

Most significantly, the White Paper emphasizes that: "The arrangements now announced for the obligatory training of Justices are only a beginning. They will be extended and improved in the light of experience."¹³

A second suggestion is the creation of special criminal courts having exclusive jurisdiction over all criminal cases. The training of the members of these courts would be along the same lines as that proposed in the first suggestion. Any move to create such special courts without the provision of adequate training for its members in the disciplines previously mentioned would of course, largely destroy the value of specialized criminal courts.

A third suggestion involves the creation of regional sentencing tribunals consisting of members of the judiciary and persons representing the social and behavioral sciences. To this tribunal it might be appropriate to add representation from the general public. The activities of such a tribunal would be restricted to cases where the court pronouncing guilt felt that some form of sentence other than a fine was called for. Such a tribunal would of course require the supportive services of an adequate investigative staff.

It is hoped that these remarks will focus attention upon the sentencing function which has devolved upon the judiciary and the way in which they carry it out. If in the process some light has been shed upon the shortcomings of the system it is hoped that this will stimulate constructive moves to eliminate those shortcomings. The continued expenditure of vast amounts of human and economic treasure by persons not possessed of the fullest possible knowledge of the nature of man and his society, is a luxury which no community of men can afford indefinitely.

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PRIVATE INTERNATIONAL LAW

"Private International Law", said Dr. Cheshire, "presents a golden opportunity, perhaps the last opportunity for the judiciary to show that a homogeneous and scientifically constructed body of law suitable to the changing needs of society can be evolved without the aid of the legislature."¹

The judiciary in the past few years has shown itself not unaware of this opportunity and perhaps its greatest contributions have been in the areas of family law and tort. In the former the concept of domicile is fundamental to so many matters that it is well to begin with a note of the development there.

13. *Id* at p.15.

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1. Cheshire's *Private International Law*, 7th edition, p. viii.

Domicile

The idea of domicile as a personal law of the individual was adopted in England on the sound reasoning that the law of the community in which a person lives and makes his home is the one most appropriate to govern his personal status and relationship as a member of that community. While this reasoning may be sound, its application in the present century has too often been out of touch with reality. If domicile is to fulfil any useful function in our time, the rigidity of its two constituent factors of intention and residence has to be reduced. These were born in the Victorian age of simplicity and certainty and have now to be developed in an age marked by complexity and uncertainty. It was encouraging therefore to see a liberalizing trend with regard to the factor of intention in the case of *Osvath-Latkoczy v. Osvath-Latkoczy*,² where the Supreme Court of Canada in fact rejected the emphasis on finality of intention (as exemplified by cases such as *Winans v. Attorney-General*,³ and *Ramsay v. Liverpool Infirmary*,⁴) and accepted a more liberal test that a person may have a sufficient intention to establish a new domicile of choice even though he admits that something which is at present unexpected or uncertain may occur to induce him to adopt some other permanent home. This is surely a more realistic approach in modern times when it is almost impossible for a man truthfully to say that he intends to stay forever in a certain place.

With regard to the other factor of residence, a liberal trend in this regard may be seen in both the Supreme Court decision in *Schwebel v. Ungar*⁵ and the Manitoba Court of Queen's Bench decision in *Zehring v. Zehring and Erdmann*.⁶ In both these cases the learned Judges were prepared to hold that the mere fact of arrival in a new country could be sufficient to establish a new domicile of choice provided the existence of an intention to leave the old country and to remain permanently in the new was already evidenced. These are surely significant developments in a society such as ours where immigration plays such a large part.

Nullity

Jurisdiction in nullity suits has always been a thorny problem. There is not space here to examine the whole field, but in the area of void marriages, two recent Canadian decisions have now established that the domicile of the petitioner alone will suffice to found jurisdiction. If this were not so, and if a common domicile were required in all cases, the question of jurisdiction might be insoluble, for since no marriage exists there cannot be a common domicile unless the respondent has

2. (1959 S.C.R. 751.

3. (1910) A.C. 27.

4. (1930) A.C. 588.

5. (1965) 48 D.L.R. (2d) 644.

6. (1966) 55 W.W.R. 90.

already, or does, acquire a domicile the same as that of the Petitioner. The British Columbia Court of Appeal in *Savelieff v. Glouchkoff*,⁷ and the Ontario Court of Appeal in *Re Capon*,⁸ both held that they were entitled to assume jurisdiction to annul a marriage void ab initio on the basis of the petitioner alone being domiciled within their respective provinces regardless of the fact that the marriages in question were celebrated elsewhere.

Recognition of Foreign Divorces

The general principle is, of course, that a foreign decree of divorce will be recognized in our courts if, and only if, it was pronounced by a Court in the domicile of the spouses. This rule has been extended in the case of *Armitage v. Attorney-General*,⁹ to include recognition of a foreign decree, which although not actually pronounced in the country of the spouses domicile, is nevertheless regarded as a valid and effective in that country. This latter extension has until recently been understood to call for recognition of divorce decrees granted in a country where the parties are not domiciled only if the decree would be recognized in the country where the parties were in fact domiciled *at the time of the divorce decree*. Now, however, there has been a most interesting decision in the case of *Schwebel v. Ungar*¹⁰ where the action took the form of proceedings by the Plaintiff husband for a declaration of nullity on the ground that the Defendant wife was a party to a valid and subsisting marriage to a man named Waktor. Waktor and the Defendant were married in Budapest in 1945 at which time they both had a Hungarian domicile of origin. Shortly after the marriage they fled from Hungary intending to settle in Israel. For the next three years, they were refugees moving from one camp to another and while in such a camp in Italy in 1948 they were divorced according to the procedure under Jewish law by Waktor delivering a "get" or Bill of Divorcement to his wife before a Rabbinical Court. About three weeks after this divorce the parties reached Israel. Waktor continued to reside in Israel at all material times thereafter. The Defendant lived in Israel for 7½ years and then came to New York and Toronto for a visit, during the course of which she met the Plaintiff who was domiciled in Ontario, and they were married in Toronto in 1957.

On these facts, the Supreme Court of Canada decided first that the defendant wife had acquired an Israeli domicile at some time prior to her marriage to the plaintiff though at the time of the divorce she was still domiciled in Hungary (which did not recognize the "get"), and secondly that she was eligible to contract a second marriage to the plaintiff. Unfortunately the Supreme Court did not make clear in its

7. (1963) 48 M.M.R. 335.

8. (1965) 2 O.R. 83.

9. (1906) P. 135.

10. *Supra*, Note 5. (For a discussion of the wider significance of this case in the Conflicts of Law, see comments by K. Lysyk, 43 Canadian Bar Review, p. 363).

judgment whether the second question was decided on the general principle that the defendant's status was solely a matter for her *lex domicilii* or whether they were applying the Conflicts of Law rule respecting recognition of foreign divorces. There are, however, passages in the judgment of Ritchie J. which indicate that Ontario's Conflict Rule for the recognition of foreign divorces was interpreted as requiring recognition of the divorce because the parties at some time *after the date of the divorce* had acquired a domicile in a country by the law of which the divorce was regarded as valid.

However, quite apart from the above, since the divorce jurisdiction of both the English and Canadian courts has been widened by statute, there has been a corresponding tendency to widen the recognition of foreign divorce decrees on the principle of reciprocity. In 1953 in the case of *Travers v. Holley*¹¹ the English Court of Appeal stated that in view of the enlarged divorce jurisdiction of the English Court, recognition should be granted to divorce decrees pronounced by foreign courts in cases where the foreign court was not the court of the domicile, but was exercising a jurisdiction substantially similar to that conferred by statute on the English court.

The application of this doctrine of reciprocity in Canadian jurisdictions has been the subject of some controversy in the Province of Alberta which until last year appeared to have a monopoly of this type of situation. In 1960, in the case of *La Pierre v. Walter*,¹² Mr. Justice Riley was sharply critical of the *Travers v. Holley* principle, but his decision could be explained on the footing that the doctrine of reciprocity was inapplicable to the facts of the case before him because the divorce in question was a Scottish one based purely on three years residence regardless of domicile, whereas under the Canadian Divorce Jurisdiction Act, the deserted wife could only petition for divorce after two years in that province where she and her husband were actually domiciled immediately prior to the desertion.

During the past year, however, the Alberta monopoly has been broken and the Courts of Ontario and Manitoba have both expressed themselves in favour of the above principle. In Ontario this was evidenced in *Re Capon*¹³ (though this was actually, as mentioned above, a case involving a nullity decree) and in Manitoba in the recent decision of Mr. Justice Nitikman in *Januszkiewicz v. Januszkiewicz*.¹⁴ In that case the Plaintiff husband asked for a declaration that his marriage with the Defendant in Poland in 1958 had been validly dissolved by Polish divorce obtained by the wife in Lodz in 1964. Both parties were domiciled in Poland at the time of the marriage and the Plaintiff had emi-

11. (1953) P. 246.

12. (1960) 31 W.W.R. 26.

13. (1965) 20 P. 85.

14. (1966) 55 W.W.R. 73.

grated to Manitoba a month after the wedding. The wife was to join him but never did. Expert evidence on Polish law was adduced to show that a divorce could be obtained in Poland on the grounds of desertion for one year, but unfortunately the basis of jurisdiction for such a divorce is not too clear from the judgment. The learned judge, it seems, may possibly have misunderstood the expert evidence and inferred that desertion was also a factor in connection with jurisdiction. In any event, he found that the Polish court had jurisdiction to grant a divorce even though the husband at that time had acquired a domicile in another territory. He applied the principle of *Travers v. Holley*, stating that here both parties prior to the desertion were domiciled in Poland, that they had in fact been living separate and apart for a period of over two years, and therefore he felt that the Polish divorce decree granted to the wife was on a substantially reciprocal basis of jurisdiction to that exercised by the Canadian Courts under the Divorce Jurisdiction Act. It is interesting to note, therefore, that the Courts now seem prepared to recognize a foreign divorce decree where the jurisdiction is based on a factual rather than a legal similarity to our own, for of course Poland has no concept of domicile in its law, and the legal basis of jurisdiction on which Mrs. Januskiewicz obtained her decree was presumably that of nationality and not on any particular period of desertion coupled with domicile. The interesting problem still to be resolved, therefore, in Canada, is how far we would be prepared to carry this factual reciprocity. Would we, for example, recognize a foreign decree obtained by a wife in the country of domicile at the time of desertion if in fact that desertion had only lasted for, say, one year? In Mrs. Januskiewicz's case, she had grounds for divorce on the basis of one year's desertion, and if she had obtained her decree immediately at the expiration of this period, would this have been recognized in Manitoba? I rather think not. However, I share the sentiments of Dean Irwin Griswold of Harvard¹⁵ that this is an area where anything that can be done to lift the heavy hand of the *Le Mesurier case*¹⁶ with regard to recognition based on domicile alone, should be done, so as to avoid the hardships and problems of the so-called *limping marriage*.

Recognition of Polygamous Marriages

It will be recollected that Lord Penzance in the case of *Hyde v. Hyde*¹⁷ has defined marriage in such a way as to exclude polygamous marriages, both potential and actual. For about 80 years it was thought that this meant that the common law Courts would give no recognition to a foreign polygamous marriage. A liberal trend, however, started in 1946 when the English Court of Appeal in *Baindail v.*

15. (1951-52) *Harvard Law Review*, Vol. 65, p. 194.

16. (1895) A.C. 517.

17. (1866) L.R. 1 P. & D. 130.

*Baindail*¹⁸ decided that such a marriage did give a person the status of being married so that another marriage in England could be declared a nullity. In that case the Master of the Rolls was careful to point out that he was not suggesting that for every purpose and in every context a polygamous marriage would be regarded as a valid marriage. This liberalizing trend has in recent years taken two forms:

- (a) that of re-defining the time at which to judge whether the marriage is polygamous or monogamous, and
- (b) in extending the areas in which even a polygamous marriage will be recognized as valid in our law.

(a) As to whether a marriage is monogamous or polygamous, it is necessary to examine what law determines this. The traditional view is that this is decided by application of the *lex loci celebrationis* on the basis that it is the *lex loci* which covers all questions of the formal validity of the marriage ceremony. But as Dr. Cheshire has pointed out,¹⁹ if two parties go through a ceremony of marriage and become husband and wife in accordance with the *lex loci*, the problem in which we are now interested is not whether they are related, but what is their position *vis-a-vis* each other, once the relationship has been created. Of course, the consequences of the marriage union do not affect only the parties themselves, but also the community in which they will make their home, and therefore Dr. Cheshire has submitted that these consequences should be determinable by the law of the country of the "matrimonial domicile", that is to say, that country in which the parties intended at the time of the marriage to establish their home, and in which they do in fact establish it. A good illustration of the difference which such a solution would make may be seen in a recent Australian case of *Khan v. Khan*²⁰ where a wife who sought a decree of dissolution on the ground of adultery and also custody of the children and maintenance, was denied any such relief on the ground that her marriage was potentially polygamous. Mrs. Khan was domiciled in Australia at all times, until she went to Pakistan in 1955 and married the respondent. The marriage was in Moslem form and was potentially polygamous. The parties returned to Australia and at the date of the proceedings the respondent was an Australian domiciliary and citizen. Gowans, J., in the Supreme Court of Victoria, held that the English decisions constrained him to refuse jurisdiction. The result is that so long as the husband remains domiciled in Australia there can be no matrimonial relief granted by an Australian Court. If the Courts had applied Dr. Cheshire's theory of the nature of the marriage being determined by the matrimonial domicile, then surely this could have

18. (1946) P. 122.

19. Cheshire *op. cit.* p. 268.

20. (1963) V.R. 203.

been regarded as a monogamous marriage giving rise to all the reliefs of Australian law. Surely if two people make their matrimonial home in a country which only knows monogamous marriages, it is hardly right that the husband should be able to escape his domestic responsibilities in that country simply because the marriage was celebrated in an area which allowed potentially polygamous marriages.

While the Courts in the Commonwealth have unfortunately been reluctant to apply the above test of the matrimonial domicile, there has been some alleviation of the problem by the Courts in England and Canada being prepared to hold that whether a marriage is monogamous or polygamous is not necessarily determined at the time of its inception. In England there was the recent case of *Cheni v. Cheni*²¹ where the husband and wife who were Jews domiciled in Egypt, were married there, and by the local law, the marriage was potentially polygamous until the birth of a child. A child was in fact born a few years later and thereby the marriage became monogamous. The English courts were prepared to hold that the relevant date for deciding whether this was a polygamous or monogamous marriage was not the date of the celebration of the marriage, but the date of the proceedings.

In Canada there was the recent case of *Sara v. Sara*,²² which involved the validity of a marriage taking place in India. This marriage was performed according to Hindu law which at that time recognized polygamy. Almost immediately thereafter the parties came to British Columbia where a domicile of choice was acquired. The marriage remained monogamous in fact and in 1955, the Hindu law was changed, making polygamous marriages illegal. The British Columbia Supreme Court which was asked to adjudicate upon this marriage was prepared to hold that it was then a monogamous one so that the parties were entitled to all the reliefs of the local matrimonial law. Unfortunately the learned judge did not decide whether the marriage had become monogamous by virtue of a change in the law of the place where the marriage was celebrated or by virtue of the fact that the parties had taken up domicile in a country which only permitted monogamous marriages. If the latter, it will be noted that the effect is that the decision is approaching very closely to Dr. Cheshire's suggested test of the matrimonial domicile governing the classification of the marriage.

(b) Even if the Court is unable to find that the marriage is or has become a monogamous one, there is an increasing tendency to restrict the operation of Lord Penzance's definition to cases involving purely matrimonial relief. It would now almost seem that for all other purposes our Courts would be prepared to recognize a polygamous marriage. The most recent example of this is the English case of *Shahnaz v.*

21. (1965) P. 85.

22. (1962) 31 D.L.R. (2d) 566.

*Rizwan*²³ where a wife of a potentially polygamous marriage celebrated in India was claiming certain dower rights from her former husband. The Court held that this claim was not one for matrimonial relief, and therefore that she was entitled to recover her dower.

It will be readily appreciated that there are still many problems to be resolved as to the extent of the recognition to be granted to polygamous marriages, for example, the claims of such wives to pension rights, and insurance benefits, which may be a very real problem in coming years in this country. It is interesting to note that in the United Kingdom, the Family Allowances and National Insurance Act of 1965 expressly provides that a polygamous marriage formed outside the United Kingdom is to be treated as a valid marriage for the purposes of family allowances and insurance benefits provided that, in fact, it has at all times been monogamous.

It is submitted that the above Act contains in it the solution for many of our present problems concerning polygamous marriages. There is surely a need for an increasing realization of the normality of marriages of one man and one woman even in polygamous systems. If Lord Penzance's reasons for his definition of marriage in the case of *Hyde v. Hyde* are carefully examined, it will be seen that while they make some sense where there is in fact a polygamous marriage, it is not easy to see why it can be said that our matrimonial jurisdiction is not adapted to forms of union which are monogamous in fact though they may be potentially polygamous under the *lex loci celebrationis*.

In the case of *Sowa v. Sowa*,²⁴ one of the learned Lord Justices rejected any distinction between potentially and actually polygamous marriages since he felt that if the Courts were to extend relief to the former and not the latter, the husband could always invalidate the proceedings simply by taking a second wife as soon as the petition was launched. This is surely unreasonable since if the law freezes the situation as it does in all other matters, as at the date of the institution of the proceedings, this could never arise and we would achieve the socially desirable results to avoid the injustices of a case like *Khan v. Khan* mentioned above. It is interesting to note that the American Courts have by and large adopted this latter solution and thereby avoided many of the pitfalls into which our own Courts have fallen, as a result of the rather illogical treatment of a marriage monogamous in fact but potentially polygamous under the *lex loci celebrationis*.

Torts

The role of Private International Law with regard to foreign torts is to specify the legal system according to which the rights and liabilities of the parties must be determined. Both in England and Canada, a

23. (1965) 1 Q.B. 390.

24. (1961) P. 80.

passage in the judgment of Willes, J., in the case of *Phillips v. Eyre*²⁵ has been slavishly adopted in this regard. The passage reads as follows:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.²⁶

It will be noted that this rule involves the blending of the *lex loci delicti commissi* and the *lex fori*, but with greater emphasis on the *lex fori* by which the Defendant's conduct must be actionable, while with regard to the *Ex loci delicti* it is sufficient if the conduct is simply not justifiable. Space forbids a discussion here of the many interpretations of this rule, but suffice it to say that there is general dissatisfaction with the present state of law produced by its adoption. During the last two decades, there has been an increasing demand for the adoption of some new principle more fitted to contemporary needs. Because of the infinite variety of torts, both Dr. Morris²⁷ and Dr. Cheshire²⁸ have argued for the development of a proper law of tort (analogous to a proper law of contract developed in this century), in which the place of commission is no longer the decisive factor. Such a principle has not yet found favour in England, but in the past two years, it has found favour in the United States and has been considered in Canada.

In the American case of *Babcock v. Jackson*²⁹ the facts were as follows:

Mr. Jackson and Miss Babcock were residents of New York State. Miss Babcock was injured through negligent driving by Mr. Jackson while she was a guest passenger in his car in Ontario. The law of Ontario exempts drivers from liability for injury to guest passengers. New York law imposes such liability. Miss Babcock sued Mr. Jackson in New York State for damages for the negligence committed in Ontario.

Fuld, J., expressing the view of the majority of the New York Court of Appeals, adopted the view expressed in the latest revision of the *Restatement of the Conflict of Laws of the American Law Institute* to the effect that, "The local law of the State which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort,"³⁰ and applied New York law rather than the Ontario *lex loci delicti*.

In the Canadian case of *Abbott-Smith v. Governors of the University of Toronto*,³¹ the Nova Scotia Supreme Court considered the idea of this

25. (1870) L.R. 6 Q.B. 1.

26. *Id.* at p. 28.

27. 64 Harvard Law Review 888.

28. Cheshire *op. cit.* p. 252.

29. 12 N.Y. 2 D. 473 (Also in England in (1963) 2 Lloyds Rep. 286).

30. *Id.*, at p. 477.

31. (1964) 45 D.L.R. 672.

proper law of tort and although his remarks were purely obiter (since the case dealt with the interpretation of what is the place of a tort for the purpose of service of a Writ *ex juris*), Currie J. said, "If the opportunity is taken to apply a new doctrine, then I should prefer that the doctrine be that of the proper law of tort as propounded by Professor J. H. C. Morris."³²

It is the hope of this writer that the Canadian Courts will seize this golden opportunity of pioneering the development of a new principle which is so badly needed in this important field in Private International Law.

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PUBLIC INTERNATIONAL LAW

An interesting and significant judgment involving the question of the implementation of an international treaty as part of the law of the land was handed down in 1964 by Smith, J., of the Manitoba Court of Queen's Bench, in the case of *Regina v. Canada Labour Relations Board, Ex parte Federal Electric Corp.*¹

In this case, to which I shall refer herein as the *Federal Electric Case*, Federal Electric Corporation was seeking an order of *certiorari* from the Manitoba Court of Queen's Bench in an endeavour to quash an order of the Canada Labour Relations Board certifying Local 2085 of the International Brotherhood of Electrical Workers as bargaining agent for a unit of employees of Federal Electric. A wide variety of arguments was urged, including jurisdictional and constitutional points, but the application for *certiorari* was ultimately dismissed. Of special interest here, however, was the contention that the Canada Labour Relations Board was precluded from hearing the application for certification on the ground that a treaty between Canada and the U.S.A. prescribed that rates of pay and working conditions were to be set in this particular situation not by the ordinary processes of bargaining but through consultation with the Department of Labour of Canada.

Federal Electric, under a contract with the United States Air Force, was to man and operate the Distant Early Warning System [D.E.W. Line] in Alaska, Canada and Greenland, and all of the work and all of the employees in the instant case were located in the Canadian Territories. The problem therefore arose of a square conflict between the provisions of an international treaty to which Canada was a party, and the provisions of a federal Canadian Statute, the

32. *Id.*, at p. 691.

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1. (1964), 44 D.L.R. (2d) 440, 47 W.W.R. 391.