CONFLICT OF LAWS: 1923-1947

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In Anglo-American conflict of laws the last twenty-five years have been of outstanding interest and importance. This was to be expected with regard to a subject which is essentially modern and which is still in the formative stage. As to case law, reference will be made later to some of the more important decisions of courts in Canada and the United Kingdom.[1] The decisions of courts have not, however, been the most significant feature of the development of the conflict of laws in the period in question. Non-judicial writing has undoubtedly held the centre of the stage. This again was to be expected in view of the peculiar nature of this branch of the law. As to the domestic or local rules of the law of England, or of Anglo-American law in general, there exists a long background of judicial decisions with which any competent judge may be fitted to deal by his whole course of training as student, practitioner and judge. On the other hand, when a judge has occasionally to deal with a problem of the conflict of laws he may, unless the problem is a simple one, be less likely to arrive at a satisfactory solution or to give satisfactory reasons for his judgment. He may not ever have made any intensive study of the conflict of laws over a wide field. He may have rarely had to consider problems of the conflict of laws. Even with the help of counsel, he may not grasp all the ramifications of the problem or its relation to the whole subject of the conflict of laws. Most important of all, he must arrive at a conclusion and give his reasons, if not at once, at least within a reasonable time. In the pressure of judicial business he cannot neglect other cases calling for adjudication in order to devote adequate time to a conflict problem. As regards this time element the judge is at a peculiar disadvantage as compared with a non-judicial writer. The former cannot, the latter can, consider a conflict problem over a period of years, revise and change his opinion or its mode of expression and, if he is a teacher, his conclusion must, in Beale's phrase, be submitted "to the cleansing fire of class criticism". Relatively speaking the reasons for judgment of a judge must in the nature of things be a less mature statement than that of the non-judicial writer if the

[1] As to the case law of the United States, see Lorenzen, Developments in the Conflict of Laws, 1902–1942 (1942), 40 Michigan L. Rev. 781, reprinted in his Selected Articles on the Conflict of Laws (1947) 203; Goodrich, Five Years of Conflict of Laws (1946), 32 Virginia L. Rev. 295; 1947 Supplement to 2nd edition (1941) of Cheatham, Dowling, Goodrich and Griswold, Cases and Materials on Conflict of Laws.

latter has delayed publication of his conclusion until after long consideration. Especially if the judge ignores non-judicial writing, and applies the doctrine of *stare decisis* and relies upon an old case, itself perhaps casually decided, his judgment is likely to be less satisfactory. An old case in the conflict of laws might be a late nineteenth century or early twentieth century case, precisely because the whole subject of the conflict of laws has been intensively studied and developed to an unprecedented extent in the last twenty-five years.

Courts have to some extent tacitly recognized that the conflict of laws differs essentially from the ordinary domestic law of the forum because they have more frequently in conflict cases than in domestic cases referred to non-judicial writing. This is so at least in England, but perhaps the observation is less true of Canadian courts. Even in England, however, there is a regrettable tendency to rely upon the *ipsissima dicta* of Dicey on the Conflict of Laws — a book which even in its fifth edition (1932) is essentially a nineteenth century book, stating the conflict of laws in a set of stereotyped rules and exceptions, reproducing all the odds and ends of the most casual *obiter dicta* of English judges.[2]

In countries of western continental Europe *la doctrine* has long played an important, if not the predominant, part in the development of the conflict of laws. In Anglo-American countries, however, non-judicial writing was formerly relatively meagre. At the beginning of the period under review the number of important articles in the English language was not large and, as regards treatises, while Story had been to a large extent displaced in England by Westlake, Foote and Dicey, in the United States the dominant position of Story had not been substantially disturbed by Wharton and Minor. Within the last twenty-five years, however, many comprehensive books have appeared, including, in England, Cheshire's treatise and, in the United States, Goodrich's handbook, Beale's monumental treatise, a smaller book by Stumberg and the published collections of Cook's and Lorenzen's articles.

As regards Canada it would seem that at the beginning of the period Canadian case law was practically unknown or ignored both in England and the United States, but in the course of the period became known to some extent through the medium of non-judicial writing. Johnson's three volume treatise, although written with special reference to Quebec law, expounded and made readily available both in Canada and elsewhere a formidable body

[2] These remarks will doubtless be inapplicable to the forthcoming sixth edition of Dicey by Morris.

of Canadian case law and non-judicial writing. Read, within the limits of his subject (recognition and enforcement of foreign judgments), collected and discussed for the first time the case law of all the common law units of the British Commonwealth and Hancock discussed Canadian and English as well as American cases relating to torts in the conflict of laws. Finally, I mention for what it is worth the fact that owing chiefly to the extraordinary indulgence of Dr. C. A. Wright who, as editor of the Canadian Bar Review, published everything good, bad or indifferent, that I chose to contribute, I was encouraged to write so many articles and case comments that their mere bulk seemed (to me at least) to justify my revising and collecting them in a single volume under the title of Essays on the Conflict of Laws.

Obviously it is not practicable in this survey even to mention individual articles written in England, Canada or the United States and not yet published in collected form. This is unfortunate, because as a result the survey is peculiarly incomplete in that it fails to take adequate notice of what is perhaps the most significant feature of the development of the conflict of laws in the period under review. Especially, though not exclusively, in the United States emphasis has been laid in many important articles on the investigation of the social and economic objectives of conflict rules and on the consequent need for the reconsideration, revision and refinement of those rules in the light of those objectives, as contrasted with the application, regardless of consequences, of the relatively few stereotyped rules stated long ago in the relatively immature stage of the subject. Many of these articles may be described as heretical in the sense that they tend to criticize and dissent from the views stated in Dicey and Beale, particularly with regard to the theory of acquired or vested rights, or of the recognition and enforcement of foreign created rights, and the implications derived from that theory.

A significant feature of some of the modern non-judicial writing on Anglo-American conflict of laws has been the emphasis laid on comparative law. Some years before the beginning of the period now under review Lorenzen, at the Yale Law School, had written important studies on the conflict of laws of various foreign countries and towards the end of the period, at the Michigan Law School, in a series edited by Yntema, the first volume appeared of a comparative study of the conflict of laws by Rabel. In my review of this volume[3] I have given some account of the scope and purpose of Rabel's work. When the book is completed it

[3] (1947), 25 Can. Bar Rev. 318.

will afford a comprehensive and detailed comparison of the conflict of laws systems of the world and make available in English a wealth of comparative law material. In the interval many books and articles have been written both in England and the United States by scholars who found refuge there and who before leaving Germany were intimately acquainted with German conflict of laws. Other writers in England who had manifested especial interest in comparative law include Beckett, Vesey-Fitzgerald and Gutteridge.

As regards Beale, it is true that in his treatise he shows an undue preference for preserving the "purity" of "common law" doctrines of the conflict of laws, but it is only fair to point out that he includes in his treatise an impressive bibliography of foreign books and reproduces his earlier historical account of some foreign systems of the conflict of laws. Furthermore, his summary of all the case law of the United States relating to the subject (covering some 16,000 cases) affords comparative law material of which English and Canadian judges and writers have been slow to take advantage. It may happen that in England or Canada a problem has been solved somewhat casually or merely in a single previous case, and there may be ground for reconsidering the solution in the light of the way in which the problem has been considered in a series of cases in the United States.[4]

The foregoing brief survey of some of the general aspects of the development of the conflict of laws in the period 1923-1947 may be appropriately followed by references to some particular topics which have been the subject of judicial decisions in the United Kingdom and in Canada, firstly, with regard to the jurisdiction of courts and, secondly, with regard to matters of the selection and application of the proper law. If especial emphasis is laid on cases relating to marriage, this would seem to be justified by the critical social importance of marriage in the conflict of laws.

Early in the period the important case of *Salvesen or von Lorang* v. *Administrator of Austrian Property* was decided by the House of Lords, on appeal from the Court of Session, Scotland.[5] As regards a marriage celebrated in France and alleged to be void *ab initio* for lack of formalities according to the law of the place of celebration, it was held that a German court had jurisdiction to declare the marriage void because both parties were domiciled in Germany at the time of the declaration of nullity, and that this declaration of nullity was entitled to recognition in Scotland.

[4] The point is somewhat elaborated in my review of Beale (1935), 13 Can. Bar Rev. 531.

[5] [1927] A.C. 641.

The marriage being void *ab initio*, the woman (of Scottish domicile of origin) did not become domiciled in Germany merely by reason of the fact that the man had acquired a domicile in Germany, and her domicile in Germany was based upon her residence in Germany with the essential *animus manendi*. If the marriage had been voidable, not void, the wife's domicile would have followed that of her husband, regardless of her residence and *animus manendi*, and therefore the court of her husband's domicile would have been a court of the common domicile and that court would, within the principle of the *von Lorang* case, have jurisdiction to annul the marriage and its decree of annulment would be entitled to be recognized as valid elsewhere. It is submitted that the effect of the *von Lorang* case is to overrule *Ogden* v. *Ogden*,[6] at least so far as it had been held in that case that an English court was not obliged to recognize the validity of a decree of a French court annulling a marriage voidable under the law of France for lack of parental consent, the husband being domiciled in France, and the wife being resident in England, but, by virtue of her husband's French domicile, being domiciled in France.

A case that has given rise to much difference of opinion is *Inverclyde* v. *Inverclyde*,[7] in which it was held in England by Bateson J. that as regards a marriage which is voidable, not void *ab initio*, annulment jurisdiction belongs exclusively to a court of the domicile of the parties, the jurisdiction being analogous to divorce jurisdiction. The case has been followed in several provinces of Canada,[8] but more recently in England two judges have refused to follow it and have held that there is no difference between voidable marriages and void marriage, so far as jurisdiction is concerned, and therefore that jurisdiction to annul a voidable marriage may be based on the residence of the respondent.[9]

The English judges who have expressed their dissent from the *Inverclyde* case may be right or may be wrong as regards jurisdiction (there is something to be said on both sides of the question), but, it is submitted, they were clearly wrong in applying English

[6] [1908] P. 46. The English court, being now obliged to give effect to the French decree on the single ground that the French court had jurisdiction to annul the marriage, might reach the same result by holding that the requirement by French law of parental consent to the marriage of a minor should be characterized as a matter of capacity to marry governed by the law of the domicile and therefore that the marriage, voidable by French law, is also voidable by English conflict of laws.

[7] [1931] P. 29.

[8] *W.* v. *W.* (1934), 42 Man. R. 578, [1934] 3 W.W.R. 230; *Fleming* v. *Fleming*, [1934] O.R. 588, [1934] 4 D.L.R. 90; *Shaw* v. *Shaw* (1945), 61 B.C.R. 40, [1945] 1 D.L.R. 413, [1945] 1 W.W.R. 156. As to *Shaw* v. *Shaw*, see note 11, *infra*.

[9] *Easterbrook* v. *Easterbrook*, [1944] P. 10; *Hutter* v. *Hutter*, [1944] P. 95.

domestic law with regard to the ground of annulment of a voidable marriage to the case of a husband who was not domiciled in England. The particular ground of annulment had been created by the Matrimonial Causes Act, 1937, which presumably was intended to change the domestic law of England and could not reasonably be construed as changing the conflict rules of the law of England.

Furthermore, in cases in which a marriage is alleged to be void *ab initio*, as, for example, because it is bigamous, English judges have shown a tendency to assume jurisdiction on the basis of the residence of the petitioner in England.[10] In Canada, on the other hand, the courts have adhered to the rule that there are only three bases of jurisdiction in annulment cases, namely, the domicile of the respondent, the residence of the respondent and the place of celebration of the marriage.[11]

The case of *Attorney-General for Alberta* v. *Cook* is important in several respects.[12] It was held by the Privy Council, firstly, that each province of Canada is a separate country or law district for the purpose of divorce jurisdiction, as it is, of course, for the purpose of the selection and application of the proper law in the conflict of laws; secondly, that in applying the rule, theretofore established in Anglo-Dominion countries, that divorce jurisdiction is based solely on the domicile of the parties, the domicile of the wife is in all circumstances the same as that of the husband; and, thirdly, that in the actual situation, the husband not being domiciled in Alberta, an Alberta court with general divorce jurisdiction had no jurisdiction to entertain proceedings for the dissolution of the particular marriage. Fourthly, the decision led to an important change in the law, made by the Divorce Jurisdiction Act, 1930, passed by the Parliament of Canada.

The House of Lords in *Lord Advocate* v. *Jaffrey*[13] had held that for the purpose of succession to movables on death a wife's domicile follows that of her husband, if the parties have not been

[10] *E.g.*, *White* v. *White*, [1937] P. 111, irrelevantly cited in the *Easterbrook* case; *cf. Spencer* v. *Ladd*, *Finlay* v. *Boettner*, [1947] 2 W.W.R. 817, [1948] 1 D.L.R. 39, Boyd McBride J. (domicile, or perhaps residence, of petitioner sufficient basis of jurisdiction).

[11] *Hutchings* v. *Hutchings* (1930), 39 Man. R. 66, [1930] 4 D.L.R. 673, [1930] 2 W.W.R. 565; *cf. Manella* v. *Manella*, [1942] O.R. 630, [1942] 4 D.L.R. 712. On an appeal from the judgment in *Shaw* v. *Shaw*, cited in note 8, *supra*, the Court of Appeal for British Columbia held that a court in British Columbia had no jurisdiction to annul a marriage on the ground of impotence, if the petitioning wife was resident in the province but the respondent was neither domiciled nor resident there and the marriage had been celebrated elsewhere: (1945), 62 B.C.R. 52, [1946] 1 D.L.R. 168, [1945] 3 W.W.R. 577.

[12] [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742.

[13] [1921] 1 A.C. 146.

judicially separated, even though grounds for judicial separation exist, and the Privy Council in the *Cook* case closed the gap left by the House of Lords and held that, even if the parties have been judicially separated, the wife's domicile follows that of her husband. In the *Jaffrey* case the result followed that the movables of the deceased wife were distributed in accordance with the law of Queensland, although she and her husband were at one time domiciled in Scotland and she continued to live there, and he had been shipped off to Australia and finally settled in Queensland and there married and lived with another "wife". This absurd result was caused by the combination of two general rules, namely, that succession to movables is governed by the law of the domicile at the time of death, and that a wife's domicile follows that of her husband. Each of these rules is reasonable enough in itself as a general rule, but the combination and application of the two rules is less easy to defend. So, in the *Cook* case the Privy Council combined and applied two general rules, each in itself reasonable enough as a general rule, namely, that divorce jurisdiction is based on domicile, and that the wife's domicile follows that of her husband. The result has been widely criticized and it raises the question whether the inflexible combination of the two rules is justifiable. In the United States the conclusion has been reached that for some purposes and in some circumstances, including divorce jurisdiction, a wife may have a separate domicile from that of her husband. In Canada, as regards divorce jurisdiction, a different mode of solution has been adopted by statute, namely, that in some circumstances a wife may sue for divorce in a province in which her husband (and consequently she) is not domiciled, that is, specifically, a deserted wife may sue in the province in which her husband was domiciled immediately before the desertion.[14] The statute did not remedy the precise hardship of the wife in the *Cook* case but it does afford a substantial measure of relief to a deserted wife.

Duke v. *Andler* is another noteworthy case relating to the jurisdiction of courts and the recognition of foreign judgments.[15] The parties were at all material times resident in California and a contract was made there between the plaintiffs and the defendant Duke for, *inter alia*, the conveyance to Duke of certain land situated in British Columbia. It was alleged by the plaintiffs that the conveyance to Duke was delivered in escrow and

[14] *Cf.* in England, the corresponding provision of the Matrimonial Causes Act, 1937.

[15] [1932] S.C.R. 734, [1932] 4 D.L.R. 529, reversing *Andler* v. *Duke* (1931), 45 B.C.R. 96, [1932] 2 D.L.R. 19, [1932] 1 W.W.R. 257.

that he had obtained possession of it by fraud. He registered it in the proper registry office in British Columbia and, thus becoming the registered owner, conveyed the land to his wife, who then mortgaged it. The plaintiffs brought an action in California against Duke and his wife, alleging that the latter knew of her husband's fraud and participated therein, and asking for rescission of the contract and reconveyance of the land. The court gave judgment in favour of the plaintiffs and ordered the defendants to reconvey the land, and in default of reconveyance by the defendants ordered the clerk of the court to reconvey. Upon the refusal of the defendants to reconvey, the clerk reconveyed and the plaintiffs tendered the reconveyance to the registry office in British Columbia, and on the registrar's refusal to register the reconveyance, the plaintiffs brought the present action against Duke and his wife in British Columbia for the purpose of securing the revesting of the title to the land in the plaintiffs pursuant to the California judgment. The Court of Appeal for British Columbia held that the plaintiffs were entitled to a vesting order, but the Supreme Court of Canada held that the action should be dismissed.

Obviously no objection could be validly taken in British Columbia to the California court's ordering the defendants to reconvey the land (whatever might be said about ordering reconveyance by the clerk of the California court) in view of what the Court of Chancery in England was accustomed to do and what courts in other countries in which English law prevails have done, in giving orders to defendants resident within the country of the forum relating to land situated abroad in cases in which the defendants were guilty of fraud or were bound by contract or equity. But, said the Supreme Court of Canada, the relief given in these cases was strictly personal in character and did not purport to affect the title to the land and had no effect in the country of the situs of the land. The explanation is, however, an over-simplified statement of the problem. It is consistent of course with the way in which the Court of Chancery attempted to justify its decrees relating to foreign land, but equitable remedies, although nominally personal, were enforced by imprisonment and sequestration and operated more effectually *in rem* than the judgments of common law courts. Furthermore, it is not possible to distinguish between equitable or contractual rights relating to land and the title to, or interests or property in land. They are all merely varying aggregates of rights, powers, privileges and immunities with respect to land, or, in other words, the benefit of various legal relations between persons with respect to land.

None of them can be accurately described as a so-called right *in rem*, and all should be governed by the *lex rei sitae* and must ultimately be decided by the courts of the situs. It is undesirable, to say the least, for a court other than that of the situs to adjudicate on a controversy between two persons with respect to foreign land under the specious pretext that it is acting *in personam*, when in reality and inevitably it is adjudicating on the property in foreign land or some interest in the land. The undesirability of the assumption of jurisdiction is aggravated if the court applies domestic rules of the law of the forum and disregards the *lex rei sitae*. It is submitted therefore that a court other than that of the situs ought as a general rule to decline to exercise jurisdiction in controversies with respect to foreign land and that, if it does entertain such a controversy, it ought to take great care to avoid deciding the case in a way that may conflict with the *lex rei sitae* or with the way in which the case may be decided by a court of the situs if it should arise for adjudication in the foreign country.

As regards questions of the selection and application of the proper law in the conflict of laws, perhaps the most remarkable feature of the period now under review is the development in a series of judgments of single judges in England[16] of a new theory of the *renvoi* — a theory of total *renvoi*, namely, that if a court is referred by a conflict rule of the law of the forum to a foreign law because it is the law of the domicile of a given person, the court should decide the case in accordance with the conflict rules of the foreign law, including the particular theory of the *renvoi* prevailing in the foreign law. The non-judicial writing on this topic has been voluminous and has been almost, though not quite, unanimous in its condemnation of the *renvoi* generally and of the reasoning of the judges and of the practical value of the results supposed to be achieved. The *renvoi* may be a useful device for achieving uniformity of decision in a few exceptional cases, for example, as regards questions of property or some interest in land and as regards the existence of status as distinguished from the incidents of status or from capacity; and in questions of the formal validity of wills of movables it would seem to be desirable to allow a testator a wide facultative use of any of several forms on a principle that does not really involve the doctrine of the *renvoi*, but bears a misleading resemblance to that doctrine. As regards succession to movables on intestacy or in cases involving the intrinsic validity of wills, it does not appear that the English courts, in their development of the theory of

[16] *In re Annesley*, [1926] Ch. 692; *In re Ross*, [1930] 1 Ch. 377; *In re Askew*, [1930] 2 Ch. 259; *In re O'Keefe*, [1940] Ch. 124.

total *renvoi*, have achieved any useful result by way of securing uniformity of decision or otherwise. The theory is exceedingly intricate in itself and leads to many difficulties, both practical and theoretical, in its application, including the difficulty of obtaining satisfactory evidence of foreign systems of the conflict of laws and their theories of the *renvoi*, and the difficulty of predicting the result in any future case. Sometimes the difficulties do not seem to have occurred to the judges. For example, in the most recent English case relating to the *renvoi*[17] there is a hiatus in the judge's reasons for judgment in that he does not explain why a reference by Spanish law to the "national" law of a British subject is to be construed as a reference to English law. The case involves the title to land situated in Spain and therefore is one which the English court should decide in the same way as a court of the situs would decide it, and therefore must give effect to a reference by the *lex rei sitae* to another law, and the reference to the national law might be construed as a reference to the law of that part of the British Empire in which the *de cujus* was domiciled at the time of his death. The court, by accident so to speak, reaches the right conclusion, whereas in an earlier case,[18] in which there was a reference by Italian law to the national law of a British subject, but the *de cujus* was not domiciled in any part of the British Empire at the time of her death, the court reached an indefensible result, also apparently without being aware of the difficulties inherent in the reference.

Another general theory which has been the subject of much non-judicial writing in recent years, but which has not yet to any appreciable extent infiltrated into the courts, is the theory of characterization, classification or qualification. The theory, properly understood, is fundamental in the solution of problems of the conflict of laws. Before a court can select and apply the proper law in accordance with the conflict rules of the law of the forum, it is essential that it characterize the question involved in the factual situation. Inasmuch as each conflict rule states in effect that a particular kind of juridical question is governed by the law of a given country ascertained by reference to the domicile of a given person, the situs of a given thing, the place of the doing of a given act, or, as the case may be, depending upon the nature of the question, it is inevitable that a court, as a necessary preliminary to the selection and application of the proper law governing the question, determine what is the juridical nature of the question. My own view is that in any case in which a given question may be

[17] *In re Duke of Wellington*, [1947] Ch. 506, affirmed by the Court of Appeal, [1947] 2 All E.R. 864.

[18] See *In re O'Keefe*, note 16, *supra*.

differently characterized in the law of the forum and in any foreign law which may on some characterization of the question be selected as the proper law, the court should consider any potentially applicable provisions of the foreign law in their context in the foreign law, and that the court's final selection of the proper law should be made only after the court is thus informed with regard to the provisions of the foreign law and thus knows what will be or is likely to be the result of the selection and application of a given foreign law. In other words, except in a simple case in which the characterization of the question is obvious, the court should not blindly select a foreign law as the proper law without regard to the consequences, but should require information with regard to the foreign law so that it can intelligently consider what is the policy of the conflict rules of the law of the forum and whether that policy will be accomplished by the selection and application of a given foreign law.

Some outstanding cases relating to questions of the validity of marriage in the conflict of laws may appropriately be mentioned here. In *Berthiaume* v. *Dastous*[19] the Privy Council held that the rule that the formalities of celebration of a marriage are governed by the *lex loci celebrationis* is part of the law of the province of Quebec and that the rule is imperative, not facultative, in Quebec as well as in English conflict of laws, with the result that a marriage celebrated in France according to the form of the Catholic Church between two Catholics domiciled in Quebec, and therefore celebrated in a valid domiciliary form, was held to be formally invalid because there had been no civil ceremony as required by French law. The appeal being from a Quebec court, the sole question to be decided by the Privy Council was whether the marriage was valid by Quebec conflict of laws, and not whether the marriage was valid by English conflict of laws. However this may be, the case was cited as being sufficient authority for the English conflict rule, by Lord Merriman P. in 1947 in the interesting and important case of *Apt* (*otherwise Magnus*) v. *Apt*.[20] The parties were German nationals of Jewish origin who met each other in Germany. Both of them left Germany as refugees from the Nazi regime, the man going to Argentina in 1936 and acquiring a domicile of choice there, and the woman going to England in 1937 and acquiring a domicile of choice there. In 1940 the parties became engaged to marry each other and, since it was impossible for the woman at that time to travel to Argentina, she signed before a notary public

[19] [1930] A.C. 79, [1930] 1 D.L.R. 849, reversing the judgment of the Court of King's Bench for Quebec (1928), 45 K.B. 391.

[20] [1947] 1 All E.R. 620, affirmed by the Court of Appeal, [1947] 2 All E.R. 677.

in England a power of attorney authorizing a person in Argentina as her representative and in her name to contract marriage with the man. A marriage was accordingly celebrated in Argentina between the woman by her proxy and the man, and it was proved that this marriage was validly celebrated by Argentina law. During the war and afterwards the woman repeatedly but unsuccessfully tried to obtain a permit to enter Argentina and, finally, when the man had ceased to co-operate in attempts to secure a permit for her or even to answer her letters, she petitioned in England for a declaration of the nullity of the marriage. It was held by Lord Merriman that the marriage was valid and that the petition must therefore be dismissed.

The main principle upon which the judgment in the *Apt* case was based was that the question of the validity of a marriage by proxy should be characterized as a question of formalities, governed by the *lex loci celebrationis*. On the facts there was no difficulty in finding that Argentina was the *locus celebrationis* within the relevant conflict rule and we may assume that the principle of the decision was intended to be limited to a case in which one party by proxy and the other party in person consent to take each other as husband and wife in the presence of the marriage official (if the presence of such official is required by the *lex loci celebrationis*). The principle might cover the case of both parties being represented by proxies, but could hardly be stretched to cover the case of one party in person or by proxy and the other in person or by proxy expressing their assent in different places. The latter case might encounter a difficulty similar to that which may occur when a contract is alleged to be concluded by an acceptance posted in one country and received in another, and the laws of the two countries differ on the question whether the contract is made where the acceptance is posted or where it is received.

By the Roman canon law prevailing in England until the coming into force of Lord Hardwicke's Act on March 25th, 1754, and in other countries of Western Europe, a marriage *per verba de praesenti* even without subsequent cohabitation, or *per verba de futuro* followed by cohabitation, was a valid marriage, although no priest was present and there was nothing that could be called a ceremony,[21] and the marriage in either case might be by proxy.[22]

[21] Technically, on an evenly divided vote, the House of Lords in *Regina* v. *Millis* (1844), 10 Cl. & Fin. 534, 59 R.R. 134, 10 R.C. 10, 66, held that before the Reformation the presence of a priest, and after the Reformation the presence of an episcopally ordained clergyman, was essential to the validity of a marriage, but this conclusion on a matter of history is demonstrably wrong: 2 Pollock and Maitland, History of English Law (2nd ed.,

Similar rules became part of the law of at least some of the English colonies in North America and consequently part of the law of some of the common-law states of the United States;[23] but in most countries are now expressly or impliedly excluded by modern statutes. In view of the validity of marriage by proxy in former English law, it is clear that such a marriage is not repugnant to any English rule of public policy or to any principle of Christian ecclesiastical law. The fact that marriage by proxy is no longer permitted in England or in some other country in which the canonical rules formerly prevailed is of course irrelevant to the question whether a marriage by proxy celebrated elsewhere is entitled to recognition as a valid marriage — in the absence of a statute not merely excluding the local celebration of marriage by proxy, but also excluding the recognition of marriage by proxy celebrated elsewhere, or, in other words, not merely stating a domestic rule, but also stating a conflict rule, of the law.[24]

In the *Apt* case Lord Merriman stated some reservations, as follows:

> . . . I am by no means satisfied that the problem here is one and indivisible and embraces proxy marriages as a whole. It may well be that the problem should be subdivided into categories and the test of public policy be applied, if at all, to each category separately. For example, the converse case of the husband in the Argentine being a domiciled Englishman and intending to make the matrimonial home here, and the case of a minor domiciled in this country where the law does not permit him to give a power of attorney at all, seems manifestly to call for separate consideration, as does the case, which I will consider shortly, of the revocation of the power of attorney before the ceremony.

Another interesting and important case, decided in 1946, relating to marriage in the conflict of laws, is *Baindail (otherwise Lawson)* v. *Baindail*.[25] A man domiciled in India married there a Hindu woman according to Hindu rites, the marriage being

1898) 371; prefaces to vols. 59 and 131 of the Revised Reports. The formless consensual marriage mentioned in the text is often called a common law marriage, but would be more accurately described as a canonical marriage.

[22] See, especially, Lorenzen, Marriage by Proxy and the Conflict of Laws (1919), 32 Harv. L. Rev. 473, reprinted in his Selected Articles on the Conflict of Laws (1947), p. 379.

[23] See Lorenzen, *op. cit.*

[24] Among the American cases cited by Lord Merriman in the *Apt* case see, especially, as to the distinction stated in the text, *United States ex rel. Modianos* v. *Tuttle* (1925), 12 Fed. Rep. (2nd series) 927. Notwithstanding a provision of the Civil Code of Louisiana that "no marriage can be contracted or celebrated by procuration", the court held that a marriage celebrated in Turkey by proxy, and valid by Turkish law, was valid in Louisiana.

[25] [1946] P. 122, C.A., affirming judgment of Barnard J.

potentially polygamous in the sense that the man had the privilege by Hindu law of marrying other women. Later the man went through the form of marriage in England with an English woman. On her petition an English court made a declaration of the nullity of the second marriage.

This case raised in a novel way the question what degree of recognition should be given in England to a polygamous union contracted in a foreign country in accordance with the law of that country. It had been decided a long time ago that a party to such a union was not entitled to sue for divorce in England, because the remedy sought was appropriate only to marriage as understood in Christendom, namely, "the voluntary union for life of one woman and one man, to the exclusion of all others".[26] On the same principle it may be assumed that a party to a polygamous union would not be entitled to sue in England for annulment of that union. The argument would indeed be stronger than in the case of divorce, because divorce by a court is a purely statutory form of relief, whereas jurisdiction to annul a marriage has been directly inherited from former Christian ecclesiastical courts. There is, however, a more substantial reason why a court should not annul, merely on the ground of its being polygamous, a union validly contracted in a foreign country in accordance with the law of that country, namely, because the union is neither void nor voidable. In the *Baindail* case an English court came to that conclusion and therefore held that precisely because the polygamous union was valid and existing it was inconsistent with a subsequent marriage by one of the two parties to a third person and that the subsequent marriage was itself void. The conclusion that a polygamous union validly contracted in a foreign country is entitled to some measure of recognition in a country in which polygamy is not permitted had already been advocated by various writers, and had been adopted by courts in Canada and the United States and by the Privy Council and the Committee of Privileges of the House of Lords. The question has usually arisen in cases of succession on death and it would seem to be clear that if a man has contracted a polygamous union in a country which permits polygamy and he is domiciled there at the time of his death, the rights of succession of his wife or wives and his children under the law of that country should be recognized elsewhere.[27]

[26] *Hyde* v. *Hyde* (1866), L.R. 1 P. & D. 130.

[27] The decision of an English court in *In re Bethell* (1888), 38 Ch. D. 220, denying the right of succession to assets situated in England of the daughter of a polygamous marriage, can be justified only on the supposition that her father was domiciled in England at the time of his death. The point is not stressed in the judgment, but the judgment mentions that

Limitations of space require that references to other topics shall be exceedingly brief. In the *Baindail* case Lord Greene M.R. made one observation the importance of which extends far beyond the particular case of a polygamous marriage, namely, that the recognition of a status acquired under a foreign law does not involve the recognition of capacity incidental to the status under the foreign law. A reference to Allen's article on Status and Capacity, cited in argument, would have been graceful and appropriate if it had been incorporated in the judgment. The important thing is that the distinction between status on the one hand, and capacity or other incidents of status on the other, which has been advocated by non-judicial writers, has now been buttressed by the *obiter dictum* of a judge. This *obiter dictum* can be usefully set off against the *obiter dictum* of Scott L.J. in favour of the universality of status and its incidents occurring in his otherwise commendable dissenting judgment in *In re Luck's Settlement Trusts*.[28] The judgment of the majority in the *Luck* case constitutes, it is submitted, a distinctly retrograde step. The court had to consider the new question whether it should give effect in England to the legitimation of an illegitimate child by virtue of his recognition or adoption by his father under the law of a foreign country. It might well have used the analogy of the Legitimacy Act, 1926, relating to legitimation of a child by the subsequent marriage of his parents, and have required merely that the father be domiciled in the foreign country at the time of the legitimating act. What the court did was to use the analogy of the former harsh rule of English law, namely, that the father must be domiciled in the foreign country both at the time of the birth of the child and at the time of the subsequent marriage.

In the field of contract law an outstanding decision was that of the Privy Council in *Vita Food Products* v. *Unus Shipping Co.*[29] One regrettable result of the decision was to make it easy for parties to contract out of the terms of uniform bills of lading as provided for by the legislation of various countries pursuant to an international convention respecting the carriage of goods by sea. The judgment of the Privy Council delivered by Lord Wright also contains some disturbing *obiter dicta* (1) implying, perhaps unintentionally, the applicability of the doctrine of the *renvoi* to commercial contracts, and (2) stating categorically the

Bethell had from time to time expressed his intention to return to England and that the Chief Clerk's finding that his domicile was England had not been excepted to. The English assets consisted of land situated in England held upon trust for conversion into money.

[28] [1940] Ch. 864.

[29] [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433.

proposition that parties to a contract may select as the proper law of the contract the law of a country with which the contract has no intrinsic connection. This proposition is stated to be subject to certain provisos of which the meaning is far from clear, and Lord Wright, in stating the proposition, ignores entirely all the difficulties, practical and theoretical, to which the application of the proposition may give rise, and all the large body of non-judicial writing relating to the selection of the proper law of a contract.

Fibrosa Spolka Akcyjna v. *Fairbairn*[30] was of course an important case as regards the domestic law of England and of the common law units of the British Empire in so far as the House of Lords overruled a series of earlier cases in the Court of Appeal in which the right to recover back money on the ground of total failure of consideration had been denied if the failure was caused by the frustration of the contract and the money was payable before the time of frustration. This decision was followed by the Law Reform (Frustrated Contracts) Act, 1943, which confirmed the decision in the *Fibrosa* case with certain modifications designed to prevent possible injustice, and also notably extended the scope of remedies available to prevent one person from being unjustly enriched at the expense of another person. This statute, passed by the Parliament of the United Kingdom, is expressly limited to a case in which the frustrated contract is one "governed by English law" but as to that case adopts the desirable conflict rule that the proper law of a contract not merely defines the rights and duties of the parties under that contract but also defines the right that one party may have against another party to prevent the unjust enrichment of the latter as a result of the frustration of the contract. The statute, in making these beneficial changes in the domestic and conflict rules of the law of England, does not make any change in the domestic and conflict rules of the law of any part of the British Empire other than England, except that if litigation takes place anywhere and by the conflict rules of the law of the forum the contract in question is "governed by the law of England", the court must resort to the law of England as improved by the statute. It is to be hoped that a similar statute will be passed in all the common-law units of the British Empire.

The case of *Livesley* v. *E. Clemens Horst Co.* should be mentioned here because of the clear-cut decision of the Supreme Court of Canada that damages for breach of contract are char-

[30] [1943] A.C. 32.

acterized as a matter of substantive law governed by the proper law of the contract, not as a matter of procedure, governed by the domestic law of the forum.[31]

Similarly it would seem to be clear that damages for tort should be characterized as a matter of substantive law and that the existence and extent of liability in tort should be defined by the proper law, that is, under the prevailing American conflict rule by the law of the "place of wrong" and under the English conflict rule by the domestic rules of the law of the forum, subject to the proviso that the act must not be justifiable under the law of the place where the act was done.

As this article is already too long I must refrain from further discussion of the topic of torts in the conflict of laws. The English rule achieves a just result in some circumstances,[32] an unjust result in others, and the same observation is applicable to the American rule, so that it would appear that some compromise between the two rules is desirable. I must also refrain from any discussion of the general topic of substance and procedure. The topic has been the subject of extended and intensive discussion by various writers, who have vigorously criticized the judicial treatment of conflict problems relating to the Statute of Frauds and the statutes of limitation, and the general tendency of courts to enlarge unduly the concept of procedure in the conflict of laws so as to make applicable the domestic rules of the law of the forum.

Finally, legislative errors contained in Lord Kingsdown's Act (the Wills Act, 1861) continue to be castigated by non-judicial writers and to be perpetuated and applied without protest by courts. The revision of the statute by the legislatures of the United Kingdom and of all the common-law units of the British Empire would appear to be long overdue.

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The topics included in the foregoing survey may seem to have been selected somewhat arbitrarily, but it has not been practicable within the limits of the available space to attempt a complete account of the development of the conflict of laws even in Anglo-Dominion countries during the last quarter of a century. Enough examples have been mentioned, however, to show that the judicial treatment of conflict problems has not been satisfactory. The courts are the law-makers and they have had a

[31] [1924] S.C.R. 605, [1925] 1 D.L.R. 159.

[32] In *McLean* v. *Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65, the Supreme Court of Canada applied the English rule to a Quebec case and reached a result which in the particular circumstances would not seem to be unjust, but without suggesting and perhaps without realizing that in other circumstances the application of the English rule might lead to an unjust result.

unique opportunity to develop a system of the conflict of laws that will afford just and socially desirable solutions for conflict problems; if the course of judicial decisions has tended to frustrate or narrow the scope of the opportunity they must of course bear the responsibility. What the courts have done in some cases is to start from a few apparently simple general rules, stated in old cases in the immature stage of the subject, and to apply them by analogy or otherwise, rigidly and even logically, with too little regard for consequences, to new situations that were not thought of when the rules were first stated. What would seem to be required is not a piecemeal application of the doctrine of *stare decisis* (especially if the doctrine is extended to all the *obiter dicta* of judges in old cases), but something more realistic. It would be desirable, to say the least, that when new situations occur the courts should seriously consider and discuss the results that are likely to follow from the application of old rules, and to be more adventurous than they have been in the devising of new rules, or in the refinement or modification of old rules, appropriate to the new situations. They might profitably pay more attention than they have done to non-judicial discussion. Even though writers may differ among themselves as regards solutions for particular problems, they have at least attempted to find solutions in the light of a broad and at the same time intensive study of decided cases and of the social and economic elements in new situations. Especially in view of the fact that the courts do not appear to have the time themselves to give adequate consideration to conflict problems, they might avail themselves of the work of writers who have had the time to do what may be regarded as being at least worthwhile spade work.