

# Articles

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## NEW LIGHT ON THE PROPER LAW

### THE JUDGE'S DISCRETION

One of the remarkable features of modern English case law is the tendency to enlarge the discretion of the judge. The reason is not far to seek. Modern society and economics have become so complex that the Victorian juridical method of systematization of the law—founded on the model of the great civil law codifications of the 19th century—in fundamental rules and clearly defined exceptions is no longer adequate. If the judge is to perform his function in society, viz. to do justice by giving judgments acceptable, on the whole, to public opinion, he must have a fairly extensive arsenal of juridical concepts which give him some discretion to adjust his decisions to the infinite variety of modern social and economic life. The civil law judge will in such a situation refer to a general clause in his code, e.g. *l'ordre public et les bonnes moeurs*<sup>1</sup> or *Treu und Glauben*,<sup>2</sup> but the common law judge does not normally have available such an easy escape route, and where it is open to him, as in the case of public policy, he will be reluctant to use it because, although his judgments today display greater realism and less legal casuistry than those of a century ago, a plain reference to public policy would be a confession that no better reasons for the judicial decision can be adduced.

We note the expansion of judicial discretion in many branches of modern English law. The most notable development is the Practice Statement of the House of Lords of July 26, 1966,<sup>3</sup> according to which the Supreme Court, varying its previous practice, declared that it did not consider itself to be bound by its own precedents in all circumstances. These are the decisive words of the Practice Statement:

"Their lordships . . . recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice, and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

In harmony with this acceptance of the relative rule of *stare decisis*<sup>4</sup> are other relaxations of judicial rigour. The two concepts of reasonableness and negligence, which are the nearest equivalents in English law to the general clauses of the civil codes, have been turned to new uses, as can be seen, as regards the former, from the judgments of the House of Lords in the solus agreement cases relating to petrol

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1. French Code Civil, art. 6.

2. German Civil Code, s. 242.

3. [1966] 1 W.L.R. 1234.

4. C. M. Schmithoff, "The Growing Ambit of the Common Law", 30 Can. Bar Rev. (1952), 58.

pumps<sup>5</sup> and, as regards the latter, from *Hedley Byrne & Co. v. Heller & Partners*.<sup>6</sup> The hallowed dichotomy of conditions and warranties has been complemented by the admission of the complex term.<sup>7</sup> The hiatus in the common law created by the absence of a *jus quaesitum tertio* has been partly, though insufficiently, filled by the admission of the concept of the collateral contract.<sup>8</sup> After the enactment of the Judicature Acts 1873 and 1875, one should have thought that a substantive coalescence of law and equity would follow their procedural unification but the opposite has happened, and judicial discretion has been extended by the rise of a new, 20th century equity, as is evidenced from cases such as *Solle v. Butcher*<sup>9</sup> and *D. & C. Builders Ltd. v. Rees*<sup>10</sup> and the extension of the doctrine of equitable estoppel.<sup>11</sup> But the most evident manifestation of the tendency of modern English case law to relax rigorous rules of law by extending the ambit of judicial discretion is the great constitutional case of *Conway v. Rimmer*<sup>12</sup> in which the House of Lords, overruling its own decision in the *Thetis*<sup>13</sup> case, held that, when crown privilege is pleaded to prevent the discovery of state documents, the government department in question has to produce the documents to the judges who have to decide whether their disclosure would be prejudicial to the public interest.

It is not surprising that this tendency to enlarge the judge's discretion should have extended to English private international law. The English legal scene has not produced great iconoclasts like Brainerd Currie and Albert A. Ehrenzweig. English jurisprudence does not support Currie's theory of policy and interest as determining factors in private international law or Ehrenzweig's advocacy of the overwhelming claim of the *lex fori* for the solution of conflict problems.<sup>14</sup> In the most penetrating analysis of modern conflict theories<sup>15</sup> so far published, the German Professor Gerhard Kegel rejects the theories of Currie and Ehrenzweig for reasons which would appeal to the English jurist. He writes of these authors and their schools that<sup>16</sup>

5. *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.* [1967] 2 W.L.R. 871; see also *Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd.* [1959] Ch. 108 and the provisions of section 3 of the Misrepresentation Act 1967.

6. [1964] A.C. 465.

7. Diplock, L. J., in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 70; see Schmitthoff's *Sale of Goods*, 2nd ed., p. 61.

8. Schmitthoff's *Sale of Goods*, 2nd ed., pp. 64, 65.

9. [1950] 1 K.B. 671.

10. [1966] 2 Q.B. 617.

11. See Cheshire and Fifoot, *The Law of Contract*, 6th ed., p. 82 et seq; also Donaldson, J., in *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd.*, *The Times*, May 30, 1968.

12. [1968] 2 W.L.R. 998.

13. *Duncan v. Cammell Laird & Co. Ltd.* [1942] A.C. 624.

14. Peter Herzog, "Recent Developments in Choice of Law in the United States" [1964] J.B.L. 273; Anton Heini, "Eine neue Methode im internationalen Privatrecht" *Zeitschrift für Schweizerisches Privatrecht*, new series, Vol. 86 (1967), p. 265 (on the theory of David F. Cavers).

15. Gerhard Kegel, "The Crisis of Conflict of Laws", *Recueil des Cours, Hague Academy of International Law*, Vol. 11 (1964), p. 93.

16. *Ibid.*, p. 229.

"They . . . retard legal culture, which, in a world of increasing international contacts must be developed not in isolation but rather in communication with the legal systems of other states."

The English reactions to the—justified—demand for greater flexibility and for relaxation of the rigorous 19th century rules of the English conflict of law has been a development of the doctrine of the proper law. This doctrine has hitherto been restricted to the domain of the law of contract;<sup>17</sup> it meant that the parties, on principle, could choose the law which was to govern their contract and that, if the contract did not contain a choice of law clause, the most appropriate law should govern their contract. Modern developments have extended the proper law doctrine into other fields, viz. into the law of divorce and possibly that of torts. This extension of the proper law doctrine will be considered in the next part of this article, but here we may ask ourselves a general question. In private international law, as in other branches of law, theories are fashionable; these theoretical fashions—the fancies of the professors—hold sway for some time and then fade away, making only a slight impact on the fabric of the law. In private international law we have had the international theory, the vested rights theory, the local rights theory. Are we now entering into a phase in which the proper law theory will become a general, all branches permeating theory of private international law? While it is still too early to commit oneself to a definite statement, the indications are that this question will eventually have to be answered in the affirmative and that this will be the English answer to the social and economic forces which have unleashed the explosion of the American *enragés*.

## THE EXTENSION OF THE PROPER LAW DOCTRINE

Modern English cases have extended the realm of the proper law doctrine from its application to the law of contract to the law of divorce and possibly to that of torts.

*The Proper Law Doctrine in the Law of Divorce.* The leading English authority here is *Indyka v. Indyka*,<sup>18</sup> already followed in subsequent decisions.<sup>19</sup> The case, decided by the House of Lords and founded on an extension of the rule in *Travers v. Holley*,<sup>20</sup> lays down that a foreign divorce decree should be recognized by the English courts if issued by the court of a country with which the petitioner

17. It has also been applied to the construction of wills disposing of movables; Dicey & Morris, *The Conflict of Laws*, 8th ed., Rule 102, p. 605; C. M. Schmitthoff, *The English Conflict of Laws*, 3rd ed., p. 241.

18. [1967] 3 W.L.R. 510.

19. *Angelo v. Angelo* [1968] 1 W.L.R. 401; *Brown v. Brown* [1968] 2 W.L.R. 969.

20. [1953] P. 248.

had a real and substantial connection; this real and substantial connection may be founded on domicile, three years' residence, nationality, the situation of the matrimonial home in the jurisdiction of the foreign court, or a combination of these or similar circumstances. This is undoubtedly an enlightened rule of general character, enabling the courts to afford recognition to foreign divorce decrees in all cases in which such decrees deserve recognition. At the same time, this rule introduces, as it were, by the back door the principle of *fraude à la loi* into English law. The rule means, in effect, that genuine foreign divorce decrees will be recognized by the English courts but that divorce decrees evasively obtained will be rejected and that it is for the English courts to decide whether a foreign divorce decree is obtained honestly or evasively.

The facts of *Indyka v. Indyka* were as follows. The husband whose domicile of origin was Czechoslovakian married his first wife in Czechoslovakia on January 16, 1936. Both were citizens of the Czechoslovak Republic and resided in Czechoslovakia where the wife continued to reside all her life. When Hitler invaded Czechoslovakia, the husband joined the Czechoslovakian army, and when Czechoslovakia was occupied by the Germans he crossed the border to Poland and served with the Polish forces. He was captured by the Russians and imprisoned in Siberia until he was released to serve with the Polish army under General Sikorski. He came to England in 1946. On arrival in England the husband was offered the choice of returning to Czechoslovakia or remaining in England. He chose to remain in England where he acquired a domicile of choice and lived ever since. On January 18, 1949, the first wife was granted a decree of divorce by the District Court of Ostrava, in Czechoslovakia; according to Czechoslovakian law, the decree became final 14 days later. On March 20, 1959, the husband went through a marriage ceremony in England with his second wife who was an Englishwoman domiciled in England. In 1965 the second wife petitioned the court for divorce on the ground of the husband's cruelty. The husband who denied the charge claimed that the second marriage was void on the ground of bigamy because the Czechoslovakian decree in 1949 was not valid in English law and cross-petitioned for a decree of nullity. Latey, J., held that the Czechoslovakian divorce decree could not be recognized in England and granted the husband a nullity decree, but the Court of Appeal, by a majority decision, reversed this judgment, recognized the Czechoslovakian decree and held that the second marriage was a valid and subsisting marriage. This decision was unanimously affirmed by the House of Lords.

The difficulty in the *Indyka* case was this. The divorce decree of the Czechoslovakian court was made in the early part of 1949 whereas

the United Kingdom Law Reform (Miscellaneous Provisions) Act 1949 (which granted the English court divorce jurisdiction on the petition of a wife who, speaking generally, had been ordinarily resident in the jurisdiction for three years)<sup>21</sup> came into operation only at the end of 1949. *Travers v. Holley* which recognized a corresponding divorce jurisdiction in foreign courts was expressly founded on the principle of reciprocity. Could the Czechoslovakian decree be recognized under the *Travers v. Holley* rule although it was made at a date at which the basis of reciprocity did not exist?

It would have been easy for the House of Lords to support its decision by interpreting the *Travers v. Holley* rule in this manner and giving it, as it were, retroactive effect. That, in fact, was the reasoning adopted by the majority of the Court of Appeal.<sup>22</sup> But the House of Lords realized that such an answer did not provide a solution of the problem and that it would soon be faced with the further question whether the divorce decree of a court of the wife's nationality should be recognized by the English courts if the wife was resident in the court's jurisdiction. It was thus clear that a more general rule was required to embrace all genuine foreign divorce decrees and the answer which the House of Lords gave was the adoption of the principle of the proper law of divorce—the test of real and substantial connection—of which the *Travers v. Holley* rule is but an illustration.

The clearest statement of this new principle is contained in Lord Wilberforce's speech in the *Indyka* case:<sup>23</sup>

"It would be in accordance with the developments I have mentioned and with the trend of legislation — mainly our own but also that of other countries with similar social systems — to recognize divorces given to wives by the courts of their residence wherever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction. I use these expressions so as to enable the courts, who must decide each case, to consider both the length and quality of the residence and to take into account such other factors as nationality which may reinforce the connection. Equally they would enable the courts (as they habitually do without difficulty) to reject residence of passage or, to use the descriptive expression of the older cases, resorted to by persons who properly should seek relief here for the purpose of obtaining relief which our courts would not give."

It follows from this statement and similar statements of the other judges in the House of Lords that one of the necessary requirements of a "real and substantial connection" of the petitioner with the jurisdiction of the foreign court is that the petitioner should be resident in that jurisdiction. It is unlikely that the English courts would recognize the divorce decree of a Ruritanian court founded on the Ruritanian

21. The present U.K. Act is the Matrimonial Causes Act 1965, s. 40.

22. [1967] P. 233.

23. [1967] 3 W.L.R. 510, 558.

nationality of the wife if the matrimonial home is in England and the wife is not resident in Ruritania.

*The Proper Law Doctrine in the Law of Torts.* The English authority in which this problem was discussed is the decision of the Court of Appeal in *Boys v. Chaplin*.<sup>24</sup> In this case the doctrine of the proper law of tort was adopted by Lord Denning, M. R., as *ratio* for his decision. The other majority judge (Lord Upjohn) came to the same result as Lord Denning but for other reasons whilst the third judge (Diplock, L. J.) dissented and came to a different result.<sup>25</sup> An appeal is pending to the House of Lords and at the present date<sup>25a</sup> the outcome of the appeal is unknown.

The problem with which *Boys v. Chaplin* was concerned was the recovery of damages in the English courts for a tort committed abroad. The traditional rules laid down in *Phillips v. Eyre*<sup>26</sup> about 100 years ago are that such damages are recoverable if two concurrent conditions are satisfied, viz. the act complained of must not be justifiable by virtue of the *lex loci delicti* and it must be actionable in English law. Mainly as the result of modern developments in transport and communications, the application of the traditional rules has become difficult. In not a few circumstances the *locus delicti commissi* is purely fortuitous. To refer to two illustrations from American law where this difficulty was felt early: in *Kilberg v. Northeast Air Lines*<sup>27</sup> a New York resident was killed in Massachusetts where the plane which he had boarded in New York crashed. The New York Court of Appeals disregarded the law of Massachusetts which imposed a maximum limitation on liability for causing wrongful death and applied the law of New York. In *Babcock v. Jackson*<sup>28</sup> a New York resident drove his car to Ontario, Canada, with a passenger who likewise was a New York resident. An accident occurred in Ontario and the passenger sued the driver. No remedy was available under the law of Ontario since the transportation was gratuitous but no such limitation existed under New York law. The New York Court of Appeals, adopting the rule of the proper law of torts, held that New York was the centre of gravity of the tort, since both parties were New York residents and the car was garaged in New York; the law of New York was the proper law of the tort and the *lex loci delicti* was disregarded. In the United States the doctrine of the proper law of torts is now widely accepted and

24. [1968] 2 W.L.R. 328.

25. It was a case of *quot judices quot sententiae*.

25a. June 1, 1968.

26. (1869) 4 Q.B. 225; (1870) 6 Q.B. 1.

27. 9 N.Y. 2d. 34, 172 N.E. 2d. 526, 211 N.Y.S. 2d. 133 (1961).

28. [1963] 2 Lloyd's Rep. 286.

is embodied in the *Restatement (Second)*. In Canada this doctrine has likewise been followed.<sup>29</sup>

The first English jurist who advocated the doctrine of the proper law of tort was Dr. J. H. C. Morris.<sup>30</sup> Dicey and Morris, though faithfully reproducing the traditional rules of *Phillips v. Eyre*, then proceed, under the heading "social environment as a test", to advocate the application of the proper law doctrine of the tort.<sup>31</sup> This doctrine did not, however, make headway in England and was, e.g. rejected by Cheshire.<sup>32</sup> Only since the judgment of Lord Denning, M. R., in *Boys v. Chaplin* is its adoption a possibility.

*Boys v. Chaplin* concerned a car accident in Malta. The plaintiff who rode pillion on a friend's motorcycle was injured by a motor car driven by the defendant who admitted negligence in causing the accident. Both parties were members of the British Armed Forces in Malta, both were normally resident in England and had returned to England. Both were insured with the same insurance company, an English company. The plaintiff started proceedings against the defendant in England. According to English law he was entitled to be compensated for his expenses and money loss and also for his pain and suffering and loss of amenities of life, and the amount of damages was £2,303. According to the Maltese Civil Code, however, he could only recover his expenses and money loss and that came to £53. Milmo, J., gave the plaintiff the larger amount on the ground that the entire assessment of damages was to be calculated according to the *lex fori*. In the Court of Appeal, the majority likewise decided in favour of the plaintiff but for different reasons; Lord Denning, M. R., held that English law was the proper law of tort, "the law of the country with which the parties and the act done have the most significant connection";<sup>33</sup> Lord Upjohn expressly rejected this rule<sup>34</sup> and founded his judgment for the plaintiff on the consideration that all questions of remedy, both as to the nature and kinds or heads of assessment of damages, were governed by the *lex fori*, whilst the dissenting judge, Diplock, L. J., decided that the admissibility of the heads of damages was governed by the *lex loci delicti*.

Lord Denning was aware that the adoption of the doctrine of the proper law of the tort, with the ensuing result that English law ap-

29. *Abbott-Smith v. Governors of the University of Toronto* (1964) 45 D.L.R. (2d) 672, 688 per Currie, J.

30. J. H. C. Morris "The Proper Law of Tort" 64 Harv. L.R. (1951), 881. Contra: Albert A. Ehrenzweig, "The not so 'proper' Law of Tort: Pandora's Box", in 17 I.L.Q.R. (1968), 1.

31. Dicey and Morris, *The Conflict of Laws*, 8th ed., p. 914, et seq.

32. G. C. Cheshire, *Private International Law*, 7th ed., 254.

33. [1968] 2 W.L.R. 328, 336.

34. *Ibid.*, p. 341.

plied, meant that a distinction had to be admitted between a collision in Malta between two Maltese and a collision between two English service men, but he was prepared to accept this result. Diplock, L. J., who applied the traditional rules was prepared to admit an exception if the two parties stood in a special relationship, such as driver and passenger of a car, but held that such a special relationship was absent in the present case.

In the result, whether the doctrine of the proper law of the tort will be adopted by the House of Lords or not, when deciding *Boys v. Chaplin*, it appears to be reasonably certain that the highest court will admit a relaxation—"Auflockerung"<sup>35</sup>—of the strictness of the traditional rules, with their rigorous emphasis on the *lex loci delicti*.

### THE PROPER LAW OF CONTRACT

It is now necessary to consider the latest developments of the doctrine of the proper law in the field of contracts.

First, however, a slight change of emphasis in the term "the proper law" should be noted. While in the law of divorce and of torts that term means the law with which the transaction has "a real and substantial" or "the most significant" connection, in the law of contract it embraces two aspects, viz. the law chosen by the parties, and, failing such choice, the law with which the contract is most closely connected. This change is apparent rather than real because if the parties have chosen a particular law as the law governing their contract, that undoubtedly constitutes the most significant connection between the transaction and a territorial law.

If we disregard historical antecedents irrelevant for the appreciation of the present position, it may be stated that the doctrine of the proper law of contract has moved through three stages. Each of them was dominated by a particular theoretical interpretation of the proper law doctrine. These three theories were the subjective, the objective and the modern theory.

*The Subjective Theory.* In the first stage the proper law doctrine was presented as being entirely of subjective character. In harmony with the 19th century theory of contract which was founded on the economic principle of *laissez faire* and which placed the idea of absolute freedom of contract on the highest level, the proper law of contract doctrine was solely founded on the intention of the parties. The doctrine was expressed in two rules, viz. first, if the parties had expressly agreed on the law applicable to their contract, that legal system

35. Binder, "Zur Auflockerung des Deliktstatus" 20 *Rabels Z* (1955), 401.



applied, and secondly, if they had failed to do so, their intention had to be "presumed" by the court. The clearest expression of this theory is found in Lord Atkin's speech in *R. v. International Trustee*:<sup>36</sup>

"The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances."

The weakness of this theory was twofold. First, and this was the principal objection, the process of "presuming and intention", if the parties had not chosen the proper law, was a pure fiction because clearly in this case the parties never directed their minds to the possibility of a conflict of laws and could not have formed an intention for this contingency. A modern court of law—and modern doctrine—refuses to use such an artificial, unrealistic construction of law. Secondly, the statement that an express choice of law is "conclusive", does not take into account the possibility of a fraudulent or evasive choice of law by the parties.

The high watermark of the subjective theory period is sometimes thought to be the *Vita Food*<sup>37</sup> case, but this statement is not entirely correct. It is true that it was held in this case that the parties to a contract may agree that the contract shall be governed by the law of a country other than that of the residence of the parties, the situs of the subject matter of the contract or similar points of connection; i.e. by a law with which prima facie there appears little "real connection." The important point of that ruling—and a point which reveals genuine progress—is that the discretion of the parties to choose the proper law is qualified; it is required that "the intention expressed is bona fide and legal . . . there is no reason for avoiding the choice on the ground of public policy".<sup>38</sup> In brief, apart from the obvious limitation of public policy, the requirement is introduced that the choice of the proper law must not be evasive. The passage in which the Judicial Committee asserted complete freedom of choice of the proper law, subject to these limitations, is this:<sup>38</sup>

"Connection with English law is not as a matter of principle essential. The provision in a contract (e.g. of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is even where the parties are not English, and the transactions are carried on completely outside England."

*The Objective Theory.* It was natural that towards the middle of the 20th century, when economists and jurists were critical of the

36. [1937] A.C. 500.

37. *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277.

38. *Ibid.*, p. 290.

doctrine of *laissez faire* and its legal consequences, the artificial presumption of the law intended by the parties, if they had not chosen the proper law, should be rejected. Following the teaching of Dr. G. C. Cheshire<sup>39</sup> and Dr. J. H. C. Morris<sup>40</sup> the objective test of real connection was clearly adopted by Lord Simonds in *Bonython v. Commonwealth of Australia*<sup>41</sup> where the proper law is defined as:

“the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.”

This test has been adopted in many subsequent decisions.<sup>42</sup>

It will be noted that Lord Simonds adopted the objective theory in a mitigated form; in his statement this test has second place after the law “by reference to which the contract was made”. This, as will be seen later, has always been the English attitude to the objective theory but it is not in harmony with the rigid interpretation of that theory. According to the latter, the choice of law by the parties is restricted to any of the legal systems with which the transaction, as such, is connected. This limitation was, e.g. adopted by the Czechoslovakian Act on Private International Law of March 9, 1948 (No. 41), now repealed,<sup>43</sup> which provided:<sup>44</sup>

“The parties are authorized to refer their legal relations to a specified law, provided that the relation shows a significant connection with the chosen law, and that the choice is not contrary to the mandatory rules of the law to which the legal relation is referred pursuant to the provisions of this section.”

The unfortunate effect of this provision can be gathered from the award of the Arbitration Commission of Prague in *Centrotex Prague v. M. K. Pakistan* (March 1, 1954),<sup>45</sup> in which a contract for the purchase of jute between a Czechoslovak trading concern and a Pakistani company, concluded on a standard form, provided that English law should be the proper law of contract. The Arbitration Committee held that English law had no “significant connection” with the transaction and applied Czechoslovakian law, a particularly unfortunate result since Pakistani law was identical with English law, as far as relevant, and the intention of the parties was clearly defeated. This decision is, of course, the opposite to the *Vita Food* decision of the Privy Council.<sup>46</sup>

39. G. C. Cheshire, *International Contracts*, 1948.

40. J. H. C. Morris, “The Proper Law of Contract, Reply” in 3 I.C.L.Q. (1950), 197.

41. [1951] A.C. 201, 219.

42. Listed in Dicey & Morris, *The Conflict of Laws*, 8th ed., p. 693, n. 15.

43. See *Tomkinson v. First Pennsylvania Banking and Trust Co.* Appeal in *In re United Railways of Havana and Regia Warehouses Ltd.* [1961] A.C. 1007, 1068, 1081, and the other cases listed in Dicey and Morris, *The Conflict of Laws*, 8th ed. p. 693, n. 15.

44. Repealed by the Czechoslovakian Act concerning Private International Law and the Rules of Procedure thereto of December 4, 1963, which came into operation on April 1, 1964 (I am indebted for the information on Czechoslovakian law to Professor Pavel Kalensky (Prague)).

45. Trajan Ionesco and Ion Nestor, “The Limits of Party Autonomy—I” in the *Sources of the Law of International Trade*, (ed. Schmitthoff) 1964, p. 189.

46. *Ibid.*, p. 190.

47. See n. 37, ante.

A further consequence of the application of the rigid objective theory is that the choice of law by the parties must not be contrary to the mandatory rules of the law of significant connection. This requirement is likewise stipulated in the Czechoslovakian Act of 1948. According to this provision the law of significant connection would indeed have a dominant position and would have priority over the law chosen by the parties because it would be necessary to ascertain in every case what that law is in order to determine that its mandatory rules have not been infringed. The cumbersome and restrictive character of such a requirement is obvious. It is of great significance that the new Czechoslovakian Act on Private International Law of December 4, 1963,<sup>47</sup> has repealed both restrictions imposed by the Act of 1948, i.e. those relating to the significant connection and to mandatory provisions; section 9 of the new Czechoslovakian Act provides:

"(1) The contracting parties may choose the law which will govern their mutual property relations; they may do so tacitly, if in view of the circumstances there is no doubt as to their manifested will.

(2) Unless the manifested will of the contracting parties indicates otherwise, the provisions of the chosen law relating to conflict of laws shall be ignored".<sup>48</sup>

This alteration indicates the intention of the Czechoslovakian legislator to liberalize the law and to facilitate international transactions.

It is further of interest to note that the United Kingdom Uniform Laws on International Sales Act 1967 (which is not in force yet) provides in section 1 (4) that "no provision of the law of England and Wales, Scotland or Northern Ireland shall be regarded as a mandatory provision" within the meaning of article 4 of the Uniform Law on International Sale of Goods (Sched. 1 of that Act).

*The Modern Theory.* In the third period the view has been generally accepted that the subjective and objective theories<sup>49</sup> are not mutually exclusive but complement each other. I expressed this view already in 1954 in the third edition of my *English Conflict of Laws*.<sup>50</sup>

"In the result, the subjective and objective theories are not opposed but complementary. 'Bearing in mind that intention of the parties is the fundamental consideration in questions of this kind',<sup>50a</sup> the two theories can be reconciled if it is realized that the test of intention is the primary test for the ascertainment of the proper law of contract, and the test of connection the secondary criterion which is invoked if the former test fails."

47. See n. 43, ante.

48. The meaning of subsection 2 of section 9 is that the chosen law shall only be the internal law but not the conflict rules, a very sensible provision!

49. Except the rigid interpretation of the objective theory.

50. Clive M. Schmitthoff, *The English Conflict of Laws*, 3rd. ed., p. 109.

50a. Per Willmer, J., in *The Assunzione* [1953] 1 W.L.R. 929, 933.

This view, which is in line with Lord Simonds' statement in the *Bonython* case<sup>51</sup> is today the generally accepted view in England.<sup>52</sup> Dicey and Morris express it in the latest edition of their *Conflict of Laws* in Rule 127:<sup>53</sup>

"In this Digest the term 'proper law of a contract' means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."

It is clear that the modern doctrine of the proper law embraces two sets of problems, one related to the ascertainment of the law intended by the parties, and the other pertaining to cases in which the parties have failed to indicate that law.

*The Law Intended by the Parties.* This part of the proper law of contract doctrine, in its modern interpretation, can be expressed in two rules, viz.

*First*, the parties to the contract are free to elect any law as the law governing the contract, even though there is no prima facie connection between the chosen law and the transaction, and,

*Secondly*, the choice of the parties must not be evasive or against the public policy of the *lex fori*.

The first rule is an absolute necessity in the modern law of international trade. It happens from time to time that the parties agree on a "neutral" law as the law governing their transaction, i.e. the law of a country other than that of the parties, in the same manner in which they may agree on "neutral" arbitration, i.e. a sole arbitrator or an umpire who is not a national of the parties' countries. Thus, in *Tzortzis v. Monark Line A/B*<sup>54</sup> Swedish sellers sold a ship, the SS. *Montrose*, to Greek buyers. The contract provided that any dispute in connection with the contract should be decided by arbitration in the City of London, and that in default of a single arbitrator each party should appoint one arbitrator and a third should be appointed by "the High Court or the corresponding court at the place where the arbitration" was to be held. The Court of Appeal held that although, apart from the arbitration clause, the contract had its closest and most real connection with Sweden, the parties by choosing the City of London as the place of arbitration had impliedly chosen English law as the proper

51. n. 41, ante.

52. See K.N.S. Counter, "The Proper Law of Contract—A Re-examination" in [1965] J.B.L. 326.

53. 8th ed., p. 691.

54. [1968] 1 W.L.R. 406.

law of the contract. The *Vita Food* decision<sup>55</sup> was expressly followed. Significant are the following observations of Salmon, L. J.:<sup>56</sup>

"I think it is not at all unnatural, in circumstances such as these, that the parties should agree for the contract to be arbitrated on neutral territory by neutral arbitrators in accordance with a system of law which very often does govern commercial contracts. Indeed, it is not uncommon in the shipping world that any dispute between them shall be decided by the English Commercial Court according to English law."

Typical, further, is the arrangement in a contract between the British engineering firm of Vickers Zimmer and the Chinese authorities for the building of a synthetic fibre plant at Lanchow, capital of the north-western industrial province of Kansu; this contract provides for arbitration in Sweden which clause would presumably imply Swedish law as the law governing the contract.<sup>57</sup>

The need to give the parties full discretion to elect even an "unconnected" law, subject to limitations in case of a choice being evasive or against public policy, is emphasized in the literature on private international law of the socialist countries. The autonomy of the parties' will is the basis of international contracting and consequently the choice of an "unconnected" neutral law for the settlement of disputes must be made available to them if they so desire. Two Hungarian authors are particularly emphatic on this point. Dr. F. Madl states<sup>58</sup> "that the right of the choice of law by the parties has become axiomatic in private international law" and notes in Hungarian law "the turning of the principle of autonomy (taken in the wide sense) into one of general validity".<sup>59</sup> Professor Istvan Szaszy, who treats the problem in detail, after discussing certain restrictive provisions of Polish law<sup>60</sup> and of the old Czechoslovakian Act of 1948, observes:<sup>61</sup>

"In other people's democratic countries, e.g. in Albania, Bulgaria, the German Democratic Republic and Hungary, as in the Soviet Union, there are no legal provisions in respect of the right of the parties to choose the law; nevertheless, this right is recognized by the courts as well as by the arbitration commissions attached to the chambers of commerce and by the 1962 U.S.S.R. [Code of] Civil Litigation."

The change in Czechoslovak law from the rigid objective to the subjective interpretation of the proper law doctrine has already been noted.<sup>62</sup> It is remarkable that English law and the laws of the socialist countries have adopted the same liberal interpretation of the doctrine

55. See n. 37, ante.

56. [1968] 1 W.L.R. 406, 414.

57. See *The Times*, April 25, 1968.

58. F. Madl, *Foreign Trade Monopoly—Private International Law*, Budapest 1967, p. 93.

59. *Ibid.*, p. 99.

60. Polish Act of 1926, art. 7.

61. I. Szaszy, *Private International Law in the European People's Democracies*, Budapest, 1964, p. 262.

62. On p. 19, ante.

of the proper law of contract, with the aim of facilitating transactions of international trade.<sup>63</sup>

The preceding observations, and in particular the analysis of the *Tzortzis* case,<sup>64</sup> have further indicated that the intention of the parties that a particular law shall govern their contract can be provided for either expressly, by adoption of a choice of law clause, or impliedly. In the latter case the terms of the contract and the surrounding circumstances, when interpreted according to the rule in *The Moorcock*,<sup>65</sup> must raise the *necessary* implication that the parties intended the application of a particular law. In the *Tzortzis* case,<sup>66</sup> this necessary implication followed from the adoption of the London arbitration clause. Such necessary implication is, of course, entirely different from the now discarded "presumed intention" of the parties in the first period of the doctrine of the proper law. Unlike the presumed intention, an intension inferred by necessary implication is real and genuine but not expressly articulated.

*The Law of Closest Connection.* This, as we have seen, is the proper law of the contract if the parties have failed to indicate a legal system which shall govern the transaction. In the United States and the Scandinavian countries this criterion is sometimes referred to as the centre of gravity method,<sup>67</sup> it admits the discretion of the judge to select from the various points of connection the one which appears to him to be most relevant and to localize the contract in the country so selected. The closest connection in the law of contract is thus determined in the same manner as in the law of divorce and possibly in the law of torts. The law of the closest connection overrides in the modern view the various presumptions, such as those in favour of the *lex loci contractus* or the *lex solutionis*.<sup>68</sup> These presumptions, founded on the so-called Florentine Rules, and also the modern catalogue of the Swedish judge, Hjalmar Karlgen<sup>69</sup> are of diminishing importance, when compared with the general test of the law of closest connection.

## CONCLUSIONS

1. It would appear that a new fundamental and general principle is emerging in private international law. This principle is that it

63. On party autonomy see also Ole Lando, *The Proper Law of Contract*, Scandinavian Studies in Law, 1964, 107, 146.

64. See n. 54, *ante*.

65. *The Moorcock* (1889) 14 P.D. 64, 68.

66. See n. 54, *ante*.

67. Ole Lando, *op. cit.* in n. 63, p. 163.

68. Ole Lando, *op. cit.* in n. 63, p. 177 *et seq.*

69. Gunnar Lagergren "Limits of Party Autonomy—II" in *The Sources of the Law of International Trade* (ed. Schmitthoff) 1964, p. 208.

is the function of judge and jurist in a matter raising a conflict of laws to ascertain the law with which the transaction is significantly and substantially connected. This rule is applied in this form in the law of contract (bearing in mind that the intention of the parties that a specified law shall govern their contract constitutes a significant connection), in the law applying to the construction of wills disposing of movables, in the law relating to the recognition of foreign divorce decrees, and perhaps in the law applicable to torts committed abroad. It is possible to subsume other detailed rules of private international law under this general principle.

2. The mental process which the proper law method requires is that the judge or jurist concerned with the matter must consider the points of connection of the transaction with the various territorial legal systems, evaluate them, treating those pointing to the *lex fori* and those pointing to foreign law on an equal footing, and decide which of them is significant and substantial. By this process a legal relationship is localized in the territory of a particular legal system.
3. The proper law doctrine, in all branches of private international law to which it is applied, has a necessary corollary: that the choice of law must not be done with an evasive intent. The words of Lord Wright in the *Vita Food* case<sup>70</sup> that the choice must be "bona fide and legal" have general application in all cases to which the proper law doctrine is extended. Indeed, the admission of this *fraude à la loi* exception in the broad area now covered by the proper law is one of the most important developments in the modern English doctrine. It would be desirable if in all branches of the proper law doctrine this exception were standardized in this manner, viz. that the courts refuse to apply the proper law of the transaction if it is founded on the evasive intent of the parties.
4. In the result, the extension of the rule of the proper law, with its inherent qualification in the case of evasive intent, means that in private international law the judge is regaining the necessary judicial discretion to keep the law modern and yet certain. The proper law doctrine does not mean that the established rules of English private international law are abolished. On the contrary, they will be applied as before. But they are no longer regarded as rigid and immutable prescripts, as "Rules" in a "Digest", in the

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70. See n. 37, ante.

sense of Dicey's philosophy of 1896, when his "complete digest of and commentary on the law of England with reference to the conflict of laws" first appeared in its immortal form. From the viewpoint of the extended proper law doctrine, we look upon the established principles of English private international law as instances of application of a broader, more fundamental concept to which the judge can have resort on occasion, when social and economic changes so demand. This relaxation in the juridical attitude to private international law should be welcomed. It will enable the courts to develop this branch of law in harmony with the requirements of a modern world in which individual contacts will become constantly closer and consequently private international law will assume greater importance than before.

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