1930] A.C. 588.

[22] [1943] 2 All E.R. 146, 169 L.T.R. (n.s.) 42 (P.D.A.).

the defendant to a foreign court entitles the successful plaintiff to enforce the foreign judgment. The defendant who submits takes his chance on the merits. But this is not so in divorce. The reason is that an Ontario couple cannot have their matrimonial difficulties adjusted by Nevada law. The concept of domicile in divorce then has to identify the court that is justified in applying its rules to dissolve the marriage. The 1968 Act expressly recognizes that there may be more than one court so qualified and the common law rules on recognition of foreign divorces also acknowledge this.

If, therefore, we can abandon the notion of domicile as a single concept that can be used as an abstract measure of an individual's connection to a jurisdiction, we have to ask in divorce cases whether the individuals before the court (one or both of them) have such a connection with the jurisdiction that it would be proper to entertain a petition for dissolution or for any corollary relief. The kinds of tests that must be developed to decide when it would be "proper" to do so will reflect all the factors present in the marriage and in the lives of the parties that might be relevant - the place where the parties live, where either live, where the children, if any, are, where the parties last cohabited, where the wife or children may be left destitute if they are not given support, and so on. What might be called "domicile" for the purposes of divorce would then be a functional test relevant solely to the appropriateness of the particular court taking jurisdiction.

The other uses of the concept of domicile involve a choice of law question. The issue could arise, in theory, before any court which might be called upon to decide who should take any assets left by a deceased or whether a particular act was performed by one who had capacity. The problem with the use of the concept in these situations is, of course, that such a choice of law device is subject to all the devastating attacks made upon jurisdiction-selecting rules by Currie,[23] Cavers,[24] Weintraub[25] and others. This is not the place for a review of their attacks, but it is safe to state that whatsoever may be the difficulties in the way of developing new approaches, the jurisdiction-selecting function performed by the traditional concept of domicile is both irrelevant to the real issues in any case and as rational as throwing dice. The statement of the rule that, for example, succession to movables is governed by the law of the domicile of the deceased, is incapable of answering rationally any question that requires a court say, to choose between the competing claim of A and B to X's estate. This has been convincingly demonstrated by Weintraub.[26] If such criticisms be accepted then the future of the concept as an abstract choice of law device

[23] B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

[24] D.F. CAVERS, THE CHOICE OF LAW PROCESS (1965); *id.*, *A Critique of the Choice of Law Problem*, 47 HARV L. REV. 173, (1933).

[25] R.J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971); *id.*, *An Inquiry Into the Utility of "Domicile" as a Concept in Conflict Analysis*, 63 MICH. L. REV. 961 (1965); *id.*, *An Inquiry Into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 CORNELL L.Q. 1 (1966).

[26] 63 MICH. L. REV. 961 (1965).

does not exist. This is not to say that the idea behind domicile, that a person may have a particular connection with one jurisdiction for a particular purpose, is not important, it is only to say that whether the connection is significant or not will depend on the actual issue raised by the case.

The point was made in *Gunn v. Gunn* that it may be one thing to have a strict domicile test when the change in domicile is between jurisdictions with very different legal systems, but quite another to have the same test when it does not, for most practical purposes, matter which jurisdiction's rules are applied. This is probably what underlies the strict English views on domicile.[27] When the differences between jurisdictions are slight there can be no justifiable basis for the view that a change of domicile "is a serious matter."[28] In such circumstances the justification for even making an inquiry into domicile may not be apparent. All this provides further argument for keeping the concept of domicile in bounds. The idea of domicile does have a function to perform but that function has to be related to the actual issue that has to be decided and to the reasons why the inquiry is necessary.

The domicile of married women and infants has traditionally been dependent on that of their husbands and fathers. (The recent changes in divorce do not change the basic rule as regards married women). The justification for such rules would appear nowadays to be slight. Perhaps these rules, too, will have to be rethought by the courts when they have the opportunity.

III. CONTRACT

There are surprisingly few Canadian cases on contracts that involve conflict of laws problems. There are probably several reasons for this, among them might be the relative similarity of provincial legislation, the reluctance of counsel to bring in conflict questions, and possibly the feeling among lawyers that the law is settled and not open to much dispute. Canadian courts and commentators have, in general, been content to take as the basis for Canadian rules the English rules laid down by Dicey and applied in many English cases. Such recent cases as there have been carry on this tradition. From an academic point of view much can be made of the apparent differences between the traditional view and the so-called revolutionary views found in the United States. But from a practical position the differences are probably much less significant and far fewer cases would, in fact, be decided differently if the newer ideas were adopted.

The basic difficulty with the traditional view is its weakness in terms of pure contract law. There are four separate aspects of any contract.

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[27] *See*, for example, the FIRST REPORT OF THE PRIVATE INTERNATIONAL LAW COMMITTEE, CMD 9068 (England 1954) and such judgments as that of Lord Kingsdown in Moorehouse v. Lord, *supra* note 6, also MORRIS at 17.

[28] In the Estate of Fuld (No. 3), [1968] P. 675, at 686 (1965) (per Scarman, J.).

First, the validity of the whole contract, and any part of it, has to be determined. Second, all questions of interpretation have to be resolved. Third, the obligations incurred by the parties may have to be construed in the light of changed circumstances, and, finally, the remedies for breach may have to be covered. The traditional view lumps all problems of contract under the single approach usually termed the "proper law". There have been many formulations of this idea: "the law intended by the parties", "the law with which the parties have their closest and most real connection". Most of these approaches are discussed in the two most recent authoritative cases in Canada, *Etler v. Kertesz*[29] and *Imperial Life Assurance Co. v. Colmenares*.[30] These cases each refer to all the leading English cases and texts, yet one, *Etler v. Kertesz*, is a question of validity, the other a question of, possibly, supervening illegality or frustration, but quite clearly not one of validity.

Once the particular contract point is isolated many of the conflicts problems become much simpler. For example, there is no choice of law problem in interpretation. The purpose of interpretation is to discover what the parties meant. All legal systems agree on this. It is not then necessary to decide what law applies in the abstract when a court has to solve a problem of interpretation. The existence of presumptions as aids to interpretation does not affect the argument that no choice of law process is involved, for presumptions are subject to the parties' intention.

The issue of validity is the problem in most contracts cases involving conflicts. Validity covers many separate issues from the capacity of the parties to contract, to the problem of illegality. Most formulations of the traditional view divide the choice of law issue (for all contract problems) into cases where there is an express choice and cases where there is no express choice of the governing law by the parties.[31] The former cases are said to be governed by the express choice of the parties. But immediately this has to be qualified, for the parties are not to be free to choose *any* law for their own purposes. For example, Cheshire discusses whether the parties can avoid the English rules relating to consideration by expressly choosing that Scottish law shall govern the contract. The suggestion is made that they should not be able to do so—at least, not without some connection between the transaction and Scotland.[32] This kind of qualification is highly unsatisfactory for it is not obvious why any particular connection with Scotland should be necessary. It is not made clear in the discussion of that example in Cheshire why the fact that one party may be domiciled and resident in Scotland is not sufficient connection to allow the parties to choose Scottish law, but that payment to a Scottish bank in Scotland is.[33]

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[29] [1960] Ont. 672, 26 D.L.R.2d 209.

[30] [1967] Sup. Ct. 443, 62 D.L.R.2d 138 (1966) The plaintiff's name was Casteleiro y Colmenares, the latter being his mother's maiden name, which, in accordance with Spanish custom, is added in to what we would call his surname.

[31] DICEY & MORRIS 691 *et seq*; MORRIS 224 *et seq*; CHESHIRE & NORTH, PRIVATE INTERNATIONAL LAW, 200-211 (8th ed 1970) [hereinafter cited as CHESHIRE & NORTH].

[32] CHESHIRE & NORTH at 211-14.

[33] *Id.* at 212.

When there is no express choice the court is said to be faced with the need to decide what the parties would have intended if they had thought about the matter and had acted as just and reasonable persons. This, for example, is what the English Court of Appeal did in the case of *The Assunzione*.[34] Canadian courts have relied on this case and it is generally regarded as setting out the law. Yet the case went off on a preliminary point of law with the issue confined to the question whether the contract was governed by French or Italian law. We do not know what the real issue was and the court never discusses it. We only know that the French charterers sued the Italian ship owners for short delivery and damage to their cargo. If we knew whether, for example, this raised issues of validity or interpretation then the inquiry into the "proper law" would be quite different. We do not even know in what respects French and Italian law differed, though it is mentioned that the plaintiffs would have preferred the application of French law.

Issues of validity are independent of the parties' intention. This is true whether the parties have expressed any choice of law or not. If a gratuitous promise should be unenforceable in England, then nothing the parties alone can do can change the result.[35] In a similar case it is difficult to see how a contrary result could be reached if parties in Scotland chose English law, for no one can be heard to say that he did not intend a valid contract. The somewhat tortuous limitations on party autonomy, developed by way of exception to the rule that intention governs, are unnecessary, for in matters of validity, intention is, quite simply, irrelevant. Similarly, if *The Assunzione* were a case of validity, it would be pointless to ask what law the parties, as just and reasonable people, ought to have intended to apply, for the contract is good or bad whatever their intention may have been. The development of choice of law rules for validity must ignore the parties' intention and concentrate on other factors.

The present statements of the rule in textbooks like Dicey and Cheshire acknowledge the limitations on the effect to be given to the parties' intention. It would be preferable if they went slightly further and ceased to start from the position that intention is relevant. An example of a new approach that avoids these difficulties is provided by Weintraub.[36] The advantage of this approach is that it permits a conflict analysis which is based on the kind of analysis that occurs whenever, domestically, a contract's validity is called

[34] [1954] P. 150, [1954] 1 All E.R. 278 (C.A. 1953).

[35] The example of a gratuitous promise may not be the best. The purpose behind the English rule that gratuitous promises are not enforceable has got to be stated. If the purpose was merely to make the parties aware of the legal effects of their actions by requiring either a *quid pro quo* or the added solemnity of a red wafer why should an express choice of Scottish law not take the case out of the English rule? The parties can, if they choose, always get around the problem of lack of consideration. This is one example where the intention of the parties can affect a rule of validity, by taking the agreement out of the rule.

[36] R.J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971); *id.*, *Choice of Law and Forum in Contracts*, PROCEEDINGS OF SIXTH INTERNATIONAL SYMPOSIUM ON COMPARATIVE LAW 141 (1968).

in question. We always start from a presumption that the agreement is valid. The parties must be presumed to have intended a valid contract and will be estopped from alleging the contrary. No other starting point makes any commercial sense. From this point we must then look to see if any invalidating rule should be applied. This is the normal contract method. This method also forces the courts to consider the reasons for the application of any invalidating rule. A contract is not defined as an agreement that is *not* vitiated by fraud, duress, lack of capacity, illegality, etc., but as an agreement which is valid *unless* it can be shown to have been vitiated in some way. In a conflicts case when one jurisdiction out of possibly several relevant ones might invalidate a particular agreement the application of the invalidating rule has to be justified.

An analysis of the two most recent Canadian cases on contracts and the conflict of laws may make this argument clearer. The first case, *Ross v. McMullen*,[37] was an action on a contract to share real estate commissions earned. The parties were employees of a Toronto real estate firm that had been asked to help in renting space in a building in Calgary. Differences arose between the parties and the plaintiff sued for a share of the commission earned by the defendant. The defendant was licensed under the relevant Alberta legislation, while the plaintiff was not. The plaintiff was, therefore, met with the objection that he could not legally receive commission on the rental of real estate in Alberta. The judge said that he did not feel "that the parties could have intended to be governed by any law other than the law prevailing where the contract was to be performed," and, though the intention of the parties was only one factor to be considered, the contract was illegal under the lex fori, and therefore unenforceable. The latter part of the judge's reasoning makes the first part irrelevant. If the Alberta legislation should be applied so as to make this contract unenforceable then it should be applied whatever the intention of the parties might have been. In any case, to say that the parties intended to have Alberta law apply illustrates the absurdity in any finding of intention. The most the parties intended was a contract to share real estate commissions. To say that the plaintiff intended to have Alberta law apply is pure imagination and would have been greeted with derision by the plaintiff had he had a chance to comment. The simple solution to the case is to forget all the traditional conflicts talk and say the contract is unenforceable because the Alberta legislation makes it so. It should be remembered that this result does not depend on the fact that the action was brought in Alberta. The same result could have been reached in an action brought in Ontario. Conversely an opposite result could have been reached in either province if the application of the Alberta legislation was not required in the circumstances. This is not to deny that the result might differ depending on where the action is brought. But such differences are unavoidable and will be no less likely to arise if meaningless formulae of "intention" are used.

[37] 21 D.L.R.3d 228 (Alta. Sup. Ct. 1971) (MacDonald, J.).

The second recent case can be dealt with in the same way. In *Sharn Importing Ltd. v. Babchuk*[38] an action was brought on a contract of guarantee signed by the defendant. The defendant carried on a shoe business in Vancouver and Edmonton. The only defence raised was that the guarantee had been signed by the defendant in Edmonton and by Alberta legislation such a guarantee would be invalid unless it was acknowledged before a notary public. The case could have been quickly disposed of because the trial judge did not believe the defendant when he maintained that the guarantee had been signed in Edmonton. The judge, however, went on to hold that, in any case, the proper law was not that of Alberta. For, unless the proper law were that of Alberta, the Alberta legislation would be irrelevant. The proper law was said to be that of either Quebec or British Columbia. This conclusion was justified on the ground that the intention of the parties was to have a valid contract. Once again the intention of the parties is completely irrelevant. It is obvious that they intended the contract to be valid. Business men cannot be allowed to make promises, like children, with their fingers crossed! The application of the Alberta rule regarding contracts of guarantee should be applied if its purposes would be forwarded by its application and if no other competing purpose in British Columbia (or even possibly Quebec) would be jeopardized by the court's so doing. The latter situation may reveal a situation of "true conflict" that offers no easy answer. The kind of problems that can come up are well illustrated by the case of *Lilienthal v. Kanfman*.[39] But, no matter what the right answer might be, it will only be found by considering those factors that are relevant in any *contract* analysis of the problem.

Both cases reached what may be loosely termed the "right" answers, for in *Ross v. McMullen*, it is probable that the Alberta legislation was intended to cover the situation found there, and in *Sharn Importing Ltd. v. Babchuk*, it is, again, probable that the Alberta legislation should not have been allowed to affect the contract, even if the defendant had been believed. The similarity of result by either the traditional or modern methods illustrates the fact that for all the academic difference in approach the practical consequences of either view may be slight. But for all the similarity in result it is well to be aware of the dangers in the traditional view. These dangers arise from the fact that the traditional view obscures so much that is important. What is most important is, of course, the rational solution of a problem arising out of a contract situation.

An abstract inquiry such as that which occurred in *The Assunzione*[40] illustrates some of the dangers in the traditional approach. Attacks have been made by writers like Currie,[41] Cavers,[42] Weintraub[43] and others who

[38] [1971] 4 W.W.R. 517, 21 D.L.R.3d 349 (B.C. Sup. Ct.) (Wilson, C.J.S.C.)

[39] 395 P. 2d 543 (Ore. Sup. Ct. 1964).

[40] [1954] P. 150 [1954] 1 All E.R. 278 (C.A. 1953).

[41] B. Currie, Selected Essays on the Conflict of Laws (1963).

[42] D.F. Cavers, note 24 *supra*.

[43] R.J. Weintraub, note 25 *supra*.

have shown that many supposedly complex conflict cases are, in fact, easily analysed in terms of basic contract law and interpretation of statutes. Both *Ross v. McMullen*[44] and *Sharn Importing Ltd. v. Babchuk*[45] illustrate this. Cavers[46] and Weintraub[47] in particular have attempted to develop new principles which would guide courts and lawyers in deciding when, for example, an invalidating rule might be applied. Ehrenzweig's analysis of cases as supporting the application of the *lex validatis*[48] offers evidence that courts may be less influenced by academic choice of law theories and more aware of what contract principles require. But the development of satisfactory rules will not be fully achieved until the right foundations are laid. Dr. J.H.C. Morris[49] in his very recent book draws attention to a statement by Mr. Justice Dixon in the High Court of Australia which states:[50]

> In the choice of law for giving obligatory force to promises or agreements, ascertaining their scope and determining their operation, English courts have been avowedly guided by the real or presumed intention of the parties. Learned writers have urged that such a standard is alike unsound in principle and inconvenient in practice. How, they ask, can an English forum be justified in giving any legal effect to the intention of the parties until it has been decided by what law efficacy is ascribed to their intentions? Why should the minds of the parties affect the question whether a foreign law operates upon an agreement made by them and translates it into rights and duties which an English court ought to recognize and enforce? If the law of a country declares that some description of transaction shall be unlawful and of no effect, why, in a question whether that law is applicable to a particular transaction of that description brought before an English forum, should any regard be paid to the intentions of the parties on the subject? How often do the parties possess any intention that their agreement shall be governed by a particular law? And, if they express such an intention, may it not be for the purpose of evading the operation of the law of a country justly claiming to control them? If an intention must be imputed where none existed, how can any certainty be found, unless by the use of presumptions producing the same effect as independent substantive rules?

This passage, though written nearly forty years ago, sums up the inadequacy of the traditional approach to choice of law in contracts.

So far mention has only been made of cases of validity of contracts. One of the advantages claimed for the traditional rule is that it provides a single regime to govern all aspects of the contract. It is admitted, however, that the contract can be split, though this will not be done "readily and without good reason."[51] This admission, which is made by most text writers,[52]

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[44] *Supra* note 37.

[45] *Supra* note 38.

[46] *Supra* note 42, especially THE CHOICE OF LAW PROCESS 181, 194.

[47] *Supra* note 36.

[48] A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS (1962).

[49] MORRIS at 234.

[50] McClelland v. Trustees Executors and Agency Co., 55 Commw. L.R. 483, at 491-92 (Austl. High Ct. 1936).

[51] Kahler v. Midland Bank, [1950] A.C. 24, at 42 (per Lord MacDermott)

[52] CHESHIRE & NORTH at 197-98; DICEY & MORRIS at 694; MORRIS at 233-34. This admission is made in general, but careful language, and it appears in addition to the discussion

raises some very interesting problems. It has been suggested that the limitations imposed upon the effect of an express choice of law by the parties do not indicate why those limitations should be applied in one case and not in another.[53] The same problem confronts those who would argue for splitting the law governing a contract. On what basis is such a split to be made? If the reason for the application of any particular rule of the jurisdiction selected by the proper law approach is never made clear, how would it ever be clear why one jurisdiction should be selected for one purpose and another jurisdiction for some other purpose? In other words, if jurisdiction A is selected as the law to govern the validity of the contract, on what basis is jurisdiction B selected to govern any other aspect of it? This kind of problem seems to be inherent in the use of jurisdiction-selecting rules, for the reason for the application of any rule is not made clear, and until these reasons are made clear then the process of picking and choosing from among competing jurisdictions becomes somewhat haphazard.

An example of this kind of problem is provided in a series of cases involving life insurance companies and refugees from Cuba after the coming to power of Fidel Castro. The leading Canadian case is *Imperial Life v. Colmenares*.[54] The issue in that case was whether the plaintiff, a refugee from Cuba, could collect the cash surrender value of two policies on his life taken out in Cuba in the 1940's. The difficulty from the defendant's point of view was that they had substantial assets in Cuba and were prevented by Cuban legislation from paying the value of the policies to the plaintiff without risking forfeiture of those assets in Cuba. The Supreme Court of Canada applied the traditional tests to determine that Ontario was the proper law of the contract. This meant that the critical time was the inception of the contracts. But the problem had only arisen some ten years after the policies had been issued. The question was now whether the obligation under the policy was frustrated by the supervening illegality by Cuban law. The parties could have answered this question for themselves had they chosen to do so, and here, unlike questions of validity, the intention of the parties would have been relevant (though, almost certainly, different). The issue of frustration however makes Cuban law relevant in quite a different way from that in which it would be considered by the court as an issue of validity of the contracts. The question is not whether Cuban law *governs* the contract, but whether Cuban law should be regarded as a frustrating event, either by Ontario or any other law. It was this focus on the "proper law" which obscured the real issue and failed to disclose why Cuban law should

on the various laws that can be applicable even under the proper law approach, *e.g., lex loci solutionis*. In other words, it may be possible to have more than one proper law defined in the way suggested by, for example, The Assunzione, [1954] P. 150, [1954] 1 All E.R. 278 (C.A. 1953). *See also* Montreal Trust v. Stanrock Uranium Mines, [1966] 1 Ont. 258, 53 D.L.R.2d 594 (High Ct. 1965).

[53] *See*, for example, the discussion in CHESHIRE & NORTH on the express choice of Scottish law to avoid the English law of consideration. Discussed *supra* text accompanying notes 32 and 33.

[54] [1967] Sup. Ct. 443, 62 D.L.R.2d 138.

have been relevant.[55] Here, too, the position would have become much clearer had the court considered the dispute in domestic contract terms.

A recent English case provides a further illustration of the curious results of a concentration on the intention of the parties coupled with separate choice of law problems in both contract and tort. In *Sayers v. International Drilling Co. N.V.*,[56] an Englishman had been employed by a Dutch company to work on an oil rig in Nigeria. The contract of employment (on a form suitable for employees of any nationality) provided that the employee waived all rights to compensation for injuries except such as were provided for in the contract. The employee was injured by the negligence of fellow employees and sued the employer in England. A preliminary issue was ordered to be tried to determine whether the contract was governed by English law. The Law Reform (Personal Injuries) Act, 1948, provided in section 1(*3*) that all clauses limiting the employee's liability for injuries caused by fellow employees were void. The question was whether the clause limiting the defendant's liability was valid.

Lord Denning said, first, that the proper law of the tort (the plaintiff's claim being said to be one in tort) was Dutch, but the proper law of the contract was English. But even so, the particular issue should be determined by the law having the closest connection to it. This he held to be Dutch. Lord Justices Salmon and Stamp both held that the proper law of the contract was Dutch. It was implicit in the judgments of all the judges that the parties could have chosen any law to govern the contract. It is difficult to see how the applicability of the English statute can be affected by such a choice. The statute is presumably intended for the protection of employees from unfair bargains imposed by a more powerful employer. The only question facing the court was a simple question of statutory interpretation—does the Act apply to this employee and this employer? If it does, the clause is void, if it does not, the clause is valid. There is, therefore no need to talk of the proper law of either the tort or the contract. The issue is one not of party autonomy in *contract*.[57]

The defects in the traditional "proper law" approach cover the whole range of conflict contract problems and it is obviously not possible to discuss the alternatives nor even the defects widely here. Though recent cases

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[55] English cases like Ralli v. Campania Naviera, [1920] 2 K.B. 287 (C.A.) and Regazzoni v. K.C. Sethia Ltd., [1958] A.C. 301, raise somewhat similar problems The former case is a case of frustration and was clearly so regarded by Lord Scrutton, at 300, 301; the latter is not really a "conflict case" at all, but is merely the application of English views on public policy. It can be argued that in these cases foreign law was applied, or given effect to, or recognized without any choice of law process.

[56] [1971] 1 W.L.R. 1176, [1971] 3 All E.R 163 (C.A.). *See also* the comment by Smith, 21 INT'L & COMP. L.Q. 164 (1972), and Collins, *Exemption Clauses, Employment Contracts and the Conflict of Laws*, 21 INT'L & COMP. L.Q 320 (1972).

[57] There is an interesting discussion of this problem in Zapata Off-Shore Co. v. The "Bremen" and Unterweser Reederci G.M.B.H., [1971] 1 Lloyd's List L.R. 122 (U.S. 5th Cir 1970) (per Wisdom, C.J., dissenting).

and textbooks have confirmed the traditional view, it is still possible that the potential of an alternative analysis might be accepted by some court and some badly needed clarification brought to the analysis of the choice of law process.[58]

IV. TORTS

The subject of torts in the conflict of laws has been in a greater state of confusion and change than any other area. The ripples created by the decision of the New York Court of Appeal in 1963 in *Babcock v. Jackson*[59] have reached both English and Canadian courts. The House of Lords in *Chaplin v. Boys*[60] reconsidered the English law on the topic and now some courts in Canada have made reference to both the American and English cases.[61] *Chaplin v. Boys* was extensively discussed in previous surveys[62] and has, in any case, given rise to so much comment that no more than is absolutely necessary should now be said about it.

The controversy in the area of torts may be divided into several proposals which have been made as choice of law rules. The old rule based on this case of *Phillips v. Eyre*[63] has been usually interpreted as requiring, first, "actionability" by the lex fori and "non-justifiability" by the law of the place where the act was committed. Proposals for new rules fall into one of these categories. The first category includes three proposals for tinkering with the traditional rule. Such tinkering usually involves some limitation on the scope of the word "justifiable" in Mr. Justice Willes' judgment in *Phillips v. Eyre*.[64] This, in turn, is said to involve the overruling of the case of *Machado v. Fontes*[65] where the word "justifiable" was given its narrowest scope. A further suggestion made here is that the law of the place where the tortious act occurred should govern *all* aspects of the action (except, of course, such matters as might be regarded as procedural). This, for example, was the proposal made by the Hague Conference on Private International Law.[66] It is also, of course, the position adopted

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[58] CHESHIRE & NORTH at 198 state that the problem in contract "is more perplexing... than in almost any other topic." MORRIS at 219 echoes this view.

[59] 191 N.E.2d 279 (1963).

[60] [1971] A.C. 356 (1969), [1969] 2 All E.R. 1085.

[61] Gronlund v. Hansen, 65 W.W.R. 485, 69 D.L.R.2d 598 (B.C. Sup. Ct. 1968) (Kirke Smith, J.), *aff'd* 4 D.L.R.3d 435 (B.C. 1969); LaVan v. Danyluk, 75 W.W.R. 500 (B.C. Sup. Ct. 1970) (Kirke Smith, J.), commented on by Carr, *Torts in the Conflict of Laws in British Columbia: LaVan v. Danyluk*, 6 U.B.C.L. REV. 353 (1971), and Castel, 49 CAN. B. REV. 632 (1971).

[62] J.A. Clarence Smith, *Annual Survey of Canadian Law: Conflict of Laws*, 4 OTTAWA L. REV. 176 [1970] *See also*, MacKinnon, *Annual Survey of Canadian Law: Conflict of Laws*, 3 OTTAWA L. REV. 131 (1968).

[63] L.R. 6 Q.B. 1 (1870).

[64] *Id.* at 28, 29.

[65] [1897] 2 Q.B. 231 (C.A.). This case was followed in Canada in McLean v. Pettigrew, [1945] Sup. Ct. 62, [1945] 2 D.L.R. 65 (1944).

[66] Draft Convention, Art. 3 (1968). This view was also put forward by the Committee redrafting the QUEBEC CIVIL CODE. This most recent recommendation from that committee may be found in a comment by Castel, 49 CAN. B. REV. 632, at 635 (1971). This is a combination of the *lex loci actus* and the plaintiff's habitual residence. *See, infra*, at note 102.

by the first *Restatement of Conflict of Laws* in the United States.[67] The second category include suggestions for a "proper law of the tort" analogous to the "proper law" of a contract.[68] Sometimes this suggestion appears to involve the idea that each tort has, like a contract, in general only one proper law to govern all issues. At other times, the issues are to be divided up and for each issue the "local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties," will govern.[69] The Foreign Torts Act proposed by the Commissioners on Uniformity of Legislation in Canada is along the same lines.[70] The third category includes the kind of suggestions made by Cavers that "principles of preference"[71] be developed to handle tort problems. It is intended that the use of such principles would help the court to decide which of two competing rules would be applied in any particular case. The difference between this approach and that of *Restatement (Second) of Conflict of Laws* and the Foreign Torts Act is that the latter are "contact counting" approaches: they list significant factors[72] and may even go so far as to direct, as in the Foreign Torts Act, that the court look at "chiefly the purpose and policy of each of the rules of tort law that is proposed to be applied."[73] Cavers' approach, on the other hand, is an attempt to say how a consideration of the contacts, purposes and policies of competing rules should be balanced.

These conflicting proposals for reform illustrate very well the state of confusion in conflicts. Recent cases and textbooks have not done much to reduce the confusion. It has not become clear, for example, as a result of *Chaplin v. Boys*[74] what the law in England is. It is probable that the very narrow interpretation of the term "justifiable" in *Phillips v. Eyre* given by the Court of Appeal in *Machado v. Fontes*[75] is no longer the law. The House of Lords may also be taken to have approved the application of *The Halley*[76]

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[67] RESTATEMENT OF CONFLICT OF LAWS §§ 377, 378 (1934)

[68] This suggestion was first made by Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951). It is said to have been adopted in several cases particularly in Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963), though that case can be many things to many men. *See*, for example, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

[69] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

[70] PROCEEDINGS OF THE COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA 153 (1967). The text is also found in J.H.C. MORRIS, CASES ON PRIVATE INTERNATIONAL LAW 315 (4th ed. 1968). The suggestion is also discussed by Hancock, *Canadian-American Torts in the Conflict of Laws: The Revival of the Policy Determined Construction Analysis*, 46 CAN. B. REV. 226 (1968); Read, *What Should Be the Law in Canada Governing Conflict of Laws in Torts?*, 1 CAN. LEGAL STUD. 277 (1968), and J.A. Clarence Smith, *The Foreign Torts Act—Look Before you Leap*, 20 U. TORONTO L.J. 81 (1970).

[71] D.F. CAVERS, THE CHOICE OF LAW PROCESS at 139, 146, 159, 166, 176 (1965)

[72] Such factors include, (a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile and place of business of the parties and (d) the place where the relationship, if any, between the parties is centred.

[73] Foreign Torts Act § 3, *supra* note 70.

[74] [1971] A.C. 356 (1969), [1969] 2 All E.R. 1085

[75] [1897] 2 Q.B. 231 (C.A.).

[76] L.R. 2 P.C. 193 (1868).

in the first rule in *Phillips v. Eyre*, in spite of strong criticism that such an approach is out of date and unjust.[77] Such a result, in any case, corresponds to the similar conclusion reached by the Supreme Court of Canada in *O'Connor v. Wray*[78] and by the High Court of Australia in *Anderson v. Eric Anderson Radio & T.V. Pty. Ltd.*[79] About all that can be said with much certainty about the present law is that the first *Restatement* position (and that favoured by the Hague Conference and by the Committee for the Reform of the Quebec Civil Code) is not the law in England or in the common law provinces of Canada.[80] The major obscurity, however, lies about the question whether some variation of *Phillips v. Eyre* is now the law or whether the English courts are moving to a proper law approach. Support for the application of the proper law theory can be found in three judgments in the House of Lords[81] which are clearly consistent with this theory. (The result is, of course, consistent with almost any variation of *Phillips v. Eyre* including *Machado v. Fontes*).[82] The proper law theory has been referred to in some recent Canadian cases. The trial judge in *LaVan v. Danyluk*[83] made reference to it and to *Chaplin v. Boys*. (Though he felt that *Chaplin v. Boys* prevented any further development of the proper law approach). The same judge at the trial of *Gronlund v. Hansen*[84] also referred to it. The theory was also reviewed in a very curious judgment of Mr. Justice Currie of the Nova Scotia Supreme Court in *Abbot-Smith v. Governors of University of Toronto*[85] which was a case, not on choice of law, but an application for leave to serve a writ out of the jurisdiction.[86] It is also reasonably clear that the kind of proposals made by Cavers have not been adopted in Canada or in England, though they have been referred to in several American cases.[87]

Since the dispute in both England and Canada appears to centre on the issue of whether the new rule should be some variation of *Phillips v. Eyre*, or the proper law approach, it is useful to compare these approaches in the context of the recent cases. *LaVan v. Danyluk*[88] arose out of a colli-

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[77] *See*, for example, HANCOCK, TORTS IN THE CONFLICT OF LAWS 89 (1942); CHESHIRE & NORTH at 265; MORRIS at 262-64.

[78] [1930] Sup. Ct. 231, [1930] 2 D.L.R. 899.

[79] 114 Commw. L.R. 20 (1965).

[80] Some support for this view can be found in the judgment of Mr. Justice Willes in Phillips v. Eyre, L.R. 6 Q.B. 1, at 28 (1870), but this has never been put forward as the governing principle of this case.

[81] Lord Hodson, Lord Wilberforce and Lord Pearson. The point is discussed in MORRIS at 270. Lord Denning in Sayers v. Int'l Drilling Co., [1971] 1 W.L.R. 1176, [1971] 3 All E.R. 163 (C.A.), continues to put forward his idea of the proper law and finds support for it in *Chaplin v. Boys*, particularly in the judgment of Lord Wilberforce. *See* [1971] 3 All E.R. 163, at 166.

[82] *Supra* note 75.

[83] LaVan v. Danyluk, 75 W.W.R. 500 (B.C. Sup. Ct. 1970).

[84] 65 W.W.R. 485, 69 D.L.R.2d 598 (B.C. Sup. Ct. 1968).

[85] 45 D.L.R.2d 672 (N.S. Sup. Ct. 1964).

[86] Ont. R.P. 25(1)(*h*). *See also* R.S.C. Ord. 11, r. 4.

[87] *E.g.*, Reich v. Purcell, 432 P.2d 727 (Calif. 1967).

[88] *Supra* note 83.

sion between two cars in the State of Washington. The parties were all resident and domiciled in British Columbia, though there was apparently no previous connection between them. The vehicles were found to be "B.C. vehicles." Both parties were found to be negligent, and, in addition, such negligence would be a bar to the plaintiff's action by the law of Washington. The trial judge, Mr. Justice Kirke Smith gave judgment for the plaintiff, but apportioned the damages under the British Columbia statute. These facts are similar to those in *Chaplin v. Boys* and the reverse of those in *Anderson v. Eric Anderson Radio & T.V. Pty. Ltd.*[89] which also involved contributory negligence. The judgment was divided into three parts. The first part was the choice of law, the second, the issue of liability, and the third, the question of damages. This kind of approach illustrates the dangers of either any variation in *Phillips v. Eyre*, or the approach of either *Restatement (Second) of Conflict of Laws* or the Foreign Torts Act. The approach allowed the judge to consider that British Columbia law had the "most significant connection" with the parties. But this conclusion was reached without any consideration of the actual competing laws. The actual laws in conflict were the provisions of the British Columbia Contributory Negligence Act and the Washington common law rule that the plaintiff's negligence was a bar to any recovery. It makes no sense to count contacts until it is known, for example, that both laws should be applied in the facts of the case. This will not be known unless the purposes of the rules are considered. Is the Washington law meant to apply to people from British Columbia? It is not always easy to discover a rational purpose behind an unamended common law rule that had a very doubtful beginning in any case, but its application makes no sense in any situation unless some purpose can be found for it.

It is exactly this same defect which lies at the root of all the objections to *Phillips v. Eyre* however it might have been varied by *Chaplin v. Boys*, and it was the failure of the members of the House of Lords to see this which led to their rejection of *Babcock v. Jackson*, their approval of *The Halley*, and the problems they ran into in the arguments based on substance and procedure. It was this same point too which has already been observed in contracts, particularly in such cases as *The Assunzione*.[90]

Kirke Smith considered that the proper law approach had been precluded by *Chaplin v. Boys* and he also seemed to feel that, at least, in Canada the old *Machado v. Fontes* interpretation of *Phillips v. Eyre* was still law. The judge was, however, bothered by the fact that he felt his interpretation of *Chaplin v. Boys* would have compelled him to a different result, even though it would have been a result contrary both to the Canadian authorities—particularly *McLean v. Pettigrew*[91]—and the "proper law" doctrine. But it really makes little difference whether the courts follow *Phillips v. Eyre*, *Chaplin v. Boys*, or the kind of proper law notion discussed by either

[89] 114 Commw. L.R. 20 (1965).

[90] [1954] P. 150, [1954] 1 All E.R. 278 (C.A. 1953)

[91] [1945] Sup. Ct. 62, [1945] 2 D.L.R. 65 (1944)

the House of Lords, Kirke Smith, *Restatement (Second) of Conflict of Laws* or the Foreign Torts Act, for none of these approaches will produce a rational application of any rule. From that point of view both *Chaplin v. Boys* and *LaVan v. Danyluk* are bad judgments.[92]

Since the number of cases coming before the courts in Canada and England are so small, the courts are unable to perform their normal function of developing the rules by a process of slow development from case to case. The situation in the United States may not be either wholly satisfactory or crystal clear, but at least there the courts are trying to find new ways to solve the problems they face. What is so unfortunate about such a decision as *Chaplin v. Boys* is that it demonstrates a failure on the part of English judges and counsel to understand the truly revolutionary nature of such decisions as *Babcock v. Jackson.*[93] The lesson of this decision is not so much in the "rule" it might be taken as laying down for the future, but in the reasons why it was felt the existing approach was inadequate. Similarly we may not accept the analysis of Cavers or Currie when they seek to develop methods for solving conflicts problems, but their analysis of the existing "jurisdiction-selecting" rules cannot be ignored. They have convincingly shown how the existing rules *cannot* provide any satisfactory basis for solving conflicts problems. Since the courts have not got the opportunity to work the common law pure on their own they must be prepared to be more eclectic, and to consider how the problems they face have been solved elsewhere and what the new developments are. For conflicts purposes Canada's models must be found in the United States.

The newer and more revolutionary ideas are frequently damned as undermining such values as certainty. This was, for example, the reason given by several members of the House of Lords in *Chaplin v. Boys,*[94] for rejecting them. The same argument was made in respect of *Donoghue v. Stevenson*[95] and in *The Practice Statement (Judicial Precedent)* of Lord Gardiner[96] that the House of Lords would no longer be bound by its own previous decisions. This argument is of only limited force. It has been often pointed out that torts are not planned; there is no reliance interest in torts as there may be in contracts. What then is needed is not certainty *before* the tort takes place, but certainty *after* it has taken place, so that settlements can be negotiated and advice given on whether an action should be brought or not. The result of such cases as *Donoghue v. Stevenson* must surely have been to increase certainty in the end. It cannot be argued that counsel are unable to negotiate a settlement based on the assumption that the court will

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[92] Morris seems to think that *Chaplin v. Boys* does not, in fact, mean the rejection of the proper law theory. It is clear that the House of Lords did not adopt it, however.

[93] 191 N.E.2d 279 (N.Y. 1963).

[94] [1969] 2 All E.R. 1085 (per Lord Guest, at 1095C; per Lord Donavan, at 1097C; and per Lord Pearson, at 1116B).

[95] *See, e.g.*, the comments in Heuston, *Donoghue v. Stevenson in Retrospect*, 20 MODERN L. REV. 1 (1957).

[96] [1966] 1 W.L.R. 1234, [1966] 3 All E.R. 77.

apply *Donoghue v. Stevenson*. Similarly, once a method for choosing between the competing rules involved in a foreign tort is found the certainty will be far greater than it is now when *Phillips v. Eyre* is to be given a "flexible interpretation,"[97] or when the "general rule" should only be departed from "on clear and satisfactory grounds."[98] Such statements as these give almost no guidance to any future courts. The present position in the United States cannot be any worse in spite of such apparent contradictions as *Dym v. Gordon*.[99]

Finally, it would seem likely that only some fairly revolutionary solution will even provide any basis on which a single approach could be found for tort problems in all jurisdictions. Such attempts at uniformity as the Hague Convention[100] are hopelessly out of date and it would be odd if we were now to adopt a view that has been rejected in the United States, even though that same view may still be present in Europe.[101] The new view of the Private International Law Committee of the Office of Revision of the Civil Code (Quebec) is that:[102]

> Extra contractual civil liability is governed by the law of the habitual residence of the plaintiff at the time when the act which caused the damage occurred. However, the defendant may raise a defence based on the lawfulness of the act which caused the damage and the absence of an obligation to repair it according to the law of the place where this act occurred

However, this particular view would seem to offer no advantages over any existing approach. The statement of the rule contains no indication of why the plaintiff's habitual residence should be relevant. The adoption of such a rule in Quebec would lead to a contrary result in a case like *O'Connor v. Wray*,[103] but are all cases of vicarious liability to be treated in the same way? If this were the general rule it would seem to be hard on defendants. Even such new approaches as *Restatement (Second) of Conflict of Laws* and the Foreign Torts Act are not wholly satisfactory, though they may provide a preferable basis when compared with either the Hague Conference or *Phillips v. Eyre*. This case itself will not be a possible basis since it was never the law in the United States and could not now be accepted there. Uniformity of approach has two great advantages; first, it would discourage forum shopping and secondly, (and more importantly) it would provide the best method for all courts to develop experience and therefore competence and predictability in the choice of law process.

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[97] Chaplin v. Boys, [1969] 2 All E.R. 1085, at 1092F (per Lord Hodson)

[98] *Id.* at 1104D (per Lord Wilberforce)

[99] 209 N.E.2d 792 (N.Y. 1965).

[100] Draft Convention (1968).

[101] *See* a short discussion in MORRIS at 283-84.

[102] This suggestion is discussed by Castel and Crépeau, *News from Canada*, 19 AM. J. COMP. L. 17 (1971) and by Castel, Comment, 49 CAN. B. REV. 632, at 635 (1971)

[103] [1930] Sup. Ct. 231, [1930] 2 D.L.R. 899

V. MARRIAGE

The problems of marriage in conflicts seem only occasionally to come up and there are few recent cases of any real interest. Most of the difficult marriage cases are really cases of remarriage and the difficulties arise from the success (or failure) of one or both of the parties to escape a previous marriage. Such cases will be discussed in the next section.

Two particular problems have been discussed in recent cases. The first is the problem of retroactive validation, the second the problem of "common law" marriage. In *Re Howe Louis*,[104] the British Columbia Court of Appeal had to decide whether a marriage in Saskatchewan according to Chinese custom was valid, even though initially invalid, after legislation in Saskatchewan purporting to validate such marriages. The parties were married in Regina in 1921. Legislation was passed in Saskatchewan retroactively validating such marriages. This legislation took effect in 1933. The parties lived together until 1944 when the husband deserted the wife. The wife claimed in the British Columbia courts to be entitled to part of the husband's estate under the provisions of the Testator's Family Maintenance Act. The British Columbia courts had no difficulty in recognizing the marriage in 1921 as a valid marriage. Reference was, of course, made to *Starkowski v. Attorney-General*.[105]

The case poses no real problems since the complicating factors present in the facts of *Starkowski* were not present here. The parties had not left Saskatchewan by the time the validating legislation was passed, and were still living together at that time. It is odd that problems of retroactive validation should cause such difficulties in conflicts. The belief that problems are present is fostered by the fact that most texts have a special section called "The Time Factor"[106] or something similar.[107] The difficulty arises, in this as in all conflict areas, from the fact that the choice of law rules used refer to the law of a particular jurisdiction. In the case of *Re Howe Louis* the choice of law rule relevant was the rule that the *lex loci celebrationis* governs all aspects of the found validity of the marriage.[108] The simple answer to the problem in cases like *Re Howe Louis* or *Starkowski* is that no choice of law rule is necessary. The marriage is valid because no jurisdiction anywhere wants to make it invalid. Only if there were an invalidating rule in either Saskatchewan or British Columbia that could have applied to this marriage would the courts have to decide whether it was invalid or not.

The problem is put into sharper focus by another recent case, this time from the state of Victoria. In *Kuklycz v. Kuklyez*[109] the issue was the vali-

[104] 14 D.L.R.3d 49 (B.C. 1970).

[105] [1954] A.C. 155 (1953).

[106] DICEY & MORRIS at 40; MORRIS at 497.

[107] *See, e.g.* J.-G. CASTEL, CONFLICT OF LAWS 293 (1968).

[108] This point was established though it had been argued that such a rule was in conflict with the constitutional requirements under the B.N.A. Act.

[109] [1972] Vict. 50 (Vict. Sup. Ct.).

dity of a marriage, celebrated in 1942 in the Ukraine without compliance with the Russian requirements. The marriage was, in fact, celebrated before an officer of the occupying German forces and later by a priest of the Russian Orthodox Church. The judge said that it was "plain that no marriage in accordance with the forms and ceremonies required by the *lex loci celebrationis* . . . was celebrated."[110] He held that such compliance was, in general, required by *Berthiaume v. Dastous*.[111] However, it was also found that compliance with the Russian law was impossible and so the marriage was held valid as a common law marriage. Such a marriage was held to require an episcopally ordained priest, and a priest of the Russian Orthodox Church was such.

The whole problem of common law marriages is most unsatisfactory. It is, to say the least, odd and somewhat arrogant to require a ceremony in the Ukraine in 1942 to comply with the common law. In particular, it is incredible that it should matter that the officiating priest should or should not be episcopally ordained. The judge nowhere discusses why Russian law should be relevant, for even this is open to dispute. For all that is known, Russian law might, in fact, have regarded this marriage as valid. The crux of the problem is that in the circumstances in which the parties found themselves there was no reason why the marriage should not be regarded as valid. Before a marriage should be invalidated for any reason it has to be shown that the purpose of the invalidating rule would be forwarded by its application in the case. Without such a justification for invalidation the normal principle that marriages are valid, unless their invalidity can be shown, applies. The so-called common law marriages are therefore justifiable because the effect is to regard the invalidating rule as ineffective due to the circumstances in which the parties find themselves. Such a rationale has nothing to do with the submission of the parties to any foreign law or the purely fortuitous fact that the officiating clergyman was or was not a member of a particular church.

It may well be that, as in contracts, the practical results of the traditional rules are not too serious, but since the problems of marriages can arise at a time when the parties involved can do nothing to remedy any mistakes that might have been made it is important that the chance of there being mistakes should be minimized.

VI. Recognition of Foreign Divorce Decrees

Parties, courts and legislatures have in recent years produced a great many interesting problems and solutions where foreign divorces are concerned. Until 1967 the law could be fairly simply stated: a foreign divorce would be recognized if it was a decree of the court of the husband's

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[110] *Id.* at 51.

[111] [1930] A.C. 79.

domicile,[112] if it would be recognized by a court of the husband's domicile,[113] or if it was granted in a court in such circumstances that the recognizing court would itself have had jurisdiction.[114] There was some fuzziness in the second rule in Canada[115] but, in general, these rules were accepted in both England and Canada.[116] It was also recognized that there were probably three problems that would sooner or later have to be resolved by the courts. The first concerned the possible retroactive effect to be given to *Travers v. Holley*.[117] The need for a rule like that in *Travers v. Holley* only arose when divorce jurisdiction could be taken on grounds other than the domicile of the husband. Such extensions were made in Canada in 1930[118] and in England in 1937.[119] The questions was, then, whether a divorce obtained by a deserted wife, say, in 1929 in circumstances sufficient to give a Canadian court jurisdiction after 1930 would be recognized.[120] The second concerned the problem whether the rules in *Travers v. Holley* and *Armitage v. Attorney-General*[121] could be combined so that not only would decrees recognized by the court of the domicile be recognized, but also decrees recognized by any jurisdiction whose own decrees would be recognized.[122] The third problem concerned the position of extra-judicial divorces.

Since 1967 all these problems have had to be faced by the courts. The first was dealt with in *Indyka v. Indyka*[123] when a divorce obtained in Czechoslovakia by a wife was recognized in England, even though it had been obtained before the English courts had an equivalent jurisdiction. This problem has, in addition, come up in an even more extreme form in *Hornett v. Hornett*.[124] The second problem arose in *Mather v. Mahoney*[125] and in *Messina v. Smith*[126] where the wider reasons given in *Indyka v. Indyka* were relied upon to justify the recognition of foreign divorces by relation

[112]This rule is usually regarded as based on LeMesurier v. LeMesurier, [1895] A.C. 517 (P.C.).

[113]Armitage v. Attorney-General, [1906] P. 135.

[114]Travers v. Holley, [1953] P. 246 (C.A.); Robinson-Scott v. Robinson-Scott, [1958] P. 71 (1957).

[115]*See, e.g.*, Schwebel v. Ungar, [1964] 1 Ont. 430, 42 D.L.R.2d 622 (1963), *aff'd* [1965] Sup. Ct. 148, 48 D.L.R.2d 644 (1964). And comment by Lysyk, 43 CAN. B. REV. 363 (1965). The matrimonial problems of Mr. and Mrs. Schwebel are now resolved: *see*, Schwebel v. Schwebel, [1970] 2 Ont. 354 (High Ct.), where a short history of the various actions (including a Hungarian decree of nullity) is set out.

[116]*See* D. Mendes da Costa, *Some Comments on the Conflict of Laws Provisions of the Divorce Act, 1968*, 46 CAN. B. REV. 252 (1968).

[117][1953] P. 246 (C.A.).

[118]Divorce Jurisdiction Act, Can. Stat. 1930, c.15.

[119]Matrimonial Causes Act, 1 Edw. 8 & 1 Geo. 6, c.57 (1937).

[120]The view that *Travers v. Holley* could not be given retroactive effect was supported by Dicey (*see*, reference in DICEY & MORRIS at 314) and was the basis for the refusal of the trial judge to recognize the Czechoslovakian divorce in *Indyka v. Indyka*.

[121][1906] P. 135.

[122]Such an attempt was rejected in Mountbatten v. Mountbatten, [1959] P. 43 (1958).

[123][1969] 1 A.C. 33, [1967] 2 All E.R. 689.

[124][1971] 1 All E.R. 98 (P.D.A. 1970).

[125][1968] 3 All E.R. 223 (P.D.A.).

[126][1971] 2 All E.R. 1046 (P.D.A.)

to an appropriate jurisdiction. The third problem has come up for solution when "talaq" divorces have occurred in England.[127] In addition to these three problems, there have been several recent cases where the reasons why an otherwise valid foreign divorce would be refused recognition have been discussed.[128] Two Canadian courts have had to consider the effect of an unrecognized foreign divorce on the collateral incidents of the marriage.[129] The Convention drafted by the Hague Conference on Private International Law 1968 has been given legislative effect by the Parliament of England in the Recognition of Divorces and Legal Separations Act, 1971.[130]

The problem of retroactivity which is raised in both *Indyka v. Indyka* and *Hornett v. Hornett*,[131] has forced the consideration of what limits must be set upon the very wide approach of *Indyka*. The facts of *Hornett* were that a couple married in France in 1919 separated when the husband moved from France to England. The wife eventually followed him, but not before she had obtained a decree of divorce in France. They lived together until 1936 when they separated again. The husband paid maintenance under a magistrates' order from 1937 until 1964 when he applied for a variation. In 1969 he sought a declaration that the French divorce was valid. The court granted the declaration sought. Relying on *Indyka*, the court held that the wife had a "real and substantial connection with France and French law" sufficient to have her divorce recognized. But recognition would not have been given if "there was injustice involved to either party, or to a child of the family as a result of a declaration."[132] The fact that the husband had had no notice of the French proceedings, and that the parties had lived together since the French decree did not affect the validity of the decree. It was also held inappropriate to rely on public policy, and in any case whether the decree should be refused recognition on this ground would raise the same consideration as those of injustice.[133]

It is perfectly clear that the divorce obtained in 1924 would not have been recognized before 1967, and this is, in fact, admitted by the court.[134] It is equally clear that a situation could be devised where such retroactive recognition could have unfortunate consequences for the parties, children, or even subsequent spouses.[135] It is not satisfactory to have to rely on the very vague notion of "justice" or public policy. These notions were, for example relied upon in *Gray v. Formosa*[136] by the Court of Appeal where

[127]Qureshi v. Qureshi, [1971] 1 All E.R. 325 (P.D.A. 1970); Radwan v. Radwan, [1972] 3 All E.R. 967 (P.D.A.); Decision No. R(G)2/71, [1972] C.L. para. 178a.

[128]Adams v. Adams, [1970] 3 All E.R. 527 (P.D.A.) (validity of Rhodesian divorce granted by a judge appointed after Unilateral Declaration of Independence).

[129]Downton v. Royal Trust, 1 Nfld. & P.E.I.R. 203 (Nfld. Sup. Ct. 1971), *rev'd* 1 Nfld. & P.E.I.R. 528 (Nfld. Sup. Ct. 1971); Reid v. Reid, [1972] 1 Ont. 554, 23 D.L.R. 3d 538 (Co. Ct. 1971).

[130]Recognition of Divorces and Legal Separations Act, 1971, c. 53.

[131]*Supra* note 124.

[132]*Id.* at 102.

[133]*Id.* at 102, 103.

[134]*Id.* at 103.

[135]Some examples are discussed by MORRIS at 140.

[136][1963] P. 259 (C.A. 1962); *foll'd* in Lepre v. Lepre, [1965] P. 52 (1962).

a Maltese nullity decree was refused recognition on the grounds of public policy. It may have been the case that no particular harm was done in that situation, but what limits are to be set upon the rule? The identification of public policy with injustice to the parties or children may make the foreign divorce voidable and not void as public policy *simpliciter* would imply, but even this is not satisfactory as one party should not have the option of, in effect, annulling a subsequent marriage of the other.[137] The policy of avoiding limping marriages is one which will help the courts to solve many of the problems in this area, but care must be taken in developing limiting rules.

It is important to notice that the problem of the retroactive effect to be given to *Indyka* is not a problem peculiar to conflict issues. Whenever any court overrules any rule or changes any rule, particularly in a radical way, the problems raised by the fact that people have ordered their affairs in reliance on the old rule can be acute. The difficulty in reconciling the need for justice and the need for a new rule is intense when, as in marriage, certainty is so desirable, but, at the same time, so many different problems have to be solved as marriage and all that it involves may have effects many years after the events in issue. The Hornetts had nearly forty years to make new relationships, have children and make all the other arrangements that may depend on family relationships.

The second problem, that of the broadening of the rule in *Armitage v. Attorney-General*, was very fully discussed in *Messina v. Smith*.[138] In that case a divorce obtained by the wife in Nevada, at a time when the husband was held to be domiciled in England, was recognized on the ground that the wife had a real and substantial connection with the United States, where she was then living, and since the state where she then was would have been compelled to recognize the decree, the decree was one which should be recognized on the principles discussed in *Indyka*. The Nevada divorce was held to be a genuine divorce. The earlier case of *Mather v. Mahoney*,[139] which had also recognized a foreign decree in much the same circumstances, had not referred to *Mountbatten v. Mountbatten*[140] where a Mexican divorce was refused recognition even though it was recognized in New York where the wife had lived for more than three years. *Mather v. Mahoney* had relied on *Indyka* but it is only a short judgment in a case where the respondent did not appear and was not represented. In *Messina v. Smith* on the other hand, the petition was fiercely fought on both sides, and the Queen's Proctor intervened.

The judge in *Messina v. Smith* believed that both the result and reasoning in *Mountbatten v. Mountbatten* were right but not applicable to the present case.[141] It is difficult to appreciate this distinction. The basis

[137]This problem is also discussed *infra* note 164.

[138][1971] 2 All E.R. 1046 (P.D.A.).

[139][1968] 3 All E.R. 223 (P.D.A.).

[140][1959] P. 43 (1958).

[141]*Supra* note 138 at 1058.

for the recognition of any foreign divorce is the acceptance of the foreign court as an appropriate court to sort out the problems of the marriage. This clearly was the factor behind the early decisions in this area.[142] This lies behind the reasoning in cases like *Indyka*. The early cases may have regarded only the court of the domicile as appropriate,[143] the newer view was that a court with a "substantial connection," or the court of the matrimonial home or even nationality was sufficient. It is quite a different thing however to adopt some kind of renvoi approach as was the case in *Armitage v. Attorney-General* and now in *Messina v. Smith*. The basis for recognition in these cases is not any acceptance of the appropriateness of the foreign court granting the decree but a desire to prevent limping marriages or unilateral marriages. It is one thing to develop criteria of what might be an appropriate court to dissolve a marriage,[144] but quite another to set limits to the policy of preventing limping marriages. The House of Lords in *Indyka* spoke of the need for the divorce to be "genuine."[145] The court in *Messina v. Smith* noted that the House of Lords in *Indyka* has approved *Mountbatten v. Mountbatten*.[146] But why should the Mexican divorce in that case be denied recognition and the Nevada divorce in the former case be recognized? Why should the prevention of a unilateral marriage be more important in one rather than the other? Once recognition is given to foreign decrees on any basis other than the connection of the foreign court with the parties it is hard to see where to stop. It will be difficult to provide certainty here unless very careful and precise limits are set to the developments of *Armitage v. Attorney-General*.[147] Perhaps the only divorce that could be classed as not "genuine" is one obtained solely to avoid a law that should be applicable to the matrimonial problems of the couple. For example, a divorce obtained in Nevada by one spouse, at a time when both were living and domiciled in Canada. Such cases are probably rare and it is easy to see how only slightly changed facts could raise awkward questions.

The third problem, that of extra-judicial divorces, has arisen in England due to the large number of immigrants from, particularly, Pakistan. The typical facts are that a "talaq" divorce is pronounced by the husband which is valid by the law of his domicile. The question then is whether this is to be recognized in England. The earlier cases on this are contradictory,[148] but recent cases have recognized these divorces.[149] The judgment of

[142]Wilson v. Wilson, L.R. 2 P. & D. 435, at 442 (1872) (per Lord Penzance).

[143]*See, e.g.* LeMesurier v. LeMesurier, [1895] A.C. 517 (P.C.)

[144]The issue of the appropriateness of the court to dissolve a marriage has already been discussed in connection with domicile, *supra* notes 2, 6 and 7. This arises from the choice of law issue in divorce.

[145][1969] 1 A.C. 33, 88*d*, 89*a* (per Lord Pearce)

[146]Messina v. Smith, [1971] 2 All E.R. 1046 at 1057*f*

[147]These fears are shared by MORRIS at 142, 143. *See also* Morris, *Recognition of Divorces Granted Outside the Domicile*, 24 CAN. B. REV. 73.

[148]*See*, for example, Regina v. Hammersmith Supt Registrar, [1917] 1 K.B. 634 (C.A. 1916) where a "talaq" divorce was refused recognition.

[149]Har-Shefi v. Har-Shefi, [1953] P. 220; Russ v. Russ, [1964] P. 315 (C.A. 1962); Qureshi v. Qureshi, [1971] 1 All E.R. 325 (P.D.A. 1970), commented on in Hartley, *Non-Judicial Divorces*, [1971] CAMB. L.J. 40; Pearl, Comment, 34 MODERN L. REV. 579 (1971).

Sir Jocelyn Simon in *Qureshi v. Qureshi* was a complete analysis of the law regarding the recognition of extra-judicial divorces. He recognized a "talaq" pronounced by a husband domiciled in West Pakistan, at a time when both parties were living in England. The recent English legislation, The Recognition of Divorces and Legal Separation Act, 1971,[150] has altered the law in regard to recognition of such divorces, but the principle in *Qureshi v. Qureshi* would be applicable in Canada. It is worth noticing that the judge was very concerned with the possible abuses to which such divorces might give rise. In this regard he asserted the power of the court to prevent injustice but, at the same time he said that "any necessary modifications called for by public policy [should be left] to other organs of the constitution."[151]

The situation in regard to these divorces is the converse of that in cases of recognition of foreign divorces. In the latter type of case the foreign court may be regarded as an appropriate court to sort out the differences between the married couple. In a case like *Qureshi v. Qureshi* the parties are living in England but are still allowed to dissolve their marriage on grounds relevant under a foreign law.[152] Had the parties in *Qureshi v. Qureshi* sought a divorce in England, English law would have been applied even though the parties would have been domiciled elsewhere. The recognition of the "talaq" could in some cases, fly in the face of the policy of the jurisdiction where the parties live. An order of maintenance (which had been made in *Qureshi v. Qureshi*) will survive a divorce decree in England.[153] But this is not so in Canada.[154] The result might well be to leave a wife without any support when a Canadian decree of divorce would have ensured that she got some. Such problems are inherent in the present situation in divorce so long as no express notice is taken of the choice of law issue implicit there.

There have been cases where foreign divorces that would normally have been recognized have been refused recognition. Such cases have

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[150]1971, c. 53. *See* Radwan v. Radwan, [1972] 3 All E.R. 967. The case turned on the point whether an Egyptian consulate in London was part of a "country outside the British Isles" (per § 2(*a*)).

[151][1971] 1 All E.R. 325, at 345.

[152]An odd situation can occur when the law of the domicile is discovered in reliance on such cases as Udny v. Udny, L.R. 1 Sc. & Div. 441 (1869). In a case under the National Insurance Act, 1965, c.51 (U.K.); Decision No. R(G)2/71, [1972] 4 C.L. para 178a, a husband, a national of Pakistan, temporarily in Kashmir from England was allowed to divorce his wife by "talaq" even though this was ineffective (for procedural reasons) by his *lex patriae*, Pakistan, and by English law, but because it was effective by his domicile of origin, India, which had revived. The case, as reported, is far from clear on why the "talaq" should be recognized. The relevance of a man's domicile of origin in such a situation is slight, to say the least. In Radwan v. Radwan, *supra* note 150, the husband was domiciled in England when he pronounced the "talaq."

[153]*Supra* note 151, at 345. Reliance was placed on Wood v. Wood, [1957] P. 254 (C.A.).

[154]The application of the corollary relief sections of the Divorce Act is excluded, and most provincial statutes providing for maintenance do so only in favour of a "wife." *See, e.g., Deserted Wives' & Children's Maintenance Act,* ONT. REV. STAT. c. 128, § 2(1) (1970). A maintenance order under a provincial statute does not survive a decree of divorce.

included fraud by the petitioner so that the respondent had no knowledge of the divorce,[155] and there are, as we have seen, claims made that the recognizing court has power to refuse to recognize a decree when to do so would produce injustice. Apart from the very few cases of fraud by the petitioner, there were several cases where decrees had been recognized in spite of procedural defects,[156] such as lack of notice to the respondent,[157] and even when a divorce had been obtained under pressure from the Nazi secret police in a marriage between a Jew and a German.[158] Two recent cases have added to the list. The first may be shortly disposed of. In *Adams v. Adams*[159] a divorce had been obtained in Rhodesia by a wife. She sought to have the decree recognized in England so that she could remarry. The decree was refused recognition on the ground that the judge who had made the decree had been appointed after the Rhodesian Declaration of Independence and had therefore no power as a judge by English law. The situation has now been remedied as such people as Mrs. Adams can petition for divorce in England without waiting three years.[160] It is to be hoped that a Canadian court would see no need to take the same view as the English court.

The other case, *Meyer v. Meyer*,[161] is of more interest. There the German wife of a Jew had obtained a divorce in Germany in 1939. The evidence accepted by the court was that she had been induced to get the decree by pressure from external circumstances, by fear for her life and livelihood. The court held that the decree was invalid and would not be recognized. This result was reached in spite of the earlier case of *Igra v. Igra*.[162] That case had also concerned the validity of a German divorce where the husband was a Jew, but that had been recognized as valid even though the husband had received no notice of the proceedings and even though the reason for the divorce was a difference in race. *Igra v. Igra* was distinguished on the ground that in that case the parties had relied on the invalidity of the decree and the husband had remarried. In addition, there was no allegation that the decree had been obtained by duress which was the real basis for the refusal to recognize the decree in *Meyer v. Meyer*.

This case raises two problems. The first is when will a foreign decree be refused recognition because of some defect in the way in which the decree was obtained. The second raises the problem of choice of law, for in *Meyer v. Meyer*, and in *Igra v. Igra*, the existence of an ordinance of the Allied Control Commission[163] specifically providing for German divorces to be

[155]MacAlpine v. MacAlpine, [1958] P. 35 [1957]; Middleton v. Middleton, [1967] P. 62 (1965).

[156]Pemberton v. Hughes, [1899] 1 Ch. 781 (C.A.).

[157]Wood v. Wood, [1957] P. 254 (C.A.); Hornett v. Hornett, [1971] 1 All E.R. 98 (1970)

[158]Igra v. Igra, [1951] P. 404.

[159][1970] 3 All E.R. 572 (P.D.A.).

[160]Southern Rhodesia (Matrimonial Jurisdiction) Order, S.I. 1970 No. 1540. The waiting period has been cut to six months ordinary residence in the United Kingdom (per § 1(2))

[161][1971] 1 All E.R. 378 (P.D.A. 1970).

[162]*Supra* note 158.

[163]Control Council Ordinance 16, § 74(4). The ordinance is referred to in more detail in Igra v. Igra, [1951] P. 404, at 409.

recognized was noted. In *Igra* this ordinance was regarded as strengthening the German decree, while in *Meyer*, the ordinance was dismissed as being only part of German domestic law—not part of the law of England.

The problem of when foreign decrees will be refused recognition can be put into the question of deciding when they are void, voidable or valid. If the foreign decree is valid then there is no problem. But if the decree is either void or voidable then there may well be a problem. If the decree is void because it was obtained by duress, or by fraud[164] or on the grounds of public policy[165] then, presumably, any subsequent marriage by either party in reliance of the decree is invalid. If the decree is voidable then, if the normal consequences apply, the party offended may either affirm or deny the decree. This would mean that, say, in the case of fraud,[166] one party has the option of invalidating the other's remarriage. Such a result seems odd. The issues can be endlessly complicated by deciding what might be an election to treat the divorce as valid.

The court's talk of "justice" in this context is liable to confuse the issue. The only real issue is the matter of support. If the parties in *Igra v. Igra* or *Meyer v. Meyer* had wanted to remain married they could have re-married. The only reason for the decision of the Court of Appeal in *Gray v. Formosa*[167] was the need to provide for the wife, similarly in *Malcalpine v. Macalpine.*[168] If either woman had remarried in reliance on the foreign decrees it is inconceivable that their second husbands could have obtained decrees of nullity on the ground that their wives were already married. It is on this basis extremely difficult to think of any situation where a foreign divorce should, on the grounds of "justice", be refused recognition where the only issue is the capacity of either party to remarry. *Meyer v. Meyer* involved, of course, the right of the wife to a pension from the German government.

The choice of law issue in divorce raised by the ordinance of the Allied Control Council is interesting. The German courts that granted the decrees in *Igra* and *Meyer* were the appropriate courts in the sense that German law could properly have been applied to adjust the parties' differences. If, therefore, there is a subsequent order of the supreme legislative body in the state[169] providing that no marriage that has been dissolved can be restored, and if that body's decisions cannot be attacked on any grounds of public policy, the English court would seem to be compelled to give effect

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[164]As in MacAlpine v. MacAlpine, [1958] P. 35 (1957) and Middleton v. Middleton, [1967] P. 62.

[165]Gray v. Formosa, [1963] P. 259 (C.A. 1962).

[166]As was clearly possible in the facts of MacAlpine v. MacAlpine, [1958] P. 35 (1957), where the husband had remarried in reliance on the invalid Wyoming decree he had obtained. Some of the same questions are asked by MORRIS at 147.

[167]*Supra* note 165.

[168][1958] P. 35 (1957).

[169]The judgment in Meyer v. Meyer, [1971] 1 All E.R. 378, referred to the case Rex v. Bottrill, [1947] K.B. 41 (C.A. 1946), where the position of the Allied Control Council, and the attitude of the British Government to it, is discussed.

to the subsequent legislation. The situation in divorce would be much the same as in marriage in these circumstances.[170] It is therefore not possible to reject the ordinance simply because it is part of German domestic law. It is precisely because it was that that it should have been given effect to.

Foreign divorces that are otherwise invalid may yet have effect for some collateral purposes. In *Downton v. Royal Trust*,[171] the Newfoundland Supreme Court, Appeal Division held that a wife who appeared in the foreign court and was represented on the issue of maintenance would be estopped from alleging that she was a "wife" for the purpose of claiming against the husband's will under the Family Relief Act.[172] The normal cases of this kind have involved the petitioner in the foreign court later coming into court to claim on the death of his or her spouse.[173] It is an extension of the normal rule to apply it to a case of a respondent in the foreign proceedings who accepted them. The rule applied by the Newfoundland court has a logical attractiveness about it that obscures some real dangers. Cases discussed earlier in this article have shown how a divorce that the parties might have regarded as invalid may turn out many years later to be valid. If a wife does not appear in the foreign court she may forfeit any chance of support from her husband if the divorce were subsequently to be recognized. But now if she does appear she may be put in an equally difficult position.

The answer to this kind of problem lies in a complete severance of the so called status aspects of divorce from any other aspects. A foreign decree of divorce, if it is recognized, can then do nothing more than confer a capacity to remarry on each spouse. The collateral incidents of the marriage should be unaffected. Such a solution would, in addition to removing any need for wives to appear in the foreign jurisdiction to protect their interests, avoid the kind of problem that came up in *Grey v. Formosa*[174] and *Macalpine v. Macalpine*.[175] The marriages in those cases cannot be saved, so the parties may as well be free to remarry, but that fact alone is no reason why the wives should not be able to seek support from their husbands. The existence of another wife will only have the effect of making less support available. The all or nothing approach is too clumsy.

The same kind of approach would also have avoided the result in another case where there was an invalid foreign divorce. In *Re Reid and Reid*[176] the

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[170]The obvious analogy is to a case like Starkowski v. Attorney-General, [1954] A.C. 155 (1953).

[171]1 Nfld. & P.E.I.R. 203 (Nfld. Sup. Ct. 1970); *rev'd* 1 Nfld. & P.E.I.R. 528 (Nfld. Sup. Ct. 1971). Appealed to the Supreme Court of Canada and reversed per Laskin, J.

[172]Nfld. Stat. 1962 c. 56.

[173]*See, e.g., Re* Plummer, [1942] 1 D.L.R. 34 (Alta. Sup. Ct. 1941); *Re* Capon, [1965] 2 Ont. 83. (Though this involved a foreign nullity decree to which other principles are applicable).

[174]*Supra* note 165.

[175]*Supra* note 168.

[176][1972] 1 Ont. 554, 23 D.L.R.3d 538 (Co. Ct. 1971)

husband had married after a Michigan divorce. He was held to have been domiciled in Ontario at the time he obtained the divorce. It was, therefore, not recognized. His "wife" was therefore not entitled to maintenance under the Deserted Wives and Children's Maintenance Act.[177] The facts in *Reid* are scanty. It might have been possible for the court to have recognized the divorce under *Indyka v. Indyka*.[178] It would also have been interesting to know where the "wife" came from. Michigan, where the divorce was obtained, and where the husband had spent some time, would almost certainly have awarded the wife some support and perhaps she might have relied on the validity of the marriage under American law (they were married in Nevada). In these circumstances her treatment in Ontario is unfair and the black-letter approach required by the Ontario legislation unnecessary. An emphasis on the contractural, as opposed to the status aspects of marriage, might be preferable.

Recent attempts to tidy up the area by international conventions and by legislation have tended to follow the traditional bases for recognition. The Hague Convention on Private International Law in 1968 produced a draft convention on the recognition of divorces and legal separations.[179] This convention substituted "habitual residence" and the nationality of the spouses for any other jurisdictional factors. In general, the convention preserved the power of the recognizing court to refuse to recognize decrees in certain circumstances, including those where it would be "manifestly incompatible with [its] public policy." The United Kingdom Act[180] was based on the recommendations of the English and Scottish Law Commissions,[181] and differs slightly from the Hague Convention. The effect of the act is to preserve the rules of *Le Mesurier v. Le Mesurier* and *Armitage v. Attorney-General*. The rules of *Travers v. Holley* and *Indyka v. Indyka* are swept away. Foreign divorces will be recognized if, at the date of the institution of the proceedings, either spouse was habitually resident in the foreign jurisdiction, was a national of that state or was domiciled there (within the meaning of the foreign court's concept).[182] There are other provisions related to the proof of facts and cases where recognition may be refused.[183] Such grounds include the absence of reasonable steps to inform the respondent, and, like the Hague Convention, if recognition would be manifestly contrary to public policy.[184] The act also provides that a remarriage is valid if the prior divorce would be recognized under the act.[185] The new act

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[177]ONT. REV. STAT. c. 128, § 2(1) (1970).

[178][1969] 1 A.C. 33, [1967] 2 All E.R. 689 (1967).

[179]The text of the Convention is reproduced in Anton, *The Recognition of Divorces and Legal Separations*, 18 INT'L & COMP. L.Q. 620, at 658-64 (1969).

[180]Recognition of Divorces and Legal Separations Act 1971, c. 53.

[181]LAW COMMISSION REPORT No. 34, SCOTTISH LAW COMMISSION, REPORT No. 16, CMND. 4542.

[182]Recognition of Divorces and Legal Separations Act, 1971, c. 53, § 3.

[183]*Id.* §§ 5,8.

[184]*Id.* § 8(2)(*h*).

[185]*Id.* § 7.

comes into immediate force with respect to foreign divorces obtained outside the British Isles at any time, even though, for divorces obtained in the British Isles, it only came into force on January 1, 1972.[186]

The new act will have the advantage of producing certain rules to cover the great majority of situations and, for this, the courts (and others who decide such questions) can be thankful. It remains to be seen how far the public policy exception can be taken and what will happen in those few cases that have caused so much trouble in the common law—cases like *Hornett v. Hornett* and *Messina v. Smith*.[187] The retroactive aspect of the statute may have to be limited to avoid the kind of problem that could have arisen in *Hornett v. Hornett*.[188] The *Armitage v. Attorney-General* type of case is confined to recognition in the spouse's domicile and so would not permit the recognition in *Messina v. Smith*. In addition, as one commentator has pointed out,[189] it would have helped to have had the Act provide that no foreign divorce should affect a spouse's right to support so that there could have been in effect a separation of status and its incidents.

VII. Maintenance and Custody

There have been no startling new developments in the area of maintenance and custody. The maintenance problems that can arise when there are difficulties in recognizing (or in not recognizing) foreign divorces have already been discussed. The view of the courts on custody has reinforced the powers of the courts to discourage kidnapping of children so as to raise the issue of custody in a new jurisdiction, and, in general, to take jurisdiction in custody matters when the children involved are "ordinarily resident" in the jurisdiction as opposed to the "artificial"[190] concept of domicile.

Thus, in *Re Ridderstroem v. Ridderstroem*[191] a Danish father had brought his two and one half year old daughter to Ontario and had petitioned for custody. The trial judge and Court of Appeal refused to make an order and said that the proper place for the determination of the custody question was in Denmark, for there the wife was living and where all parties were (and might still have been) domiciled. Conversely, the Ontario courts retained jurisdiction in an application for interim custody in divorce proceedings even though the husband, who was the petitioner, took the child to Saskatchewan and had attempted to discontinue.[192] In a similar case, the

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[186]*Id.* § 10.

[187]Hornett v. Hornett, [1971] 1 All E.R. 98 (P.D.A. 1970); Messina v. Smith, [1971] 2 All E.R. 1046 (P.D.A.).

[188]Section 10(4) of the Recognition of Divorces and Legal Separations Act 1971, c.53, provides that no retroactive recognition shall effect any property rights.

[189]*Karsten, The Recognition of Divorces and Legal Separation Act, 1971*, 35 Modern L. Rev. 299 (1972).

[190]*Re* Walker v. Walker, [1970] 3 Ont. 771, 14 D.L.R.3d 155 (High Ct.).

[191][1972] 2 Ont. 113.

[192]Johnson v. Johnson, [1972] 1 Ont. 212 (C.A. 1970).

Ontario High Court took jurisdiction and ordered an immediate hearing on an application for custody by a wife when the husband had removed the child of the marriage to India.[193] In this case the wife had also sought habeas corpus but this was refused.

In *Re Walker & Walker*,[194] a decision of the Ontario High Court, the issue was whether that court should take jurisdiction in custody proceedings when the children were living with their mother in Massachusetts. Here the judge preferred "ordinary residence" over the "artificial" concept of domicile. The same basis for jurisdiction was accepted by the same court in *Nielsen v. Nielsen*.[195] The courts are flexible in matters of custody and will nearly always take jurisdiction if it is in the best interests of the child.

The corollary relief sections of the Divorce Act, 1968, give jurisdiction to the court granting the divorce to make orders of custody. The orders made by any court in Canada in the exercise of this power have effect across Canada. The Act provides that the court that made any order for corollary relief has power to vary or rescind it. The Nova Scotia Supreme Court has now asserted a power to vary a custody order made in divorce proceedings in another province.[196] The exercise of such power may make for flexibility and convenience, but these advantages will only be achieved if all the courts involved are prepared to concede the power to vary. If, for example, the court that made the original order does not concede the power to vary to the Nova Scotia court, then there is the possibility of two Canadian courts carrying on a most unseemly wrangle over the custody of a child.[197] The sooner the power to vary or rescind orders for corollary relief made under the Divorce Act is made completely clear the better.

VIII. JURISDICTION

Several recent cases have raised the issue of *forum non conveniens*. The issue has been presented as one where the defendant has been served in the jurisdiction so that no question of the discretionary power of the court to refuse leave to serve *ex juris* arises.[198] The question is the burden that must be assumed by the defendant who seeks to have an action stayed or dismissed on the ground that the place where it is brought is not a convenient forum. In general, it appears that the plaintiff's action must be regarded as vexatious and intended to induce a defendant to settle through harassment.

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[193]*Re* Vadera and Vadera, [1972] 1 Ont. 441, 23 D.L.R.3d 289 (High Ct. 1971).

[194]*Supra* note 190. *See also*, *Re* P., [1965] Ch. 568 (C.A. 1964).

[195][1971] 1 Ont. 541 (High Ct. 1970).

[196]O'Neill v. O'Neill, 19 D.L.R.3d 732 (N.S. Sup. Ct. 1971).

[197]The same situation can, for example, arise, if a court in one province varies an order for maintenance made in another when the order of the latter has come to the province for registration under the Reciprocal Enforcement of Maintenance Orders Act of any of the provinces.

[198]*See* Ont. R.P. 25. Such rules are based on R.S.C. Ord. 11. *See*, in general, Castel, Comment, 49 CAN. B. REV. 466 (1971).

In *Moreno v. Norwich Union Fire Insurance Society Ltd.*[199] an English insurance company (which carried on business in Ontario) was sued by an Illinois plaintiff on a contract of insurance. The contract had been made in England by an American airman serving there and the motor accident giving rise to the claim had occurred there. Mr. Justice Hughes had little difficulty in finding the plaintiff's claim to be vexatious. The action was, accordingly, dismissed. A similar result was reached in *Sittler v. Conwest Exploration Co.*[200] where an action brought in the Northwest Territories Court, by plaintiffs who did not reside in the Northwest Territories, against defendants who were only registered there, concerning a mine in the Yukon was stayed.

When the court does not consider that the plaintiff's action is vexatious then it appears that the action will not be stayed or dismissed. In *Van Vogt v. All-Canadian Group Distributors Ltd.*[201] the Manitoba Court of Appeal refused to stay an action on a contract of employment. This case was complicated by the fact that four years had passed after the action was commenced and before the defendants pursued the argument of *forum non conveniens*. This case seems to have assumed that the only basis for the exercise of the courts discretion was that the action was frivolous and vexatious.[202] The court refused to exercise its discretion in favour of the defendant. The dissenting judge based his conclusion on the fact that the plaintiff had been involved in other actions against the same defendant (which had been dismissed on the ground that the plaintiff should have sued in Quebec), and that a pattern of harassment appeared to exist.

The result of these cases is that the plaintiff must be shown to be harassing the defendant by his choice of forum. It is interesting to note that had the plaintiff in *Moreno v. Norwich Union*[203] or *Sittler v. Conwest*[204] been unable to have the defendant personally served in the jurisdiction he would have been unable to obtain leave to serve the writ out of the jurisdiction.[205] If the standard the defendant has to reach to have the plaintiff's action dismissed once he has been personally served is higher than that where leave has to be sought to serve *ex juris*, it is impossible to argue that the courts have adopted any true notion of *forum non conveniens*. The cases which have so far come up have not raised this point expressly and it remains to be seen how the courts will interpret the requirements that the plaintiff's action be vexatious.

Two other cases, one in England and one in the United States illustrate other approacnes to the problem of jurisdiction. In *The Atlantic Star*[206]

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[199][1971] 1 Ont. 625, 16 D.L.R.3d 247 (High Ct. 1970).
[200][1971] 3 W.W.R. 359, 18 D.L.R.3d 631 (N.W.T.).
[201]71 W.W.R. 535, 9 D.L.R.3d 407 (Man. 1969).
[202]9 D.L.R.3d 407, at 411 (Man. 1969).
[203]*Supra* note 199.
[204]*Supra* note 200.
[205]*See, supra* note 198.
[206]116 Sol. J. 237 (1972).

the English court refused to stay an action brought in England when the claim arose from a shipping accident in Antwerp where there were already five actions in Belgium arising out the same accident. The judge said that it had to be shown that the action was oppressive or vexatious and balance of convenience was not enough. The court in Antwerp was said to be "far the more appropriate forum" but the plaintiff's attempt to secure the application of the more favourable English law was not sufficient grounds for dismissing or staying his action.

A recent American case illustrates the fact that the American courts are prepared to regard choice of court clauses more favourably than had previously been the case. The United States Supreme Court in *M/S Bremen v. Zapata Off-shore Co.*[207] upheld a clause providing for the litigation of any dispute in the High Court in England in a towing contract between an American drilling company and a German towing company. The American company had commenced an action against the German company in the American courts. The District Judge and Circuit Court of Appeals[208] had allowed the action to go forward in spite of the forum-selection clause even though this would apparently take away certain defences available to the German company if the action had been brought in England. The Supreme Court reversed and held that the clause would be enforceable unless the respondent (the American company) could show that enforcement would be unreasonable, unfair or unjust. It was assumed that the choice of court would also lead to the choice of law and in England the German company would be far better off.[209]

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[207]407 U.S. 1 (1972); 32 L. Ed.2d 513.

[208]428 F.2d 888 (1970), [1971] 1 Lloyd's List L.R. 122 (U.S. 5th cir. 1970). There was a very powerful dissent by Mr. Justice Wisdom, (on a re-hearing *en banc*, the decision went 8-6 in favour of the American company): 446 F.2d 907 (1971), [1971] 2 Lloyd's List L.R. 348. See Nadelmann, 21 AM. J. COMP. L. 124 (1973).

[209]It goes without saying that the decision on the question of whether or not the German Company could take advantage of the clause limiting its liability could be made without involving any express choice of law clause.