THE CANADIAN BAR REVIEW

VOL. XIV JANUARY, 1936 No. 1

TWO APPROACHES TO THE CONFLICT OF LAWS: A COMPARATIVE STUDY OF THE ENGLISH LAW AND THE RESTATEMENT OF THE AMERICAN LAW INSTITUTE*

There are two ways in which a court might approach the decision of cases involving a foreign element. This is a practical problem, it might say, to be solved in a practical way. What is the interest for which protection is claimed? Is it such that the wishes of a community, whether foreign community or our community, as expressed in some law, should be treated as paramount over the wishes of the parties before us? If it is, as in the case of family relationships or title to land, then our duty is to be fair to that community. We will therefore enquire what community will be most closely affected by our decision, and resort to its law for our ruling upon the issue. If the interest is such that no community is interested, e.g., where should the defendant properly have been sued, or what law should govern a contract between A and B, we are concerned with the parties only; our duty then is to be fair to them. We will enquire, therefore, if under the circumstances there is any hardship to the defendant in making the defendant pay the amount of the foreign judgment, or what is the law which the parties may fairly be said to have had in contemplation when they entered into the agreement.

Ultimately, all rules of law rest on considerations of justice and convenience. But "justice and convenience" is too vague a principle to serve as the immediate basis for the decision of either an English or an American court upon the question of what court should rule upon a given case or what law govern it; neither, accordingly, gives it express recognition. Its influence

* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS. As Adopted and Promulgated by the AMERICAN LAW INSTITUTE at Washington, D.C., May 11, 1934. St. Paul: American Law Institute Publishers. 1934. Pp. xli, 814.

however is to be discerned in both the Restatement and the English law, and one section of this article will be devoted to contrasting its operation in these two systems by a comparative study of three selected topics, domicile, jurisdiction in divorce and nullity suits, and choice of law in contract cases. Whatever the conclusions upon the examples selected for discussion in that first section, the article as a whole will tend to show that the English law gives more effect to the principle of justice and convenience than does the Restatement. It is not denied that certain parts of the Restatement do admit the paramount importance of justice and convenience: thus the main object of the law of administration is stated to be "the prompt, fair, and convenient handling of an estate for the benefit of those concerned therein".[1] But the Restatement purports to be a system, and as such has a theory, viz., that the conflict of laws exists for the recognition and enforcement of foreign-created rights; and from that theory it deduces most of its specific rules. The English law, on the other hand, has no single theory — the chaotic state of the authorities alone shows that — and it is possible to discern in many instances, e.g., jurisdiction *in personam* which is based either on service within the jurisdiction or on submission, and the law of contracts, where the governing law is the law which the parties wish to govern, a definite adherence to the view that justice and convenience is the end to be obtained.

The other possible approach is not practical but conceptual —the deduction of specific rules from a consistent legal theory of the "nature" of the conflict of laws. When a given system of law deduces the answer to the question whether an English branch of a dissolved Russian bank can be sued in England from the "nature" of a branch of a foreign corporation,[2] or solves the problem of whether there is a good marriage between A and B, whose French domiciliary law requires the consent of their parents for a valid marriage, when that marriage is celebrated in England where no such consents are required, by determining whether "consent of parents" "goes to form or capacity", its approach is conceptual.[3] The conceptual approach is common both to the Restatement and to the English law— for that is the method of the common law; but there is a wide difference between them in this respect. First, the Restatement is more conceptual than the English law; that has been pointed

[1] RESTATEMENT, pp. 559 - 560.

[2] *Lazard Brothers and Company* v. *Midland Bank, Limited,* [1933] A.C. 289.

[3] *Ogden* v. *Ogden,* [1908] P. 46.

out in the preceding paragraph. Secondly, the fundamental concept of the Restatement is wholly different from that of the English law. The rules of the Restatement are based on the assumption that (a) the court of the forum, being a court of law which exists for the enforcement of legal rights only, can give no help to a party unless he can pull out of his pocket a legal right which he, quite ficticiously of course, is carrying about with him, and that (b) that legal right only exists in so far as some system of law created it. It follows from this theory that even questions of choice of law are ultimately questions of jurisdiction in disguise; to determine what law governs the formation of a contract we must ask what law "created" the contract; to determine the validity of a marriage, we must consider two laws, the law which "created" the contract, the *lex loci celebrationis*, and the law which "created" the status, the *lex domicilii*. It follows, further, that the forum has only the choice between enforcing or not enforcing the foreign right — it cannot view it through its own spectacles; the forum may not ask whether a foreign marriage is such that it will recognize, but only if it is valid both by the *lex celebrationis* and the *lex domicilii;* if by the law of the state where a judgment was rendered the original cause of action is merged in the judgment, there can be no suit on the original ground, because no such foreign right any longer exists.

When an English court grants a remedy to a plaintiff upon facts which contain some foreign element, it does not purport to recognize or enforce a foreign-acquired right. Does the English law, it asks, including in that term the rules which we call the conflict of laws, bid us on these facts to create an English right? It is immaterial that the right so created bears no resemblance to that given by the foreign law beneath whose shadow occurred the events which it is claimed gave rise to it. To discover the effect of fraud on a foreign judgment, the English court utterly disregards the law of the state which gave the judgment, and decides the question according to the English law of foreign judgments, i.e., according to English and not foreign notions of the effect that fraud should have on a judgment obtained abroad. A marriage may be perfectly valid both in the state where it was celebrated and in the domicile, and yet, as in *Hyde's* case,[4] be disregarded by an English court on the ground that it is not such a union as the English law of foreign marriages regards as marriage. The English approach, in a word, is an application of the principle that law is territorial and can claim no effect

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

beyond the boundaries of the territory within which it operates; a plaintiff who brings his foreign case before an English court, must expect it to be viewed through English eyes.

It is now proposed, by means of a comparison of the Restatement with the English and Canadian law: (A) to examine the extent to which each prefers considerations of justice and convenience to the rigid application of legal concepts, and (B) to contrast the "foreign-acquired rights" theory of the Restatement with the "territorial" theory of the English law.

A.—The Approach of Justice and Convenience

(1) *Domicile.* Both Restatement and English law base the legal concept of domicile on the common-speech notion of "home". Whence, then, come the striking differences between their rules on this topic? The disagreement between the two systems of law upon the degree of fixity necessary for the acquisition of a domicile of choice and upon the "reverter theory" is not traceable to any difference in their approach, but to the fact that Americans and Englishmen are not agreed upon the elements which are fundamental to the notion of "home". The difference in the rules as to the power of a married woman to acquire a separate domicile is, on the other hand, the product of a different approach. Here the English law remains, unlike the Restatement, content with imposing upon a deserted woman as her legal home the very last place in the world at which she is likely to be found.

(a) *The nature of the intention required for the acquisition of a domicile of choice.* Restatement and English law alike require an intention to make the new dwelling-place one's home, but they differ as to the meaning of "home". For the Restatement, "home" involves only "to a certain extent the idea of fixity" : "it is possible . . . . . for a person to make his home in a place even though he does intend to move at a definite time" : a workman who intends to stay in a place only so long as he can get a good job there, or even a student, independent of his father, who intends to stay in the University town until he graduates, may each acquire a domicile of choice.[5] Fixity is of the very essence of the English conception of domicile. At no stage in its development would the English law have admitted the acquisition of a new domicile by the Restatement's workman or student; both are resident for a purely temporal purpose; neither has "settled down". Since *Winans* v. *Attorney-General*,[6]

[5] See Restatement, pp. 36, 37, and 46.
[6] [1904] A.C. 287.

and *Ramsay* v. *Liverpool Royal Infirmary*,[7] even "settling down" is not, it appears, enough, if you have at the back of your mind an intention to pack up and go if and when a wild and visionary scheme of building cigar-shaped boats comes to fruition, or your "settling down" is the result of passive inaction rather than active deliberate choice. Has the propositus come finally to anchor, is the question for English and Canadian lawyers. Query, does the restless North American, e.g., Mr. Winans, ever come to anchor in the final sense which an Englishman does? If he does not, is there any point in applying to Canadians a conception of domicile which assumes a character which is not theirs?

(*b*) *The reverter theory.* By the English law a man may abandon his domicile of choice in the same manner as he acquired it, *animo et facto;* if, however, he abandons his old domicile without simultaneously acquiring a new one, the result is to leave him without a domicile; in that interval of time, therefore, he is said to "revert" to his domicile of origin. As between England and Scotland, the result of the doctrine is absurd enough. Colonel Udny, the hero of the leading case upon the reverter theory,[8] had been forty-one years away from Scotland, twenty-eight of them domiciled in England, and twelve of them resident in Boulogne, by the time the House of Lords solemnly decided Scotland to be his legal home. As for the doctrine itself, it rests upon nothing more substantial than the feeling of Lord Westbury that to fill the vacuum with any law but that of a man's native country would be "absurd"—rests, that is, on the assumption that a man always looks back longingly to the place of his birth. This assumption is not applicable to a Canadian who, having left Scotland at the age of three and lived all his life in Nova Scotia, is retiring to California and dies en route there; yet it is almost certain that any court in one of the English provinces would hold him domiciled in Scotland, except possibly the Alberta Court, which might select as sound a dictum to the contrary effect from among a host of other unsupportable remarks in the Alberta case of *Nelson* v. *Nelson*.[9] The rule in section 23 of the Restatement that "a domicil once established continues until it is superseded by a new domicil" (the Quebec rule also it seems)[10] by abolishing abandonment *animo et facto*, renders impossible the occurrence of a vacuum,

[7] [1930] A.C. 588.

[8] See *Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441, and 2 C.E.D. (Ont.) 653 - 4.

[9] [1925] 3 D.L.R. 22; 2 W.W.R. 1.

[10] JOHNSON, CONFLICT OF LAWS (Montreal, 1930), I, 120.

and hence the resort to the reverter theory to fill it; our Nova Scotian would retain his Nova Scotia domicile, whatever his feelings towards that place, until he overlaid it with his new California domicile. It should be noticed that this rule is not only more applicable to Canadian conditions than the English rule, but it effects also a simplification in the law of domicile, in that it renders unnecessary the distinction between domicile of origin and domicile of choice.

(c) *Power of a married woman to acquire a separate domicile.* Must the property of a married Scotswoman, whose rascally husband has become domiciled in Queensland and there bigamously married another, descend by the law of Queensland?[11] Must a married Englishwoman, whose husband has given her cause for divorce and has then skipped to France and acquired a new domicile there for the express purpose of rendering it more difficult and expensive for her to get a divorce, meet with a denial of jurisdiction from the English court?[12] Yes, says the English law: since by the old common law of Baron et Feme the wife's personality is drowned in the husband's, she cannot, while the marriage lasts, have any domicile but his. The court looks only to the Common Law, and disregards woman's new-found independence, and the fact that the Married Women's Property Acts have removed all the practical consequences of that unity. Such peculiar hardship is worked on the injured wife in the case of divorce that the Parliament of Canada, without casting any doubt on the inability of the wife to acquire a domicile for herself, has resorted to an expedient of doubtful wisdom, viz., permitting her to sue at the court of the last matrimonial domicile.[13] But surely the Parliament of Canada should never have been put into this predicament. The Privy Council should have adopted another basis for the rule that the domicile of a married woman is the same as that of her husband. Section 28 of the Restatement to the effect that "if a wife lives apart from her husband without being guilty of desertion according to the law of the state which was their domicil at the time of separation, she can have a separate domicil", founds its domicile rule on the legal duty of the wife to live with her husband as head of the family.[14] Where, as in the normal case, she is under that duty, she is domiciled where

[11] *Lord Advocate* v. *Jaffrey*, [1921] A.C. 146; and see *Attorney-General for Alberta* v. *Cook*, [1926] A.C. 444.

[12] *H.* v. *H.*, [1928] P. 208.

[13] See Horace E. Read, *The Divorce Jurisdiction Act, 1930* (1931), 9 Can. Bar Rev. 73.

[14] See Comment (a) to sec. 27 of the RESTATEMENT on p. 50.

her husband is; where, as in the abnormal case, she is absolved by some matrimonial offence of his from her duty to live with him, she may acquire a domicile of her own. The Restatement's rule is to be preferred to ours on two grounds: first, that it avoids the tendency apparent in the English and Canadian cases, towards creating a special type of domicile—"domicile for divorce"—which differs substantially in its content from ordinary domicile, e.g., "Canadian domicile", "detention of the judicially separated husband in the matrimonial domicile" [15]: second, that it brings the legal concept of domicile more into harmony with the common-speech concept of "home", by refusing to impose upon a married woman a legal home to which even the law does not require her to resort.

(2) *Jurisdiction in divorce and nullity cases.* Who, asks the Restatement, has an interest in the continuance of the marriage relation? This question it answers: (1) first and always the community in which either of the spouses has a domicile, a legal home, where he or she lives a home life; (2) the defendant spouse in the continuance of his or her relation with the plaintiff spouse. If, then, we consult the community interested, and see to it that there is not too great a hardship on the defendant in calling him before its courts, justice will be done. It follows (a) that the state of the common domicile always has jurisdiction, for it is certainly interested (section 110); (b) but a state where neither party is domiciled never has jurisdiction for it has no interest (section 111); (c) where there are two communities interested, as a result of the domiciles of the parties being different, resort may be had to the courts of either, subject to proper protection of the interest of the defendant spouse in the continuance of the marriage relation. If the party not domiciled in the state claiming jurisdiction has consented, or by misconduct has lost the right to object, to the acquisition of a separate home by the other; or even if, while there is no such consent express or implied by law, he is, under the law as to jurisdiction *in personam*, forced to listen to the commands of the court (section 113, comment c); or finally, if the court to which resort is had is the court of the last state in which the parties were domiciled together as man and wife; in all these cases there is jurisdiction. In the last case—the only one in which one might feel the defendant to be ill-treated—there is no hardship in calling back the alleged delinquent spouse to the last marriage home to show cause why the marriage relation should not be discontinued. The

[15] See *Attorney-General for Alberta* v. *Cook*, *supra*; *H.* v. *H.*, *supra*; JOHNSON, *op. cit.*, II, 125.

rules as to nullity are the same as those concerning divorce (section 115). Here the approach is one of convenience, and its results, although complicated, are just.

The English approach is conceptual and its results simple but, at any rate as applied to Canada, unjust. "The status of marriage," says Lord Dunedin — and he is not being unfair to the English decisions — "is not strictly a res . . . . . but . . . . it savours of a res." Marriage, that is, is equated to a ship; if you wish to know to what extent decrees affecting marriage status are immune from collateral attack, you need do no more than turn to Admiralty Law and apply to the marriage decree the immunity extended to judgments which dispose of the rights in a ship.[16] If, further, marriage is a res, like a ship, it can be dealt with only by the courts of the place where it is, and, like a ship, it cannot be in more than two places at once. Whence two important conclusions are drawn.

The first is concerned with the law of divorce. The substantial considerations of the interest of both parties and of some state or states in the continuance of the relation are disregarded. Instead, the marriage ship, called a status, is docked or "given a situs" at the domicile. Next, because one ship cannot be alongside two docks at once, it becomes necessary to hold that husband and wife between them can never have more than one domicile: reason and justice may tell us that there are circumstances under which the homes of husband and wife are not, and their domiciles therefore should not be, the same, but by hook or by crook we must preserve a single situs for the marriage res, by maintaining unity of domicile. The hook or crook is supplied by the old law of Baron et Feme, now wholly obliterated by statute. But when Lord Merrivale resorts to that old law in *Attorney-General for Alberta* v. *Cook*,[17] in order to hold that the unity of husband and wife prevents the acquisition by a judicially separated wife of a domicile of her own, even for the purposes of divorce, the reason he assigns is mere technique designed to preserve the unity of domicile without which the fundamental English concept of a marriage res would become unworkable. The result of this holding — that a husband who deserts his wife and acquires a new domicile a thousand miles away, can force the injured wife to resort to his court for matrimonial justice — has been commented on above, and it has already been stated that the Parliament of

[16] This is the effect of *Salvesen* v. *Administrator of Austrian Property*, [1927] A.C. 641; note especially Lord Dunedin at p. 662.

[17] [1926] A.C. 444.

Canada has cut the Gordian knot by the Divorce Jurisdiction Act, 1930.

The second conclusion is concerned with the law of nullity. H, a domiciled Frenchman, marries W, a domiciled Englishwoman, without having obtained the consent of his parents, which by French law is mandatory upon him. The parties never lived together in France, but H brings a suit in France, to which W appears, claiming that his marriage with her is null and void, and the French Court declares that H was never married to W. Of the three possible grounds of jurisdiction in the French court, celebration of the marriage in France, residence of the parties in France, and domicile, only the last is applicable on the facts; but since W is only domiciled in France if she has been married to H, and the French court has decided that she was not married to H, the English court held that the decree of the French court, not being the court of the common domicile, was not entitled to recognition.[18] Once more the concept of the marriage res rears its head. Because the marriage ship is not at a French dock, the French court has not power to give a decree affecting it which will be recognized in England. Practical result : W is a wife in England, no wife in France.

Follow the analysis of the Restatement : (1) the French community is interested in the marriage relation, and hence has a prima face power to deal with it : (2) the wife is also interested in the marriage relation, and since she consults the French court as to its existence, she suffers no hardship when they tell her that it does not exist. The famous problem in *Ogden* v. *Ogden* is solved.

It should be remarked here that the equivalation by the Restatement of nullity jurisdiction with jurisdiction for divorce is in line with a noticeable tendency of the English and Canadian courts in the same direction; for they seem to be making domicile, which is already the sole ground of jurisdiction for divorce, the sole ground for jurisdiction in nullity cases.[19]

(3) *What law governs a foreign contract?* On this topic the contrast between the conceptual approach of the Restatement and the practical approach of the English law is so marked that little need be said upon it. The key to the approach of the Restatement is given by the words used in making a very

[18] *Ogden* v. *Ogden*, *supra*.

[19] As to nullity on the ground of impotence, see *Inverclyde* v. *Inverclyde*, [1931] P. 29; *Fleming* v. *Fleming*, [1934] O.R. 588. As to nullity for grounds other than impotence, see the *Salvesen* case, *supra*, and JOHNSON, *op. cit.*, II, 233.

questionable distinction between questions of obligation and performance: "When the application of the law of the place of contracting would extend to the determination of the minute details of the manner, method, time and sufficiency of performance so that it would be an unreasonable regulation of acts in the place of performance, the law of the place of contracting will cease to control and the law of the place of performance will be applied." [20] "Unreasonable regulation of acts in the place of performance" . . . . . "will cease to control." In other words, the choice of law rule may be deduced from an answer to the question: What sovereign has power over the acts before the court? — i.e., from the rule as to jurisdiction. Accordingly we find that by section 332 all questions concerning the binding nature of the promise are determined by the law of the place of contracting, for that is the law which "creates" the obligation; by section 348 and 349, comment (b), whether an instrument is negotiable or not is determined by the law of the place of issue; by sections 350-352 the formalities requisite to, the capacity of an assignor of, and the effect as between assignor and assignee of, an assignment of an informal contract is determined by the law which creates the assignment contract, namely, the law of the place of assignment (section 350). Suppose, as to section 332, that two Nova Scotians who are travelling by rail through Quebec on their way to New York City, make in Quebec a contract that is to be wholly performed in Nova Scotia; according to that section the effect of fraud on the promise must be determined by the wholly fortuitous law of Quebec. The same criticism applies to making the law of the place of assignment govern the effect as between assignor and assignee of an assignment of a contract right. Suppose, as to sections 348 and 349, comment (b), that a foreign government issues registered bonds and declares them negotiable. Shall that declaration enlarge, in a Canadian province, the restricted class of property to which a man may pass a better title than he has? To this question the English law answers an emphatic "No." [21]

The English rules as to the law which governs the formation of a contract are today based clearly upon justice and convenience. They show a marked development from the old mechanical application of the *lex loci contractus* to the modern investigation of the so-called "proper law", which is either,

[20] RESTATEMENT, section 358, comment (b)—upon which see an article by E. G. Lorenzen and R. J Heilman, *The Restatement of the Conflict of Laws* (1935), 83 U. of Pa. L. R. 555 at p. 576.

[21] *Picker* v. *London and County Banking Co.* (1887), 18 Q.B.D. 515.

according to Dicey, the law which the parties intend to govern their contract, or, according to Westlake, the law of the country with which the transaction has the most real connection. It is true that formalities are generally believed to be governed exclusively by the *lex loci;* but even Dicey, who thus states the rule, regards it as anomalous, a legacy from the old law, while Cheshire is of the opinion that it is sufficient if the formalities required by the proper law are satisfied.[22] It is also true that, although Cheshire submits that capacity to contract should be tested by the law of the country with which the transaction has the most real connection, the dicta are evenly divided between domicile and *lex loci contractus* and make no mention of the proper law.[23] Even here, however, the test of convenience has led Lord Macnaghten to remark that "it may be that all cases are not to be governed by one and the same rule",[24] and Dicey to distinguish ordinary commercial contracts from other contracts, in sharp contrast to the Restatement which regulates capacity to marry and capacity to enter into an ordinary contract of sale alike by the *lex loci contractus.*[25] In any case no one doubts that by the English law the intrinsic validity, the interpretation and the effect of a contract are all governed by the proper law. Whether we define proper law with Dicey, as the law which the parties intend to govern, or with Westlake, the law of the country with which the transaction has the most real connection, makes no difference; in either case the approach is the same. In either case the inquiry is directed to discovering what law should "on substantial considerations", in fairness that is, be applied to the transaction.

B.—The Conceptual Approach

In the preceding section, wherein the approach of justice and convenience was contrasted with the conceptual, it abundantly appeared that neither approach was peculiar to the Restatement or to the English law. While the English law was practical in its choice-of-law rules for contracts, upon divorce jurisdiction it was unpractical and unfair: the Restatement made much of convenience in divorce jurisdiction, but disregarded it in its

[22] Dicey, Conflict of Laws, 5th ed., note (f) on p. 643; Cheshire, Private International Law, pp. 175 - 181.

[23] Cheshire, *op. cit.*, 152; Westlake, Private Intrenational Law, 7th ed., pp. 40 - 42.

[24] *Cooper* v. *Cooper* (1888), 13 App. Cas. 88 at p. 108.

[25] Contrast Dicey, *op. cit.*, pp. 634 - 641, and *Bondholders Securities Corporation* v. *Manville*, [1933] 3 W.W.R. 1 (Sask.), with Restatement, sections 121 and 322.

choice-of-law rules for contracts. This section will attempt to show that while each system bases its rules to some extent upon the theory it holds of the legal nature of the conflict of laws, the theory of the Restatement is not only very different from, but exercises a deeper influence upon the determination of specific rules than the theory of the English law, which is always ready to give place to considerations of what is just and sensible. In the view of the Restatement, the conflict of laws is a system which stands by itself and rests on principles peculiar to itself: for it deals with the recognition and enforcement of foreign-acquired rights. The Restatement treats foreign-protected interests as rights, and supplies a set of rules which particularize the circumstances under which these already exisitng rights will be made effective at the forum. Since on this view the forum is enforcing rights, not protecting mere interests, the sole object of inquiry is what law created the right. That law is discovered by asking what law or laws had *power* over the transaction or the constituent elements of a complex transaction.

Readers of Dicey will note that this is the approach which that authoritative author attributes to the English law. But the English decisions which will be cited in this section tend to show that Dicey is wrong. English law, they reveal, knows nothing of foreign-created rights; for it, all law is territorial. Do we upon these facts, it asks, create an English right? The English conflict of laws is not, accordingly, a separate system, but an aggregate of the rules which have resulted from the application of the English domestic law to situations in which one of the possibly relevant facts is the fact that the transaction in question occurred wholly or partly abroad, or between foreign parties, or with reference to a foreign res. The law applied to a foreign judgment, marriage, or tort, is an extension of the English domestic law of judgments, marriages, and torts, and cannot properly be understood unless it is viewed as it is, as an appendix to domestic law.

(1) *Foreign Judgments.*

(*a*) *Jurisdiction in personam.* The leading English cases of *Harris* v. *Taylor*,[26] and *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*,[27] provide an admirable contrast between the fundamental theories of the Restatement and the English law. Section 77 (e) of the Restatement gives as a sixth head of jurisdiction

[26] [1915] 2 K.B. 580.
[27] [1894] A.C. 670.

in personam the situation "where the defendant has by acts done within the state subjected himself to its jurisdiction". Section 82, one of the sub-heads to section 77 (e), might have been expressly designed as a head note for *Harris* v. *Taylor*, viz., "an appearance by a defendant in an action gives the court jurisdiction over him for all purposes of the action if by the law of the state in which the action is brought the appearance has that effect". In that case the English Court of Appeal held that since by the law of the Isle of Man an appearance to contest the jurisdiction was an appearance for all purposes, a default judgment of the Manx Court against A, whose only connection with Isle of Man process was an appearance for the sole purpose of contesting the jurisdiction, was binding upon him in England.[28] But the case was not decided on any such ground as that contained in section 82. The English law of foreign judgments recognizes only two grounds of jurisdiction in a foreign court, service within the jurisdiction, and submission. There is little doubt that *Harris* v. *Taylor*, as decided, is an application, perhaps not justified by the facts of the case, of the principle of sudmission. Starting with the obvious case of a contract to submit,[29] the English courts proceed to the position that a voluntary appearance to a foreign action on the merits is an election to submit to the jurisdiction; next, they treat as voluntary an appearance which is so far involuntary that the defendant only makes it to save first, property which may hereafter come into, and then property which is actually within the foreign state, from the local consequences of an execution issued under a default judgment against him;[30] finally, in *Harris* v. *Taylor*, they end by holding voluntary an appearance which the defendant makes for the one purpose of disputing the jurisdiction. For the Restatement, the case is based on the principle that other states must permit the court of resort to decide the effect of coming before it for justice, a principle which gives to the obligation-theory of foreign judgments a scope unrecognized by the English law.

Section 84, a second sub-head of section 77 (e), gives jurisdiction "over an individual who has done an act within the state as to a cause of action arising out of such act", if the foreign law so provides. This rule runs contrary to the Privy

[28] For criticisms of the case see dissenting judgment of Beck J. in *Richardson* v. *Allen* (1916), 28 D.L.R. 134 at p. 137, and CHESHIRE, *op. cit.*, 494.

[29] For instance, see Read, *Consent as a Basis of Jurisdiction in Personam of a Foreign Court*, [1931] 1 D.L.R. 1.

[30] *Voinet* v. *Barrett* (1885), 55 L.J.Q.B. 39; *Guiard* v. *de Clermont*, [1914] 3 K.B. 145.

Council case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*,[31] where it was held that a default judgment given against an absent tortfeasor by the courts of the state in which the tort was committed was not entitled to recognition outside the state. The reasons for the decision are even more important than the decision itself, for whereas the Restatement bases its extension of the powers of foreign courts on the statement of Blackburn J. that "the judgment of a court of competent jurisdiction . . . . . imposes a duty or obligation on the defendant to pay the sum for which the judgment is given, which the courts in this country are bound to enforce",[32] the Privy Council impliedly rejected that principle when it based its refusal to enforce the foreign judgment in the *Sirdar* case on the "general rule that the plaintiff must sue in the court to which the defendant is subject at the time of the suit", and then went on to note, very practically, that "if this doctrine were accepted, its operation in the enlargement of territorial jurisdiction would be very important."[33]

(*b*) *Conclusiveness of foreign judgments: fraud and merger.* The Restatement and the English law are agreed that a foreign judgment which has been obtained by fraud is not entitled to recognition; they differ on the character of that fraud. If the foreign court has jurisdiction, reasons the Restatement, then, on the obligation theory of foreign judgments, the only question is whether that judgment could be set aside by independent equitable proceedings in the state where it was rendered. What is meant by fraud, therefore, must be determined by the law of domestic judgment in the state which rendered the judgment (section 440). The answer of the English law is not so simple. Since that law does not accept the obligation theory, it does not refer to the domestic law of the foreign state to decide the question; it refers instead to the English law of foreign judgments. According to the English law of domestic judgments, a domestic judgment is conclusive as to the facts in issue, and it is therefore the rule that evidence advanced to prove fraud in an action to set aside a domestic judgment must not have been before the original court — to hold otherwise would be to deny the conclusiveness of the judgment. The rule as to fraud in foreign judgments is different, the foreign judgment being put on a lower plane than a domestic judgment, although always stated to be no less

[31] [1894] A.C. 670.

[32] *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155 at p. 159.

[33] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670, 683, 685. The same principle applies to a partnership which is carrying on business in a foreign jurisdiction, *Emmanuel* v. *Symon*, [1908] 1 K.B. 302; with which contrast RESTATEMENT, section 86.

conclusive. There are three English decisions to the effect that an English court will allow a foreign judgment to be impeached on the ground that it was obtained by the perjury of the party setting it up, and this despite the fact, first, that if the foreign judgment is treated as conclusive as to the facts in issue, then it must be conclusive as to the fact of the credibility of the witnesses, and second, that the evidence directed to prove the issue of perjury in the English action must, except in the probably rare case of an admission by the perjurer, consist of nothing but the transcript of the evidence before the foreign court. The point to notice is that the English law disregards the foreign law of domestic judgments and treats a foreign judgment, further, in a different manner from a domestic judgment of its own.[34]

To decide the question whether or not the original claim has become merged in the judgment, the Restatement refers, once again consistently with the obligation theory, to the law of the state which gave the judgment (section 450). Once again the English law refers only to its own law and treats English and foreign judgments differently. While recovery of a domestic judgment bars without more the original cause of action, the holder of a foreign judgment may sue either on the judgment or on the original cause of action. Most English authorities here make the theoretical objection that by permitting suit on the original cause of action, the English court is purporting to enforce a foreign-acquired right which the foreign law has itself put out of existence.[35] It is once more submitted, on the contrary, that the English courts do not purport to enforce foreign-acquired rights, but only give effect to such foreign interests as they deem expedient, and to such an extent as they, as Englishmen, deem expedient, and that this rule is just one more illustration of the truth of the submission.

(2) *Family relationships.* In the sphere of family relationships, dealt with under the heading of Status, a term which it is easier to use than to understand,[36] the Restatement once more founds its principles upon its theory that the conflict of laws deals with the recognition and enforcement of foreign-acquired rights. Having analysed a relationship into its constituent parts,

[34] For a full critical discussion of the problem see CHESHIRE, *op. cit.*, pp. 514 - 524, and see a note by H. E. Read in (1930), 8 Can. Bar Rev. 231.

[35] See DICEY, *op. cit.*, 473; CHESHIRE, *op. cit.*, 479; H. E. Yntema, *The Enforcement of Foreign Judgments in Anglo - American Law* (1935), 33 Mich. L. Rev. 1129.

[36] Contrast the definitions of the RESTATEMENT in section 119, and of DICEY, *op. cit.*, at p. 531 and of C. K. ALLEN, *Status and Capacity* (1930), 46 L.Q.R. 277 at pp. 309, 310.

it inquires what law or combination of laws "created" it, and then concludes that a relationship thereby established will be recognized everywhere. The incidents of the relationship — but what is a legal relationship save the sum of its incidents? — it determines by the law of the place where they are sought to be exercised (section 133), on the ground that that is the state with jurisdiction over the act, with the result that in a state where there is no corresponding relationship there are no incidents which that law knows to attach to it (section 120). That is not the approach of the English law: knowing nothing of the distinction between a status and its incidents, it asks only the question "do we recognize this status",[37] and far from taking the word of the domicile on the question of whether or not a status has come into existence, it examines the question for itself in the light of its own law. Instances of the by now familiar contrast between the "vested rights" approach of the Restatement and the strictly territorial approach of English law may be drawn from each of the four topics into which family relationships may be divided, viz., marriage, legitimacy, adoption, and guardianship.

(*a*) *Marriage.* The effect of sections 121 and 122 of the Restatement is that a marriage valid by the law of the place where it was celebrated is valid everywhere unless it offends against a fundamental policy of the law of either of the parties' domiciles. Marriage consists, i.e., of a contract, created by the appropriate law, the law of the place of making it, upon which is superimposed a family or "home" relationship by its appropriate law, the law of the "home" or domicile. Having looked, therefore, to the *lex loci celebrationis* to see whether a contract came into existence, and to the *lex domicilii* to see whether that law has any objection on the facts to creating a status out of the valid contract, the task of the court is done.

Not so with the English law. There is an English law of foreign marriages, just as truly as there is an English law of foreign judgments. That law knows nothing of the dual division of marriage into contract and status. Referring first to two foreign laws, the *lex loci celebrationis* to see whether the formalities in force were observed, and the *lex domicilii* of either party to see whether each had capacity to marry the other, it asks as its final and most important question, "is this such a marriage as we Englishmen can recognize"; "is it the voluntary union of one man and one woman for life to the exclusion of

[37] *In re Selot's Trust*, [1902] 1 Ch. 488.

all others" ? The potentially polygamous marriages of the two Mormons in *Hyde* v. *Hyde*,[38] and of the young man and the native chief's daughter in *In re Bethell*,[39] were both good by the *lex loci celebrationis* and by the *lex domicilii*, but to both marriages the English court denied recognition. It was admitted in *Nachimson* v. *Nachimson*,[40] that the marriage of the Nachimsons was good in Russia, the place of the celebration and domicile; the sole question discussed by the Court of Appeal was whether it fell within the English notion of a union "for life" when by the law of Russia it could be terminated at the will of either. *Simonin* v. *Mallac*,[41] actually decided that a marriage of two foreign domiciliaries which was duly celebrated in England was valid in England despite the fact that the foreign domicile refused to predicate a status upon it. The question for an English court is, "What is the English view of the union?"

(*b*) *Legitimacy*. Section 137 of the Restatement states that "the status of legitimacy is created by the law of the domicil of the parent whose relation to the child is in question", and comment (b) goes on to the effect that "a legitimate relationship does not necessarily involve the marriage of the parents." In *Shaw* v. *Gould*,[42] H, a domiciled Scotsman, married W, a domiciled Englishwoman, who had previously obtained from her husband a divorce which was valid by the law of Scotland, but invalid by the law of her domicile, England. The question was as to the legitimacy of their son S. The English court held him illegitimate. Yet there is no doubt that by the law of the domicile of his father — Scotland — he was legitimate. Do we recognize him as legitimate? not, does the domicile so recognize him? was the question asked by the English court. The English court did not ask him to take his foreign right out of his foreign pocket for inspection, but asked whether he was legitimate in the English sense of "born in wedlock", i.e., whether his mother was unmarried at the date when she married his father.

Let us turn now to the law of legitimation by subsequent marriage, an institution that formed no part of English or Canadian law until its introduction by statute during the last decade. When *Birtwhistle* v. *Vardill*[43] refused to accept as heir to English land a person legitimated by the law of the Scottish domicile, the case in effect said, "You may be legitimate in

[38] (1866), L.R. 1 P. & D. 130;
[39] *Bethell* v. *Hildyard* (1888), 38 Ch. D. 220.
[40] [1930] P. 217.
[41] (1860), 2 Sw. & Tr. 67.
[42] (1868), L.R. 3 E. & I. App. 55.
[43] (1835), 2 Cl. & F. 582.

your domicile, but you are a bastard here". And so it was understood until 1882.[44] And when in 1882 there came that reversal of judicial opinion which has resulted in limiting the *Vardill* case to the case of a foreign-legitimated child who claims to be common law heir of English land, the ground assigned for it was not the duty of the English court to give effect to a foreign-acquired right, but common sense and convenience, as well as the monstrous parochialism and injustice of holding that "a Dutch father, stepping on board a steamer at Rotterdam with his dear and lawful child, should on his arrival at the port of London find that the child had become a stranger in blood and in law, and a bastard, *filius nullius*".[45]

The domicile, to which alone the Restatement accords the power of "creating" the status of legitimacy, has been still further disregarded by judicial interpretation of at least one of the provincial Legitimation Acts. Thus it has been held that for the purposes of succession to his Ontario property, W, who was admittedly illegitimate by the law of the domicile of his parents, England, was in Ontario legitimated under the provisions of the Act to the effect that "if the parents of any child . . . . . born out of lawful wedlock . . . . . intermarry, such child shall for all purposes be deemed to be and have been legitimate from the time of birth".[46]

(*c*) *Adoption.* The effect of sections 142 and 305 of the Restatement, is to give to a child adopted by X in his foreign domicile, the succession rights which the law of the domicile of the decedent gives to its own adopted children. But the Canadian law disregards the foreign domicile of adoption. Quite apart from the fact that at least one provincial act impliedly denies any property rights at all to foreign adoptees,[47] the language of the Supreme Court of Canada in *Baldwin* v. *Mooney*,[48] treats a child who has been adopted abroad as quite unconnected with its adoptive parent in Canada — deals with the adoption proceedings, that is, as if they had never taken place.

(*d*) *Custodianship upon Divorce, and Guardianship.* As to the custody of a child upon divorce, the Restatement lays down

[44] *Boyes* v. *Bedale* (1863), 1 H. & M. 798; dissenting judgment of Lush L. J. in *In re Goodman's Trusts* (1881), 17 Ch. D. 266.

[45] *In re Goodman's Trusts* (1881), 17 Ch. D. 266 at pp. 296 - 298, per James L. J. For the present law on the subject see a short statement in CHESHIRE, *op. cit.*, 298.

[46] *Re W*, [1925] 2 D.L.R. 1177; 56 O.L.R. 611; decided under sec. 2 of the Ontario Legitimation Act, 1921.

[47] E.g., Adoption Act, R.S.N.S. 1923, c. 139, s. 7, which gives property rights only to "a person adopted in accordance with the provisions of this Chapter", i.e., in Nova Scotia.

[48] [1929] 2 D.L.R. 244.

by sections 146 and 147, that the decree of the domicile of the child will be enforced everywhere, but by section 148 "in any state into which the child comes, upon proof that the custodian of the child is unfit to have control of the child, the child may be taken from him, and given while in the state to another person." As to guardianship, by sections 149 and 151 the relation of guardian and ward, created by the domicile of the ward, will be recognized in the forum, but will only be given such effects as would be given it if created in the state of the forum. Again the Restatement presents those familiar figures, (a) states which "create" the relation, (b) states which "recognize and enforce the foreign-created" relation, (c) the distinction between a status and its incidents.

No such concepts will be found in the English or Canadian law of guardianship. The English law is thus summed up by Dicey: "There has been a clear development in the English law as to this topic. The earlier view treated guardianship as substantially local, and a part of the administrative law of each country, without extra-territorial validity . . . . . The more recent and reasonable doctrine . . . . . recognizes the existence of the foreign guardianship as conferring rights which the court should normally confirm if they are called into question".[49] The Canadian law is still resolutely territorial. Johnson points out a difference from the English law on this topic: "Canadian courts do not in the matter of custody regard the so-called jurisdiction of the foreign court", although, he adds, the foreign decree is entitled to great weight. The present law he states in the following significant terms: "The decree of a foreign court has in practice been recognized, unless the welfare of the child otherwise dictates. Our courts will in that respect apply exactly the criteria valid in a case wholly domestic. The future welfare of the child is paramount".[50]

(*3*) *Foreign Torts.* In final illustration of the statement that the Restatement deals with cases involving foreign elements by directing the forum to ascertain what foreign law "created" the right for which the plaintiff asks enforcement, and to decide the extent of that right by the "creating" law, while the English law extends to them its own domestic law, modified, however, by a sense of the injustice that might arise if the applicability under certain circumstances of the foreign law were not taken into consideration, it will suffice to turn to the rules as to foreign torts.

[49] DICEY, *op. cit.*, 552.
[50] JOHNSON, *op. cit.*, 282, 284.

Sections 377-390 of the Restatement determine substantially all questions as to the liability of a defendant by the law of the place of wrong, and that law alone. In this it applies the oft-quoted dictum of Holmes J. :

> The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like all obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, but equally determines its extent.[51]

The English law of foreign torts is no more than an appendix to its domestic law of torts. Not only does the court take into consideration two laws, the *lex fori* and *lex loci delicti*, instead of the Restatement's one, but the order and form of words in which it questions the plaintiff as to the contents of these two laws is in itself highly significant : (1) Is the act of the defendant actionable by the law of England? (2) Is that act innocent or justifiable by the law of the place where it was done? The sole foundation of a tort action in England is actionability by the law of England. If the defendant's act is not actionable by that law the plaintiff fails, regardless of the fact that under the foreign law an action lies.[52] Only when the court has decided that by the English law an action lies, does it refer to the law of the place where the act was done, and then for the sole purpose, in effect, of determining whether under the circumstances it would be unfair to penalize a foreign defendant who is admittedly liable by the English law. The plaintiff need not show that the act was *actionable* by the *lex loci delicti*, for it is not that law which decides the question of legal liability. It is enough that it was not innocent, e.g., gave rise to a criminal, though not a civil, suit;[53] for although it would be hard on a defendant to hold him liable in England for doing in a foreign state something that was permitted there, he cannot complain if, when he has done something wrong in Brazil, he finds that he must pay for it in England not with incarceration but in cash.

Such is the English approach. Dicey regards it as "not wholly easy of defence on theoretic grounds". In an attempt to work out of the cases a doctrine less inconsistent with his own, he changes the order and wording of the two traditional questions,

[51] *Slater* v. *Mexican Nat. R. R. Co.* (1904), 194 U.S. 120, quoted in an article by Lorenzen, *Tort Liability and the Conflict of Laws* (1931), 47 L.Q.R. 483, 485, where the English view is thoroughly discussed.

[52] *The Halley* (1868), L.R. 2 P.C. 193.

[53] *Machado* v. *Fontes*, [1897] 2 Q.B. 231.

so as to convey to the casual unwary reader the impression that the English law accepts Holmes J.'s obligation theory, subject to a public policy exception, that English law will not give damages in respect of a proceeding which English law does not condemn.[54] Indeed we could hardly expect him to do otherwise; for in this topic, as in no other, the English law finally and in no unemphatic manner denies its adherence to the doctrine of foreign-created rights which he strove hard to create.

JOHN WILLIS.

Dalhousie Law School.

[54] Note the concealment of the true effect of *Machado* v. *Fontes* by the use of the term "wrongful" in a double meaning in Rule 188 at p. 771 of DICEY, and see first paragraph on p. 775 for a misleading explanation of the effect of *The Halley*.