THE CANADIAN BAR REVIEW

VOL. XVIII FEBRUARY, 1940 No. 2

BILLS OF LADING: PROPER LAW AND RENVOI

The decision of the Privy Council in the case of *Vita Food Products Incorporated* v. *Unus Shipping Company Limited (In liquidation)*[1] is of great importance in various respects[2]. In the present article particular stress will be laid on certain matters of the conflict of laws, including the doctrine of the *renvoi* and the question to what extent the parties to a contract are at liberty to select, by express declaration in the contract, the proper law which is to govern the intrinsic validity of the contract.

§ 1. UNIFORM BILLS OF LADING

Before the *Vita Food Products Case* was decided it seemed that, by means of concurrent legislation in various countries, a substantial measure of success had been achieved in obtaining uniformity in the terms of bills of lading issued in connection with the carriage of goods by sea. The result of the decision in that case, however, appears to be that it is so easy for parties to contract themselves out of the legislative provisions that the substance of uniformity has given place to the shadow. In any event a brief account of the movement towards securing uniformity[3] will afford a useful introduction to the statement of the facts of the case. In the United States of America a federal statute, commonly known as the *Harter Act*, was passed in 1893[4], and this statute was followed by the Australian *Sea*

[1] [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433, on appeal from the Supreme Court of Nova Scotia en Banc, (1938) 12 M.P.R. 513, [1938] 2 D.L.R. 372.

[2] The case has already been the subject of comment elsewhere, namely, by Kahn-Freund (1939), 3 Modern L.R. 61, by Gutteridge (1939), 55 L.Q.R. 323, by McNair and Mocatta, editors of SCRUTTON, THE CONTRACT OF AFFREIGHTMENT AS EXPRESSED IN CHARTERPARTIES AND BILLS OF LADING (14th ed. 1939), preface p. vi, and pp. 20, 470-471, 476,479-480, 560, 569, and by Cook, *'Contracts' and the Conflict of Laws: 'Intention' of the Parties: Some Further Observations* (1939), 34 Illinois L.R. 423.

[3] See SCRUTTON, *op. cit.* (14th ed. 1939) 468 ff., 560 ff. (appendix v), 569 ff, (appendix vi).

[4] The text is reprinted in appendix v to SCRUTTON, *op. cit.*, in several editions prior to the 14th (1939).

Carriage of Goods Act, 1904, the Canadian *Water Carriage of Goods Act, 1910*[5] and the New Zealand *Sea Carriage of Goods Act, 1922*[6]. The movement towards uniform legislation was temporarily superseded, however, by a movement in favour of the preparation of a code of rules defining the rights and liabilities of a carrier of goods by sea which might be voluntarily incorporated in bills of lading[7], and at a meeting of the International Law Association held at the Hague a code of rules known as the *Hague Rules, 1921*, was approved[8]. Ultimately the project for uniform legislation was revived and the *Hague Rules* were used as a basis, as explained in the recitals prefixed to the *Carriage of Goods by Sea Act, 1924* (United Kingdom), as follows :

> Whereas at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading:
>
> And whereas at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference:
>
> And whereas it is expedient that the said rules as so amended and as set out with modifications in the Schedule to this Act (in this Act referred to as "the Rules") should, subject to the provisions of this Act, be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading[9].

---

[5] Reenacted in R.S.C. 1927, c. 207. The general scheme of the statute and the construction of certain sections are considered in *Paterson Steamships* v. *Canadian Co-operative Wheat Producers*, [1934] A.C. 538; cf. *Northumbrian Shipping Co.* v. *E. Timm & Co.*, [1939] A.C. 397.

[6] The text of these statutes is reprinted in appendix vi to SCRUTTON, *op. cit.* in several editions prior to the 14th (1939). The text of the New Zealand statute, still unrepealed, is also reprinted in appendix vi to the 14th edition.

[7] In the same way the *York-Antwerp Rules of General Average, 1890*, had been prepared with the view to their voluntary adoption.

[8] As to the *Hague Rules*, see the REPORT OF THE THIRTIETH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION held at the Hague (1921), vol. 2, *passim*.

[9] See the REPORT OF THE THIRTY-FIRST CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION at Buenos Aires (1922), vol. 2, *passim*, as to the further discussion of the *Hague Rules, 1921*, by that association, and by other bodies in 1922, including a summary of the proceedings of the International Maritime Conference held at Brussels in 1922.

Among the similar statutes or ordinances passed in various parts of the British Empire are the *Sea Carriage of Goods Act, 1924* (Australia), the *Carriage of Goods by Sea Act, 1932* (Newfoundland), the *Water Carriage of Goods Act, 1936* (Canada), and, in the mandated territory of Palestine, the *Carriage of Goods by Sea Ordinance, 1926*. Statutes for giving effect to the *Hague Rules* with modifications have been passed in Belgium and France, and in the United States the *Harter Act* has to a large extent been superseded by the *Carriage of Goods by Sea Act, 1936*[10]. Apart from some differences not material to the present discussion, the United States statute differs from a statute of the British type in at least two respects. The former incorporates the substance of the *Hague Rules* in the body of the statute, and applies to inward as well as outward bills of lading, whereas the latter sets out the *Hague Rules* in a schedule and purports to make them effective by a provision of the statute, subject to other specific provisions of the statute, and applies only to outward bills of lading.

The Newfoundland statute, in question in the *Vita Food Products Case,* is an orthodox example of the British type. Sections 1 and 3 are as follows :

> 1. Subject to the provisions of this Act, the rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.
>
> 3. Every bill of lading or similar document of title issued in this Dominion which contains or is evidence of any contract to which the rules apply shall contain an express statement[11] that it is to have effect subject to the provisions of the said rules as expressed in this Act.

The Palestine ordinance, in question in the case of *The Torni*[12], departs from the foregoing type in that in the section corresponding with s. 3 of the Newfoundland statute the following words are added: "and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

[10] The text of the last mentioned statute is reprinted in appendix v to SCRUTTON, *op. cit.* (14th ed. 1929), and that of the Australian and Canadian statutes is reprinted in appendix vi. For the discussion in the Parliament of Canada prior to the enactment of the statute of 1936, see especially the DEBATES, HOUSE OF COMMONS, 1936, volume 4, pp. 3212-3220; cf. PERRAULT, DES STIPULATIONS DE NON-RESPONSABILITÉ (1939) 61-64.

[11] This "express statement" is commonly called the "clause paramount".

[12] [1932] P. 78, C.A.

As Scrutton L.J. pointed out in the *Torni Case*[13] the Government of Palestine anticipated that people in Palestine might disobey the law by omitting the express statement that the bill of lading is to have effect subject to the provisions of the Rules, and endeavoured to give effect to the international convention by saying that even if in disobedience of the law this express statement were omitted, any bill of lading issued in Palestine should nevertheless be subject to the Rules. The Lord Justice added :

> It has occurred to the parties here that they might upset the whole applecart—if I may use a conventional expression—of the countries who have agreed to the Rules, by simply putting in a clause into their bills of lading, as they have done: "This bill of lading wherever signed, is to be construed in accordance with English law." If that has the effect of striking out the whole of the Schedule, it will be quite simple for every shipowner to defeat the Convention and the whole system under it by simply putting in a clause: "This bill of lading is to be construed by the law, not of the place where it is made, but by the law of the place to which the ship is going."
>
> It will take very strong evidence to convince me that such a clause has that meaning. I read the effect of the Palestine Ordinance as this: in every bill of lading, whether stated or not, these terms of the Schedule, the *Hague Rules*, are to be included as part of the terms. Consequently, when I come to construe this bill of lading I read into it those terms. I give perfectly sufficient effect to the clause about English law, if it has any effect, by saying: "Yes, here is the bill of lading with those terms in it. Now construe it according to English law."

The other judges of the Court of Appeal expressed their views in less colloquial language, but they agreed that the express terms of the Ordinance, based on an international convention, could not be defeated by the insertion of a clause in the bills of lading that they were to be construed according to English law, and that the bills of lading were subject to the provisions of the Ordinance and the Rules, and, with those terms read into them, should then be construed according to English law.

It is interesting to note that the author of *Scrutton on Charterparties and Bills of Lading* continued, notwithstanding his appointment to the bench, to take part in the preparation

[13] [1932] P. 78, at p. 83.

of new editions until and including the eleventh edition (1923). In the preface to that edition the Lord Justice manifested a critical, if not hostile, attitude to the proposed legislation in the United Kingdom as being an unjustified interference with freedom of contract, and to some of the provisions of the Rules as being ambiguous or unsatisfactory. Nevertheless, when the legislation had become a *fait accompli*, Scrutton L.J. in his judicial character manifested in the *Torni Case* his unwillingness to permit parties to frustrate the purpose of the international convention and the consequent legislation by attempting to contract themselves out of the statutory provisions. From this point of view it would seem to be unfortunate that the Privy Council has now encouraged parties to contract themselves out of the statutory provisions, not only by holding that the parties had succeeded in doing so on the facts of the *Vita Food Products Case*, but also by disapproving of the reasoning of the Court of Appeal in the *Torni Case*, notwithstanding that the *Torni Case* might have been distinguished on the facts[14].

In the *Vita Food Products Case*, pursuant to a contract of sale between one Basha and the plaintiff company, Basha in Newfoundland shipped, for delivery to the plaintiff in New York, three lots of herrings in the *Hurry On*, a ship owned by the defendant company and registered at Halifax, Nova Scotia. Through the captain's negligence in navigation the *Hurry On* ran ashore in Nova Scotia. The herrings were there unloaded, reconditioned and forwarded in another ship, and were delivered in New York in damaged condition, and an action for damages was brought in Nova Scotia by the consignee against the shipowner.

There were three bills of lading issued in respect of the goods shipped, identical except as regards the description of the goods, and they may conveniently be referred to as a single bill of lading. Although the shipment took place and the bill of lading was issued in 1935, by error or inadvertence an old form was used, containing no reference to the Newfoundland *Carriage of Goods by Sea Act, 1932*, or to the Rules set out in the schedule to the statute. In other words the clause paramount which was required by the statute to be inserted in the bill of lading was omitted. The bill of lading also provided that in case of ship-

[14] Firstly, because of the additional words occurring in the ordinance in question in the *Torni Case*, and, secondly, because the parties in that case merely said that the contract was to be *construed* by English law, whereas in the *Vita Food Products Case* they said that the contract was to be *governed* by English law.

ments from the United States the *Harter Act* should apply, and that save as so provided the bill of lading should be subject to the terms and provisions of and exemptions from liability contained in the Canadian *Water Carriage of Goods Act, 1910*[15], which was thus incorporated *pro tanto* in the bill of lading so as to become applicable to shipments from Newfoundland notwithstanding that by its terms the statute applied only to shipments from Canada. The bill of lading also provided that "This contract shall be governed by English law."

The plaintiff contended that the effect of the omission of the clause paramount was to render the bill of lading void for illegality so as to deprive the defendant of the benefit of the exemption from liability not only under the contractual provisions of the bill of lading (including the incorporated provisions of the Canadian *Water Carriage of Goods Act, 1910*) but also under the statutory provisions of the Newfoundland *Carriage of Goods by Sea Act, 1932*, and thus to subject the defendant to the liabilities of a common carrier. The Privy Council, having held that the bill of lading was not void for illegality either in Newfoundland or in Nova Scotia, might reasonably have held that it was subject to the *Carriage of Goods by Sea Act, 1932*, notwithstanding the omission of the clause paramount, so as to give the protection of the statutory provisions[16] instead of the contractual provisions, but on the contrary the Privy Council held that the defendant had successfully contracted itself out of the statutory provisions and was protected by the contractual provisions. It would seem to be regrettable that the Privy Council has without apparent necessity seriously impaired the efficacy of the effort made in various parts of the British Empire to give effect to an international convention, but presumably, if the partial wrecking of the work of the convention resulting from the reasoning of the Privy Council is regarded as a real grievance by persons engaged in the shipping and carriage of goods by sea, the damage can be repaired by the necessarily slow process of uniform amending legislation.

§ 2. Conflict Rules and Domestic Rules

Of perhaps greater gravity, because even less easily remediable, is the confusion which is likely to result from Lord Wright's mode of statement of certain alleged principles of the conflict of

[15] Which, as already noted, was afterwards superseded by the *Water Carriage of Goods Act*, 1936.

[16] cf. *The Torni*, note 13, *supra*.

laws. The following critical observations are submitted with all due respect to the views of a judge who in several departments of the law, by the authority of his name and the persuasive character of his writings, has given notable encouragement to movements towards the reform and improvement of the law[17].

In the *Vita Food Products Case* Lord Wright says[18]:

> It will be convenient at this point to determine what is the proper law of the contract. In their Lordships' opinion the express words of the bill of lading must receive effect with the result that the contract is governed by English law. It is now well settled that by English law (and the law of Nova Scotia is the same) the proper law of the contract "is the law which the parties intended to apply."

Postponing the discussion of this alleged rule of the conflict of laws with regard to the selection of the proper law of a contract, and assuming for the moment its accuracy, I venture to lay stress on the fact that the rule in question is a conflict rule and not a domestic rule.[19] The application of this English conflict rule is of course not a consequence of the selection of English law as the proper law of the contract, but, on the contrary, the validity of the parties' selection of English law as the proper law, so far as it is valid, is a consequence of the application of the English conflict

[17] Lord Wright has been indefatigable in his efforts to encourage in England the adoption of a new approach to the general problem of remedies for unjust enrichment, with the view of broadening the scope of these remedies and liberating them from the limitations of old procedure and forms of action: see, *e.g.*, his review of the *Restatement of the Law of Restitution* (1937), 51 Harv. L.R. 369, and his address entitled *Sinclair* v. *Brougham* (1938), 6 Cambridge L.J. 305. As regards the law of contract he has, in his review of *Williston* (1939), 55 L.Q.R. 189, manifested a willingness to look beyond the text of English judgments and avail himself of what has been written outside of England. He is chairman of the [English] Law Revision Committee appointed by the Lord Chancellor. See also LORD WRIGHT, LEGAL ESSAYS AND ADDRESSES (1939), containing his extra-judicial writings: reviewed by C.A.W., (1940), 18 Can. Bar Rev. 71.

[18] [1939] A.C. 277, at pp. 289-290, [1939] 2 D.L.R. 1, at pp. 7-8, [1939] 1 W.W.R. 433, at p. 440.

[19] For the sake of brevity a "rule of the conflict of laws" will be referred to in the subsequent discussion as a "conflict rule", as contrasted with a "domestic rule" or "domestic law" (frequently referred to as a "local", "internal", "territorial" or "municipal" rule or law). Alternative terms suggested by Taintor, in *"Universality" in the Conflict of Laws of Contracts* (1939), 1 Louisiana L.R. 695, at p. 696, are "indicative" rules as contrasted with "dispositive" rules. My own suggestions as to the three logical stages in the court's enquiry—the characterization of the question, the selection of the proper law and the application of the proper law—are stated in *Characterization in the Conflict of Laws* (1937), 53 L.Q.R. 235, 537, *Conflict of Laws: Examples of Characterization* (1937), 15 Can. Bar Rev. 215, and *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369. Compare Robertson, *A Survey of the Characterization Problem in the Conflict of Laws* (1939), 52 Harv. L.R. 747.

rule. Furthermore English law thus selected as the proper law should mean domestic English law, unless we deprive the proposition of all meaning by saying that English conflict rules apply because English conflict rules say so. The forum being in Nova Scotia the conflict rules of Nova Scotia are of course applicable to the case, and the reason why English conflict rules apply is that English and Nova Scotia conflict rules are identical. In accordance with what has just been stated, Lord Wright on the next following page of the report distinguishes between the proper law of the contract, which fixes "the interpretation and construction of the express terms of the contract" and supplies "the relevant background of statutory or implied terms," and "that part of the English law, which is commonly called the conflict of laws" and which "requires where proper the application of foreign law." His language in the passage quoted above, is, however, susceptible of the construction that English law which is to be applied as the proper law of the contract is itself part of English rules of the conflict of laws[20], and though this does not seem to be the natural meaning of the language used, that meaning alone is consistent with the following passage in which Lord Wright states his conclusion.[21]

> There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. *Hence English rules relating to the conflict of laws*[22] must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Act.

The reference in this passage to English conflict rules is perhaps a *lapsus calami* on Lord Wright's part, because the conclusion seems to bring us back in a circle to the starting point. The appeal being from a court of Nova Scotia, it would seem

[20] Incidentally, it is submitted that *Jacobs* v. *Credit Lyonnais* (1884), 12 Q.B.D. 589, and *Ralli Bros.* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, cited by Lord Wright as examples of the application of English conflict rules are really examples of the application of domestic English law resulting from the selection of English law as the proper law of the contract. Another somewhat analogous example of the application of domestic English law in its character as the proper law of the contract is *Foster* v. *Driscoll*, [1929] 1 K.B. 470. For a fuller statement of my submission, see my BANKING AND BILLS OF EXCHANGE (5th ed. 1935) 901 (including the suggestion that the *Jacobs Case* is inconsistent with the *ratio decidendi* of the Court of Appeal in *Blackburn Bobbin Co.* v. *Allen*, (1918) 2 K.B. 467); cf. comment (1939), 17 Can. Bar Rev. 746, on *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678.

[21] [1939] A.C. 277, at p. 292, [1939] 2 D.L.R. 1, at p. 9, [1939] 1 W.W.R. 433, at p. 442.

[22] Italics mine.

that the Privy Council must apply the conflict rules of Nova Scotia. As regards the topic of contract these rules may be assumed to be identical with English conflict rules. Therefore English conflict rules are to be applied. In order to give any distinct meaning to the selection of English law as the proper law of the contract, it would seem that the English law selected in accordance with the conflict rules of Nova Scotia or England must be domestic English law.

Another disquieting possibility is that Lord Wright intends to express his approval of the doctrine of the *renvoi* as universally applicable, that is, in the sense that a reference by a conflict rule of X to the law of Y always means a reference to the conflict rules of Y. It is hard to believe, however, that without mentioning the doctrine or discussing any of its implications and difficulties, he intends to break new ground by holding that the doctrine applies to the case of every commercial contract of which the proper law is a foreign law (that is, a law other than that of the forum). The English cases in which the doctrine has hitherto received some kind of recognition have been decisions of single judges proceeding on different lines of reasoning, and usually have been cases relating to the meaning of the "law of the domicile" in an English conflict rule (most of them being cases relating to the question of the formal validity of a will of movables) or have been exceptional cases in which the *renvoi* may be justifiable,[23] and it would be preferable to believe that the Privy Council has not intended to ignore all that has been previously written on a difficult problem and casually and categorically to state a solution for all cases in which the problem may arise.

If I might without undue presumption attempt to compose a paraphrase of what Lord Wright might properly have said in the conclusion stated in the passage last quoted above, and on the assumption that he was accurate in saying that the proper law of the contract was English law[24], I might suggest something like the following :

> Hence, in accordance with the conflict rules of Nova Scotia (which are identical for the present purpose with English conflict rules) domestic English law must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Newfoundland statute. Domestic English law means the law which an English court

[23] Cf. my *Renvoi, Characterization and Acquired Rights* (1939), 17 Can. Bar Rev. 369, for references to some of the more recent writing pro and con.

[24] The question of the selection of the proper law will be considered in § 3, *infra*.

would apply to a hypothetical domestic English situation, that is, in the present case, to an outward bill of lading issued in England, and domestic English law includes "the background of statutory or implied terms" existing in that situation.

Consistently, as it seems to me, with the foregoing reconstructed conclusion respecting the proper law of the contract, Lord Wright then discusses a different question, namely, whether the bill of lading issued in Newfoundland in contravention of the Newfoundland statute was wholly void for illegality because its issue was prohibited by Newfoundland law (as distinguished from the question whether by its proper law some of its provisions were invalid in view of the statutory or other provisions of the proper law) so that it not only would be declared void by a court in Newfoundland if its validity was in issue there, but also should be declared void by a court of Nova Scotia in accordance with the conflict rules of Nova Scotia without regard to the proper law of the contract. On this point Lord Wright reaches the conclusion that the bill of lading was not illegal by Newfoundland law or by the conflict rules of Nova Scotia.

§ 3. Proper Law of the Contract

There remains for discussion the question how far the parties to a contract are at liberty to select, by express declaration in the contract, the proper law that is to govern the intrinsic validity of the contract. Lord Wright has undoubtedly brought into the full light of day a question which has always been lurking in the background of all discussion of the selection of the proper law of a contract in the conflict of laws, but it is another question whether he has stated a good working rule or has merely added more fuel to the fire of controversy.

Most of the discussion in the past has related to the question to what extent the presumed intention of the parties is the controlling element in the selection of the proper law in a case in which the parties have not clearly, or not at all, expressed their intention. On this question, which ultimately involves the question as to the effect of an express declaration of the parties, there is less substantial difference between the views of certain authors than would *prima facie* appear from the extreme diversity of their modes of expression.

According to Westlake[25] "it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection. . . . ." The author deliberately retained this statement in successive editions of his book without importing into it the intention of the parties, on the ground that "even where the supposed intention has been nominally relied on, it has been in fact nothing more than a fictitious intention presumed from following the doctrine" above quoted, "and has been in itself no substantial guide to the choice of law." Referring to *Jacobs* v. *Crédit Lyonnais*[26] and *In re Missouri Steamship Company*[27] as cases decided "on substantial considerations", he added: "But it must be admitted that in both cases a stress was laid by the learned judges on the intention of the parties, as the governing element in the choice of a law, which is not in accordance with the discussion preceding [§ 212], and which, where the lawfulness of the intention is itself in question, as it was in *In re Missouri Steamship Company*, I still find it difficult to reconcile with the logical order to be followed."

In the text of his "rules" Dicey[28] states in its extreme form the doctrine that the proper law of a contract, governing its intrinsic or material validity, is "the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed," and that "when the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption."[29] The main doctrine is, however, stated to be subject to important exceptions[30], and the effect to be given to either the expressed or the presumed intention of the parties, is explained[31] in a way which deprives the intention doctrine of a good deal of its meaning. The author tells us that what is meant is that the proper law is the law with reference

[25] PRIVATE INTERNATIONAL LAW, § 212; see also the author's observations preceding and following that section.

[26] (1884), 12 Q.B.D. 589.

[27] (1889), 42 Ch. D. 321.

[28] CONFLICT OF LAWS, rules 155, 160 and 161.

[29] DICEY, *op. cit.* sub-rule 1 of rule 161.

[30] DICEY, *op. cit.*, rule 160. With particular reference to "exception 3" to rule 160, see my comment (1939), 17 Can. Bar Rev. 746, at p. 748, on *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [1939] 2. K.B. 678.

[31] DICEY, *op. cit.*, notes to rule 161, sub-rule 1, and, in the appendix, note 22: *What is the law determining the material validity of a contract.*

to which the parties "really intended" to contract, notwithstanding that in order to give validity to a contract invalid by that law the parties may "assert their intention to contract with reference to another law"[32]. The author in another place[33] calls this real intention the "*bona fide* intention", and in effect explains that this intention must be to contract with reference to the law of a country with which the transaction is really connected. The author uses the word "absurd" twice in some passages which are worth quoting in full, because they seem to be a statement of the essence of the author's theory, and because they contain some interesting examples[34]:

> The proper law of a contract, it may be objected, is the law chosen by the parties and intended by them to govern the contract. If, then, it may be argued, the proper law of a contract determines its material validity, the legality of an agreement depends upon the will or choice of the parties thereto; but this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce; the statement, for example, that under the law of England a promise made without a consideration is void, means neither more nor less than that the law will not enforce such a promise even though the parties intend to be legally bound by it, nor can they defeat this rule by agreeing that Scottish law shall govern their agreement. The same objection is sometimes put in another shape. X and A enter in England into a contract to be performed partly in England and partly in another country, *e.g.* Mauritius. It is valid by the law of England, but invalid by the law of Mauritius. Is the contract to be held valid or not? If you look to the intention of the parties, you are bound to presume that they meant to contract with reference to the law which makes the contract valid. Hence, where there is a question between two possible laws under one of which a contract is, and under the other of which a contract is not, valid, the contract must always be held valid. But this result is absurd. . . . What is contended for is that the *bona fide* intention of the

[32] DICEY, *op. cit.*, notes to rule 161, sub-rule 1; 4th ed. 1927, p. 628, footnote (v), 5th ed. 1932, p. 668, footnote (g).

[33] DICEY, *op. cit.*, appendix, note 22.

[34] DICEY, *op. cit.*, appendix, note 22. The passages are quoted here as they appear in the 5th edition (1932), pp. 964-965, slightly varied from corresponding passages of the 3rd edition (1922) by Dicey and Keith and the 4th edition (1927) by Keith.

> parties is the main element in determining what is the law under which they contract. . . . No doubt, in deciding this matter, the court must regard the whole circumstances of the case. As regards the interpretation of the contract, the expressed intention is decisive; as regards its material validity or legality, this is not quite so certainly the case. If it is clear they meant to contract under one law, *e.g.*, the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the court their real intention was to enter into an English contract.

Dicey's statement of the relation of the intention of the parties to the selection of the proper law is rendered obscure by his effort to reconcile the fashionable judicial mode of expression with what are or ought to be the results reached in various circumstances. The proper law of a contract in its natural sense means of course the law which for any reason is the governing law,[35] but, as Dicey begins, in deference to the judicial mode of expression, by defining the proper law as the law intended or presumed to be intended by the parties, he is obliged partially to explain away his definition in those cases in which for any reason the governing law is some other law, and in effect the factual intention, if any, of the parties gives place in those cases to a fictitious intention.

Cheshire[36], after quoting a few out of the many available judicial dicta which attribute predominant important to the factor of intention, says :

> The first impression produced by these passages is that so great deference is paid to intention that the choice of the governing law is left to the caprice of the parties. This is not so. It is too crude, and it is not correct, to describe the proper law as being that system of law which the parties intended to make applicable. Otherwise it would be possible for instance, for two Englishmen, when making a contract in London to be performed wholly in England, to stipulate that it should be subject as regards essentials to the law of Russia. It would also be possible for the parties to exclude some inconvenient rule of the legal system that would

[35] As is pointed out by SALMOND & WINFIELD, LAW OF CONTRACTS (1927) 530.

[36] PRIVATE INTERNATIONAL LAW (2nd ed. 1938) 251-252.

normally govern essentials. An attempt to do this was made in *The Torni*[37].

The same author states his own theory as follows :

> The proper law does not depend upon the intention of the parties *per se*. It may be more accurately described as the system of law with reference to which the contract has in fact been made, or, as Westlake puts it, the system with which the transaction has the closest and most real connexion.[38]
>
> A contract which impinges upon two or more legal systems must be more intimately associated with one particular system than with the other or others. The system with which this association exists is ascertained by an examination of the circumstances of each individual case[39].
>
> If the circumstances establishing a connexion with two or more countries are so evenly balanced that the predominant legal system is not obvious, then an explicit expression of intention by the parties may turn the scale and produce a definite decision. Provided that a contract by its very nature possesses already some reasonable connexion with a legal system, there is no objection to the connexion being made final and definite by the parties themselves. . . . What is not true is the assumption that the parties can subject a contract to some legal system with which it has no internal connexion.[40]

Beale[41] considers that rules which in various forms and with various limitations allow the parties to choose the law which is to govern the obligation of their contract are open to both theoretical and practical objections. The fundamental objection in point of theory is, in his view, that any rule of this kind involves permission to the parties to do a legislative act. "So extra-

[37] [1932] P. 78. As pointed out earlier in the present article, the Privy Council, unnecessarily refusing to distinguish the *Torni Case*, has in the *Vita Food Products Case* said in effect that the attempt of the parties to evade the law of Palestine ought to have succeeded in the earlier case.

[38] CHESHIRE, *op. cit.* 354. With perhaps greater nicety of expression, Westlake speaks of the connection between the transaction and a country, not between the transaction and a system of law. See the passage quoted from Westlake, note 25, *supra*.

[39] CHESHIRE, *op. cit.* 254-255.

[40] CHESHIRE, *op. cit.*, 256.

[41] CONFLICT OF LAWS (1935), vol. 2, § 332.2., pp. 1079 ff., substantially reproducing passages from the author's article *What Law Governs the Validity of a Contract* (1909-1910), 23 Harv. L.R. 1, at pp. 260 ff.

ordinary a power in the hands of any two individuals is absolutely anomalous; so much so that even the courts which adopt a rule of this sort have been occupied in defining limitations to the exercise of the parties' will. Thus it is almost universally provided that the parties cannot exercise the power unless they do so in good faith."

Lorenzen[42] says :

> So far as it applies to the validity of contracts the intention theory does not admit of a theoretic defence. The validity or invalidity of a legal transaction should result from fixed rules of law which are binding upon the parties. Allowing the parties to choose their law in this regard involves a delegation of sovereign power to private individuals. Dicey's explanation of the intention theory does not meet this objection. If the parties to a contract which is made in England and is to be performed in France can, by the mere operation of their will, make it a French contract or an English contract, which is subject, as regards intrinsic validity, to French or English law, respectively, they are in fact determining the validity of the contract, and to that extent exercising sovereign powers. This is true though they may be restricted in their choice to the law of the states with which the contract has a substantial connection.

Goodrich[43] observes that the rule that the validity of a contract is determined by the law intended by the parties "bristles with difficulties, theoretical and practical", but accurately points out[44] that there is no difficulty about giving effect to the parties' selection of the law which is to govern the interpretation of their language.

Wolff[45] says :

> To sum up: the parties may subject their contract to any system of law with which it is internally connected. Hereby they make the selected territory the seat of their contract. They cannot make a system of law with which the contract has no connection the proper law of the contract. If they nevertheless do just that, the true proper law must be ascertained as if no law had been agreed, and

[42] *Validity and Effects of Contracts in the Conflict of Laws* (1921), 30 Columbia L.R. 565, at p. 658.

[43] CONFLICT OF LAWS (1927) 232, (2nd. ed. 1938) 278.

[44] GOODRICH, *op. cit.* (1927) 243, (2nd ed. 1938) 290.

[45] *The Choice of Law by the Parties in International Contracts* (1937), 49 Juridical Review, 110, at p. 121.

it must be further ascertained whether the law selected by the parties contravenes any of the compulsory provisions of the true proper law. Only in so far as this is not the case, does the law selected by the parties govern the contract.

Johnson[46], writing "with special reference" to the law of Quebec, is bound by article 8 of the Civil Code of Lower Canada, which provides that effect is to be given to the expressed or presumed intention of the parties in the selection of the proper law, but he suggests some limitations in the application of the principle stated in the article.

The latest study of the intention doctrine, that of Cook[47], is especially interesting because the author submits that the rule that the parties may select their own law is not inherently or theoretically objectionable. He gives various examples of cases in which the parties admittedly may modify rules of law which would otherwise govern their rights and liabilities. It is doubtful, however, whether he gives any example which quite touches the crucial question, namely, whether the parties, by any contractual provision (whether by the incorporation of provisions of some foreign law or otherwise), can render intrinsically valid a contract which is intrinsically invalid by its true proper law (ascertained on substantial considerations) or whether their liberty to modify the application of rules of law is confined within the limits of a contract valid by that law. Furthermore Cook says[48]:

> At the outset it should perhaps be noted that so far as the present writer is aware it has never been suggested by a court or writer that the parties may choose the 'law' of any country they please, irrespective of whether or not the transaction has some substantial connection with that country. To be sure, the rule is frequently stated in language broad enough to permit such a choice, but of course, like all language, these broad expressions should be construed in the light of their context. So construed, it seems probable that the courts would hold that the parties are limited to choosing from the rules of decision found in the system of law in force in one of the states with which the transaction has a substantial connection. We shall therefore at this point discuss the problem on the basis of such a limitation on the choice of the parties.

[46] CONFLICT OF LAWS WITH SPECIAL REFERENCE TO THE LAW OF THE PROVINCE OF QUEBEC, vol. 3 (1937) 418 ff.

[47] *'Contracts' and the Conflict of Laws: 'Intention' of the Parties* (1938), 32 Illinois L.R. 899.

[48] 32 Illinois L.R. 899, at p. 902.

On a subsequent page[49] the same author states his conclusions as follows :

> (1) There seems to be no theoretical or practical objection to giving effect to the 'intention' of the parties when: (a) that 'intention' is expressed in words; (b) the choice is limited to the 'law' (domestic rule) of some state with which the transaction has a substantial connection; and (c) there is no reason of public policy which indicates a contrary decision. Moreover, there is no substantial reason why a state with which the transaction has a sufficient number of points of contact should not give effect to it even though by the 'law' (conflict-of-laws rule) of the 'place of contracting' it is legally ineffective. (2) The reasons for limiting the choice of the parties to the 'law' of states with which the transaction has some 'substantial connection' are purely practical: to allow a wider choice would place a possibly inconvenient burden on the courts of the forum and perhaps too often lead to a clash with the 'public policy' of the states concerned.

Obviously the various views above outlined point to practical as well as theoretical considerations which deserve at least serious discussion, but in the *Vita Food Products Case* Lord Wright, without discussing any of these considerations, has now told us that "Connection with English law[50] is not as a matter of principle essential" to the validity of the selection by the parties of English law as the proper law of the contract[51], so that the earlier *dictum* of Lord Atkin[52] that the parties' intention if expressed in the contract is conclusive, may properly be applied to a case in which the transaction has no intrinsic connection with the country the law of which has been thus selected by the parties. Clearly what Lord Atkin said with regard to the effect of an express declaration of the parties was *obiter dictum*, because the case was one in which the parties had not expressly declared their intention as to the proper law. What Lord Wright says would seem on an analysis of his judgment to be *obiter dictum*, because when he states that connection of a transaction with English

[49] 32 Illinois L.R. at pp. 919-920.

[50] As suggested in note 38, *supra*, one should perhaps speak of the connection between the transaction and a particular country rather than to speak of the connection between the transaction and a particular system of law.

[51] [1939] A.C. 277, at p. 290, [1939] 2 D.L.R. 1, at p. 8, [1939] 1 W.W.R. 433, at p. 441.

[52] *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, at p. 529.

law is not as a matter of principle essential to the validity of the parties' express selection of English law as the proper law, he also says that the transaction in question had some connection with English law by reason of the facts that the ship, though registered in Canada, was subject to the *Merchant Shipping Act, 1894*, and that the underwriters were likely to be English[53], and once it was decided that the provision of the Newfoundland statute as to the insertion of the clause paramount in every bill of lading issued in Newfoundland was directory, and not imperative, the result of the case would be the same whether the court applied the contractual provisions of the bill of lading or applied the *Hague Rules* appended to the statutes of Newfoundland and the United Kingdom alike. Furthermore as pointed out earlier in this article, Lord Wright did not purport to apply domestic English law, but English conflict rules, which were obviously applicable in any event on the assumption that English and Nova Scotia conflict rules are identical.[54] One may perhaps be permitted to doubt whether an ultimate appellate court ought to indulge in *obiter dicta*, involving important statements of principle not required for the decision of the case on its particular facts (without adequate discussion of the implications of the principle as applied to other facts) and at least hampering the free discussion of the principle in later cases.

Apart from the *dicta* of Lord Atkin and Lord Wright, it would seem that it might be fairly contended that the rule that the proper law is the law intended by the parties is merely a judicial mode of expressing the rule that the proper law is that of the country with which the transaction has the most real connection, in the absence of an express declaration by the parties; and there does not seem to be any authority, strictly speaking, for the view that the expressed intention of the parties is always decisive, even if the transaction has no substantial connection with the country the law of which has been selected. Lord Wright has, however, now stated that view[55], but has made some significant

[53] Why the fact that the ship was subject to the *Merchant Shipping Act, 1894*, should point to English law rather than the law of Newfoundland or the law of any other part of the British Empire is not clear, but even if the *Merchant Shipping Act, 1894*, and the conjectured English character of the underwriters, constitute a somewhat slender connection with England, they were considered by Lord Wright as constituting a valid answer on the facts to the objection that the parties were not at liberty to select English law because the transaction was not connected with England.

[54] See notes 21 and 22, *supra*. Only by a stretch of the imagination can we think that the parties intended to select English conflict rules, as distinguished from domestic English law, as the proper law of the contract.

[55] In refusing to distinguish the *Torni Case*, as mentioned earlier in this article, note 14, *supra*, he refused to recognize the distinction between the

reservations which may substantially modify the scope of the rule stated by him. The reservations are stated as follows :

> provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.

The second proviso may be intended to refer to the "stringent domestic policy"[56] of the forum which may exclude any reference to a foreign law as the proper law of the contract; or, if it were not for the judgment in the *Vita Food Products Case,* the proviso might well be construed so as to cover the suggestion approved by Cook that "it ought to be held 'contrary to the public policy' of any forum for the parties to choose a law which would nullify the Hague Rules when those Rules have been adopted by the states with which the transaction is factually connected[57]." As to the first proviso, "legal" may mean that the intention must not be to select the proper law so as to attempt to give effect to a contract the making of which is prohibited by the *lex loci celebrationis* or the performance of which is prohibited by the *lex loci solutionis.* What does *"bona fide"* mean? The usual meaning of saying that the intention must be *bona fide* is that the parties cannot be supposed to be acting in good faith if they arbitrarily seek to subject the contract to the law of a country with which the transaction has no substantial connection,[58] but this meaning is excluded by Lord Wright's statement that connection of the transaction with the selected law is not on principle essential. Some other meaning must therefore be found for *"bona fide"* in the first proviso. It would appear that we must look forward to further explanation of the scope of the reservations to which Lord Wright's main rule is subject. What would he say with regard to the example given by Dicey[59] of a promise not made under seal or for valuable consideration, and therefore invalid by domestic English law, but as to which the parties declare that the proper law is that of some country with

selection of a law by which a contract should be construed (as to which the parties may have complete liberty of choice) and the law governing the intrinsic validity of the contract (as to which the liberty of the parties may well be limited).

[56] WESTLAKE, PRIVATE INTERNATIONAL LAW, § 215.

[57] *'Contracts' and the Conflict of Laws: 'Intention' of the Parties: Some Further Observations* (1939), 34 Illinois L.R. 423, at pp. 428-429. Cook adds: "Indeed, the dictum of Lord Wright in the *Vita Food Case* seems entirely too sweeping.

[58] Gutteridge, in a comment on the *Vita Food Products Case,* (1939) 55 L.Q.R. 323, at p. 325, says: "It is difficult to conceive of any case in which a purely arbitrary choice of law can be said to be made in good faith. "

[59] Note 34, *supra.*

which the transaction has no intrinsic connection, that law being arbitrarily chosen by the parties because no consideration is required by that law for the validity of a promise? It would not appear that this hypothetical case involves any question of illegality, in any sense narrower than intrinsic invalidity in general, or any question of public policy in any sense other than that rules of law with regard to the requirements for a valid contract, like other rules of law, are expressions of public policy.

JOHN D. FALCONBRIDGE.

Osgoode Hall Law School.