Cases in Private International Law—1967

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Service out of the jurisdiction—*Forum conveniens*

Mackender v. Feldia A.G.[1] concerned the case of a claim on a policy of insurance over jewellery. There was a provision in the policy that it should be governed exclusively by Belgian law and that any disputes arising thereunder should be exclusively subject to Belgian jurisdiction. Thus there was not only a choice of law clause but also a choice of jurisdiction clause. The plaintiff commenced proceedings in England claiming a declaration that the policy was void for illegality and voidable for non-disclosure. Although the contract of insurance was made in London so that the case fell within one of the situations in which service out of the jurisdiction could be ordered under English R.S.C., O. 11, r. 1, the Court of Appeal held that the discretion to grant leave to serve the writ out of the jurisdiction had been wrongly exercised. Two points are of interest. In the first place Diplock, L.J., expressed the view that the discretion to grant leave under R.S.C., O. 11, should be exercised with great caution as it was wider than any corresponding jurisdiction which the Court recognized as possessed by a foreign court over defendants who are not present or ordinarily resident in the foreign State. The other point is that the Court of Appeal gave full weight to the choice of jurisdiction clause. The existence of a clause of this nature is not conclusive and the local court may well decide, notwithstanding such clause, that it is *forum conveniens*. However Diplock, L.J., said:

> "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reasons to induce me to permit one of them to go back on his word."[2]

It is somewhat relevant indeed that in this case there was also an express choice of law clause and the court seemed to have no doubt that this made Belgian law the proper law of the contract. That the English court, if it took jurisdiction, would have to apply a foreign law whereas the Belgian court (presumably) would not, is obviously a factor going to convenience. However, it is easy to overweight this factor. It is quite probable that the mere fact that disputes under a contract are exclusively justiciable by the *courts* of one country means that the *law* of that country is also the proper law of the contract.

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1 [1967] 2 Q.B. 590; [1967] 2 W.L.R. 119; [1966] 3 All E.R. 847.

2 [1967] 2 Q.B. 590, at p. 604.

This seems to follow from *Lewis Construction Co. v. M. Tichauer Société Anonyme*[3] where is appears to have been recognized by the court that a provision that all disputes should be adjudicated before a French tribunal made French law the proper lay of the contract.[4]

Polygamous marriages

Three cases here fall due for notice.

In the last previous issue of this commentary the present reviewer expressed himself somewhat critically of the decision in *Ali v. Ali*[5] which seemed to extend to a grotesque extent the facility with which an initially polygamous marriage could be converted into one of a monogamous character. No such objection can be made to the decision in *Parkasho v. Singh.*[6] Here the marriage took place in India, was valid by the law of India but was also potentially polygamous by that law. The question of the nature of the marriage arose in summary proceedings before magistrates on a complaint by the wife of neglect to maintain and at the time of such proceedings the marriage in question had been, so far as Hindu law was concerned, rendered monogamous (so it was held on the phrasing of the Act by the court) by the passing of the Hindu Marriage Act 1955 by the legislature of India. Once one endorsed the view, accepted in *Cheni v. Cheni,*[7] that the proper time to evaluate the character of the marriage in terms of whether it was polygamous or monogamous, was at the time of the institution of proceedings, then the decision was but a modest extension of the principle of that decision unless some point of differentiation could be found in the fact that in *Cheni* the circumstances which could change the character of the marriage to monogamy were at the outset within the contemplation of the parties. The court, however, thought this difference an immaterial one. In actual fact the more difficult task for Cairns, J., was to consider in detail whether the effect of the Indian legislation was in truth to make the marriage monogamous and to decide what should be the proper course for the Court when experts differed in their views as to the effect of a foreign law.

One facet of *Lee v. Lau*[8] is the issue of the characterization of a marriage as polygamous or monogamous. In this case the marriage was performed in Hong Kong and the local law allowed the husband to take "tsipsis" or secondary wives. Though Hong Kong law regarded this type of union as monogamous, Cairns, J., held that it was for the English law as the *lex fori* to determine whether it, in truth, was so for the purposes of the application of the *Hyde v. Hyde* [(1866), L.R. 1 P. & D. 130; [1861-73] All E.R. 175] principle.

It is submitted that this decision deserves commendation. Whilst

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3 [1966] V.R. 341.

4 [1966] V.R. 341, at p. 347.

5 [1968] P. 564; [1966] 2 W.L.R. 620; [1966] 1 All E.R. 664.

6 [1968] P. 233; [1967] 2 W.L.R. 946; [1967] 1 All E.R. 737.

7 [1965] P. 85; [1963] 2 W.L.R. 17; [1962] 3 All E.R. 873.

8 [1967] P. 14; [1964] 3 W.L.R. 750; [1964] 2 All E.R. 248.

much space has been devoted to the question as to what law governs the question whether a marriage is monogamous or polygamous,[9] it has always seemed to the present commentator that this question was rather a futile one as put, because it was beset by a fundamental ambiguity between the question of incidents and the question of effect. Any principle that the matter was governed by the *lex domicilii*[10] became hopelessly confused once the possibility came to be recognized that a change in the domicile might work a change in the status of the marriage.[11] It is submitted that the *lex loci celebrationis* must determine the factual and jural incidents of the union that was celebrated on its soil, but the question whether the union is polygamous or not must be determined by the *lex fori*. The *lex loci celebrationis* provides, as it were, only the jural raw materials. It must also be for the *lex fori* to determine whether subsequent events such as a change of domicile or of religious faith or of nationality or of tribe convert an initially polygamous marriage into a monogamous one. In *Ali v. Ali*,[12] for instance, English law was consulted not as the later *lex domicilii* but in its quality as the *lex fori*. Any contrary view would mean that if Mr. Ali had changed his domicile to France instead of England, then the question whether the quality of the marriage had changed would be determined *by the law of France*. It is thought that the reference to the *lex fori* is reasonable. The issue is not whether the marriage is void or valid,[13] but whether it is such a union as is capable of the application of English matrimonial relief machinery. It is not unreasonable then to refer the matter to the judgment of the law which provides that machinery.

Lee v. Lau, however, goes on to deal with other points involved in the learning in relation to polygamous marriages. The married pair purported to dissolve the marriage by the execution of a document. The husband, later acquiring a domicile in England and being desirous of remarrying, petitioned for a declaration that the Hong Kong marriage had been validly dissolved by the procedure adopted. Cairns, J., held that he had jurisdiction to make the declaration on the footing that the petitioner was domiciled in England, unless jurisdicton was ousted by reason of other considerations. He also thought that the fact that the divorce was by agreement was not a fatal bar, though he did reinforce his decision here by reference to the fact that it was presented to a local organization and sealed.[14] Cairns, J., then had to face the further difficulty that he might appear to be granting relief in respect of a polygamous marriage—a course which would run

9 E.g. Cheshire, *Private International Law*, 7th ed. pp. 266-73; Nygh, *Conflict of Laws in Australia* (1968), pp. 376-9.

10 See Cheshire, op. cit., p. 267.

11 As in *Ali v. Ali*, [1968] P. 564; [1966] 2 W.L.R. 620; [1966] 1 All E.R. 664.

12 *Supra*.

13 In *Risk v. Risk*, [1951] P. 50; [1950] 2 All E.R. 973, the court deliberately declined to hold a polygamous marriage void though withholding matrimonial relief in respect of it.

14 Something of the same kind of reinforcement was supplied by the Court in *Russ v. Russ*, [1964] P. 315; [1962] 3 All E.R. 193.

directly counter to the *Hyde v. Hyde* decision. In *Russ v. Russ*[15] the Court of Appeal had given recognition to a polygamous ceremony of dissolution, though there is some doubt as to whether what was regarded as dissolved was a polygamous or a monogamous union.[16] However, no active relief in respect of a polygamous marriage was asked for in that case. The simple question was whether the polygamous union (accepting it to be such) was eliminated as a factor bearing on the matrimonial status of Mr. Russ. In the present case the petitioner was asking the court to make an order directly relating to the polygamous union. However Cairns, J., first held that he could pronounce upon the validity of the divorce without adjudicating on the validity of the marriage[17] and, furthermore, that the fact that the marriage was potentially polygamous did not prevent him from judicially determining that it had been dissolved. The last part of his opinion here relied on policy consideratons. If the husband had remarried without taking the present proceedings and had later petitioned for a decree of nullity of such second marriage, the court would have had to determine the question of the effect of the Hong Kong divorce. It was far more desirable that the issue be now settled in these proceedings before he had taken the step of remarrying.

Imam Din v. National Assistance Board[18] raised what might be called the non-jurisdiction effect of a polygamous marriage. It seems to be accepted that the effect of the rule in *Hyde v. Hyde*[19] is to deprive the Court of jurisdiction to grant matrimonial relief in respect of a polygamous marriage and the majority of cases have proceeded on the basis that where the issue of the validity of a polygamous marriage is raised as incidental to other questions, as for instance in questions of succession on death,[20] the matter is settled on normal choice of law considerations, that is the polygamous marriage is treated no worse than any other marriage. It *may* be void but this is so only if the appropriate law governing marriage validity pronounces against its validity.[21] The *Imam Din Case*, however, is not a choice of law case but one on the interpretation of a statute. The question was whether the wife of a polygamous marriage was a "wife" within

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15 [1964] P. 315; [1962] 3 All E.R. 193.

16 Willmer, L.J. (at [1962] P. p. 326) regards both of Esther's marriages as potentially polygamous. Donovan, L.J., on the other hand (pp. 331-3) discussed the matter in terms of the effect of a "talak" decree on a "Christian" marriage.

17 [1967] P. 14, at pp. 22, 23.

18 [1967] 2 Q.B. 213; [1967] 1 All E.R. 750.

19 (1866), L.R. 1 P. & D. 130; [1861-73] All E.R. Rep. 175.

20 *Coleman v. Shang*, [1961] A.C. 481; [1961] 2 All E.R. 406; *Bamgbose v. Daniel*, [1955] A.C. 107; [1954] 3 All E.R. 263.

21 It is submitted that it is legitimate to distinguish the troublesome case of *Re Bethell* (1888), 38 Ch.D. 220; [1886-90] All E.R. Rep. 614, on the score that English internal law as the *lex domicilii* was appropriate to govern the question of legitimacy. There is no doubt that English *internal* law would regard a polygamous marriage as void and English internal law may be in some situations the appropriate law to apply from a conflictual point of view.

the meaning of the National Assistance Act. It was held that the construction of the word "wife" in an English statute depended on the purpose for which, having regard to the object of the statute, the marriage was to be recognized and that, viewed in this light, common sense and justice required that in this case the spouse of a polygamous union should be included. This interpretation seems to introduce a very desirable element of flexibility in this area.

Validity of marriage

The much-queried decision in *Sottomayor v. De Barros (No. 2)*[22] was distinguished by Selby, J., in *Ungar v. Ungar.*[23] Here the marriage was between a woman who was domiciled in Czechoslovakia and an Australian domiciliary who was her uncle. The marriage was performed by proxy but nothing turns on that fact. The marriage was valid by Czechoslovak law but of course was invalid by the law of Australia as being within the prohibited degrees of consanguinity. The court affirmed what may be regarded as the "orthodox" rule propounded by Dicey and his subsequent editors in relation to validity where the suggested invalidity went beyond any matter of form, viz. that where the parties have separate pre-marital domiciles, the marriage must be valid by the law of the domicile of each party. Selby, J., considered that the Matrimonial Causes Act 1959 (Com.) with its emphasis on domicile in matters of jurisdiction and of recognition of foreign decrees, had evinced a clear intention to retain the test of domicile and also to preserve the common law rules of private international law. The petitioner, who was the party asserting the validity of the marriage, could derive no help from *Sottomayor v. De Barros (No. 2)*[24] which upheld the validity of a marriage in the teeth of a prohibition imposed by the law of the woman's pre-marital domicile, because English law as the law of the husband's pre-marital domicile (which was also the law of the place of celebration) regarded the marriage as valid. Here the facts were of a converse nature inasmuch as it was a case where "an Australian domiciliary seeks recognition of a restriction which he claims to be imposed by Australan law".[25] The position of the *Sottomayor* decision still remains dubious but Selby, J., pointed out that in *Miller v. Teale*[26] the High Court of Australia had disapproved *Pezet v. Pezet*[27] which relied on *Sottomayor* and had referred to the latter case as supplying "dubious guidance".[28]

Matrimonial remedies—Action for damages for adultery

The decision of Barber, J., in *Holeczy v. Holeczy*[29] is primarily one on the question of the jurisdiction of the Australian court to enter-

22 (1879), L.R. 5 P.D. 94; [1874-90] All E.R. Rep. 94.
23 (1967), 10 F.L.R. 467; [1967] 2 N.S.W.R. 618.
24 (1879), L.R. 5 P.D. 94; [1874-90] All E.R. Rep. 94.
25 (1967), 10 F.L.R. 467, at p. 472.
26 (1946), 47 S.R. (N.S.W.) 45.
27 (1954), 92 C.L.R. 406.
28 (1954), 92 C.L.R. at p. 414.
29 [1967] V.R. 294.

tain this type of claim. A husband presented a petition for dissolution of marriage on the ground of adultery and claimed damages against one co-respondent who was resident in Hong Kong, was not domiciled in Australia and had not submitted to the jurisdiction. The adultery occurred in Hong Kong. The learned judge regarded the question as to whether it must be shown that a person against whom damages are claimed for adultery had a local domicile as settled by the decision in *Rayment v. Rayment*,[30] where it was held that the citation corresponded to what would have been before the (English) Act of 1857 an action for criminal conversation. The claim, therefore, was a mere personal claim uncomplicated by questions of personal status and the co-respondent who had been served was placed on the same footing with regard to jurisdiction as a defendant properly served with a writ out of the jurisdiction under O. 11 in a personal action. Barber, J., agreed that this represented the position in the proceedings before him. It is clear of course that the position is not altered by the fact that under the Matrimonial Causes Act 1959 (Com.) no claim for damages can be made except on the presentation of a petition for dissolution or judicial separation, that is to say no separate action can be taken for damages for adultery, at least not in federal jurisdiction.

The learned judge then proceeded to ask a second question which was stated by him to involve the question whether the court had jurisdiction in view of the fact that the act of adultery was committed outside the jurisdiction. He proceeded to some discussion of the rules in regard to the question of foreign-committed torts and the conditions set out in *Phillips v. Eyre*.[31] He was troubled over the question of the requirement that the act be "not justifiable" by the law of the place of commission and the suggestion in *Koop v. Bebb*[32] that it was enough that the act abroad was such as to give rise to a civil liability by the law of the place where it was done. He concluded that it was not necessary for him to choose between the decision in *Machado v. Fontes*[33] and the views set out in *Koop v. Bebb* because it was clear here that the law of Hong Kong regarded adultery as a ground for dissolution of marriage and a ground for the award of damages to a husband.

At first glance the learned judge is discussing as a jurisdiction problem what is really a choice of law one. However the trend in recent Australian cases, for instance *Anderson v. Eric Anderson Radio and TV*,[34] a trend which the present commentator regards as deplorable, to treat the *Phillips v. Eyre* formulation as a jurisdictional requirement, makes one suspend criticism on this score. It seems that the analogy between the claim for damages for adultery and the action for tort has a solid basis.[35] The rules relating to foreign torts, however, with

30 [1910] P. 271.

31 (1870), L.R. 6 Q.B. 1, at pp. 28, 29.

32 (1951), 84 C.L.R. 629, at p. 643.

33 [1897] 2 Q.B. 231.

34 (1965), 114 C.L.R. 20.

35 See *Rayment v. Rayment*, [1910] P. 271, at p. 286, per Sir Samuel Evans, P.

acute uncertainties existing as to jurisdictional prerequisites and as to the rules for choice of law assuming that jurisdiction is established, are obviously in such a state of flux that further comment at this point may well be excused.

Matrimonial remedies—Recognition of foreign decrees of divorce

The decision of the House of Lords in *Indyka v. Indyka*[36] was obviously the conflictual highlight of the year 1967. There have been so many commentaries on it that the present discussion may well be somewhat brief. The question was whether a Czech decree, secured at the instance of the wife, was to be recognized in England in a situation where the husband had later remarried in England and in proceedings launched by his second wife in England for a divorce contended that the first marriage was still subsisting. The husband and the first wife were Czech nationals and the domicile and matrimonial residence had been in Czechoslovakia until 1938 when the husband had joined the Czech and later the Polish Army. The husband had obtained an English domicile in 1946. The wife remained in Czechoslovakia until the decree in 1949.

There was no doubt that the wife had had more than three years residence in Czechoslovakia and on the basis of *Travers v. Holley,*[37] as interpreted and extended by *Robinson-Scott v. Robinson-Scott,*[38] a principle had become recognized that where the factual situation was such that, *mutatis mutandis,* the English court could have assumed jurisdiction, the English court would recognize the decree in spite of the fact that the foreign court of decree had not proceeded on the same jurisdictional basis. The only fact which would operate against a *Travers v. Holley* recognition was that at the time of the Czech decree English statute law had not yet introduced the provision conferring jurisdiction on an English court on the basis of three-year residence of the petitioning wife. That came later. Latey, J., held that this was fatal to the recognition of the Czech decree but he was reversed by the Court of Appeal[39] on the ground that it would be against the policy of the *Travers v. Holley* line of decisions to judge the position on the basis of what existed at the time of the Czech decree and that the principle should be applied retrospectively. On appeal to the House of Lords all their Lordships, with the exception of Lord Reid, and possibly Lord Wilberforce, were prepared to uphold the validity of the Czech dissolution on the grounds espoused by the Court of Appeal, but in a bold piece of judicial legislation they were prepared to uphold it on much wider grounds which go considerably beyond the *Travers v. Holley* principle. So far as the United Kingdom is concerned, the old principle of *Le Mesurier v. Le Mesurier*[40] that

36 [1969] A.C. 33; [1967] 3 W.L.R. 510; [1967] 2 All E.R. 689.
37 [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794.
38 [1958] P. 71; [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.
39 [1967] P. 233; [1966] 3 W.L.R. 583; [1966] 3 All E.R. 583.
40 [1895] A.C. 517; [1895-9] All E.R. Rep. 836.

domicile is the only jurisdictional basis in divorce, already eroded by legislation so far as the English courts' jurisdiction is concerned, is now, as a result of this decision, shattered so far as the recognition of foreign decrees is concerned. Lord Reid thought that the prior existence of the matrimonial home in Czechoslovakia was enough. Lords Morris, Pearce and Wilberforce based their judgments on the existence of a "real and substantial connexion" between the petitioner and the jurisdiction in which she obtained the decree. Lord Pearson, however, seemed to regard nationality (or domicile) as the significant basis of foreign jurisdiction but thought that it should be supported by a real and substantial connexion which he thought here existed.[41] He, therefore, appears to regard the latter element as something in the nature of a second string. The majority opinion is clearly in favour of the "real and substantial connexion" test. Nationality and matrimonial residence would be important elements to establish that connexion. All of their Lordships were apparently prepared still to accept domicile as a jurisdictional ground except possibly Lord Pearson who appeared to think that there ought even in the case of domicile to exist some other element to supply a real and substantial connexion.[42] Lord Reid was the only member to reject the *Travers v. Holley* principle though Lord Wilberforce regarded it as no more than a general working principle.[43] Lord Reid regarded the principle as one involving an undesirable social policy in that it would compel the rigid application to foreign decrees of grounds created for the purposes of domestic jurisdiction for reasons applicable solely to considerations of domestic jurisdiction.[44] It seems unlikely, however, that even those Law Lords who approved of the *Travers v. Holley* principle (and the majority did approve of it) would be prepared to give it a rigidly mechanistic application. They were in general not enthusiastic over regarding the residence of the wife alone as in itself supplying a real and substantial connexion[45] and it does not seem that they would regard three years' residence by the wife as sufficient if that residence was merely of a transitory character, notwithstanding that the decision in *Robinson-Scott*[46] might seem to say that recognition should automatically follow on the proof of three years' residence in the foreign country of the decree irrespective of the quality of that residence.[47]

The decision seems to leave some matters unsettled, e.g. whether the "real and substantial connexion" test can be applied to a husband's decree.

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41 [1969] A.C. 33, at p. 111.

42 At p. 111.

43 At p. 106.

44 At pp. 59-60.

45 At pp. 88 (Lord Pearce), 112.

46 [1958] P. 71; [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.

47 Though Lord Pearson does seem to think ([1969] A.C. 33, at p. 112) that it should.

It seems very doubtful whether the High Court of Australia would be prepared to follow the *Indyka* principle. The presence of the Matrimonial Causes Act 1959 (Com.) of itself would not prevent its adoption as s. 95 (5) clearly permits the introduction of the "common law" principles. It must be recalled, however, that *Travers v. Holley* itself received a very mixed reception in this country. In *Fenton v. Fenton*[48] it was rejected by the Full Court of Victoria in a virtually identical situation. Its principle was accepted by the New South Wales Full Court in *Sheldon v. Douglas (No. 1)*[49] but its application was denied on the facts on a rather narrow interpretation. The technique of judicial legislation adopted by the House of Lords may well not commend itself to the High Court, especially when one considers the considerable extension beyond the *Travers v. Holley* principle involved in their approach.

One should not at this stage go into the applications of the *Indyka* principle in later decisions in the United Kingdom as these go beyond the present period reviewed. It may be said, however, that they evince the giving of a broad and liberal interpretation to the concept of "real and substantial connexion". However, there is one 1967 decision which applies something of a brake. In *Peters v. Peters*[50] it was held that the mere celebration of the marriage in the jurisdiction of the foreign decree did not supply the necessary real and substantial connexion.

Succession law—substantive validity, capacity and evidence

In the labyrinthian maze of the *Fuld* litigation it is necessary to concentrate attention only on the decision that is reported under the name of *In the Estate of Fuld, deceased (No. 3)*.[51] The deceased, born in Germany of German nationality, had led a somewhat wandering life in the course of which he had later attained Canadian nationality but had died in Germany. He had left a will and no less than four codicils. Some of these testamentary documents were argued to be invalid as not complying with the formalities of German law and some of them were attacked on the score of lack of testamentary capacity and undue influence. Scarman J., after a long examination of the deceased's movements and life habits, held that he had never lost his German domicile of origin so that at all material times his domicile was in Germany. No comment is offered on this part of the decision.

As regards the issue of testamentary capacity, the learned judge affirmed the old decision of *In the Goods of Maraver*[52] that the *capacity* of a testator was determinable by the law of his domicile, though like the judgment in the old decision he left it uncertain

48 [1957] V.R. 17.
49 [1963] N.S.W.R. 129.
50 [1968] P. 275; [1967] 3 W.L.R. 401; [1967] 3 All E.R. 318.
51 [1968] P. 675; [1966] 2 W.L.R. 717; [1967] 2 All E.R. 649.
52 (1828), 1 Hag. Ecc. 498; 162 E.R. 658.

whether the reference was to domicile at the time of death or at the time of making the will.[53]

He was, therefore, referred to the law of Germany as the law of domicile but thought that German law and English law were alike in that they required that a will express the true wish of a free and capable testator. However, rules as to the incidence of proof might be different as between the two systems. He affirmed the proposition that matters relevant to the proof or disproof of testamentary capacity were part of the law of evidence, therefore part of the law of procedure and therefore governable by the *lex fori*. Thus an English court, if conducting its inquiry *de novo*, must scrupulously follow its own *lex fori* in all matters of burden of proof. He concluded that the English rule commonly described as the principle of knowledge and approval[54] was entirely an evidential rule and hence must be applied by an English court as part of its own *lex fori*.

The learned judge approached the issue of undue influence in the same way. The law which defined the nature and consequence of undue influence was part of the substantive law of wills but any question as to the incidence of proof was for the *lex fori*.

It is appropriate to notice that the learned judge decided the classification question as between substance and procedure in the light of English law though his analysis followed the technique of Uthwatt, J., in *Re Cohn*.[55]

Succession—renvoi

A question of formal validity was also raised as to the codicils in *In the Estate of Fuld (No. 3)*.[56] The validity of the first two codicils was saved by the Wills Act 1861 (Lord Kingsdown's Act) but as the Wills Act 1963[57] was not applicable to the other two codicils, the validity of these had to be referred in the first instance to German law as the law of the last domicile of deceased. This, however, raised a

53 It is submitted that the view taken by Professor Graveson in (1966), 15 I. & C.L.Q. 937, that Scarman, J., indicated a preference for the law of the domicile at the time of the making of the will is without foundation. One does not doubt that had Scarman, J., moved in the direction indicated by Professor Graveson, it would have been a move in a very desirable direction. Unfortunately the devastating fact is that he did *not* move.

54 See *Barry v. Butlin* (1838), 2 Moo. P.C. 480; 12 E.R. 1089; *Wintle v. Nye*, [1959] 1 W.L.R. 284; [1959] 1 All E.R. 552.

55 [1945] Ch. 5.

56 [1968] P. 675; [1966] 2 W.L.R. 717; [1967] 2 All E.R. 49. See footnote No. 51.

57 This Act, which refers the formal validity of a will to a number of different legal systems, has been adopted in Australia in four States, viz. Victoria, South Australia, Western Australia and Tasmania. Queensland and the Northern Territory have adopted somewhat improved versions of Lord Kingsdown's Act whilst New South Wales and the Australian Capital Territory have so far preferred the rigidities of the old rule of *Bremer v. Freeman* (1857), 10 Moo. P.C. 306, that formal validity is rigidly and invariably governed by the law of the last domicile of the testator. South Australia was the only State which, prior to the present spate of legislation, had adopted the (English) Act of 1861 (Lord Kingsdown's Act).

renvoi situation. German internal law regarded the codicils as formally invalid. Ontario internal law as the law of the nationality regarded them as valid. The initial reference was to the law of Germany. The reference, however, was to the totality of German law which in turn referred the matter to the *lex causae* which was defined in the German Civil Code in the case of succession to the estate of a foreigner to be the law of the nationality (Ontario). The reference would be to the whole of the law of Ontario which in this case would look to the law of domicile and re-refer to it. As, however, the German Civil Code provided that in this case German law accepted the *renvoi,* then the correct final solution was to apply German internal law. However, the German Code provided an alternative to the *lex causae,* viz. the law of the place where the will was made (which in the report is referred to as *lex loci actus*). This was Germany, but there was an uncertainty here as to whether German jurists would regard the Code provisions as a reference to the whole of German law, in which case German conflicts law would bring in the application of the law of the nationality, or merely to German internal law. Scarman, J., adopted the second view in reliance on a decision of the Karlsruhe Court of Appeal. Hence both of the alternatives set out in the German Civil Code led finally to the application of German internal law.

It is difficult to see any of this process as anything but an application of the orthodox *foreign court* theory, though Scarman, J., does finally in applying the *lex loci actus* limb of application find himself in something of the same dilemma as that which faced Wynn-Parry, J., in *Re Duke of Wellington,*[58] viz. uncertainty in the law of first reference. It is, therefore, difficult to agree with Professor Graveson in his view[59] that the learned judge followed a novel path in relation to the reference to the law of the nationality in that he treated what under the English foreign court theory would be the second starting point, namely, the foreign system, as the starting point for the whole inquiry.

Foreign torts

Though spelt out clearly in only two of the judgments in *Anderson v. Eric Anderson Radio and TV Pty. Ltd.,*[60] viz. those of Barwick, C.J., and Windeyer, J., there is undoubtedly a clear trend, though arguably a very deplorable one,[61] in that case to regard the two limbs of the oft-quoted rule in *Phillips v. Eyre*[62] as propounding a jurisdictional test only.[63] The decision of Kerr, J., in *Hartley v. Venn*[64] follows that trend though the concentration is necessarily on

58 [1947] Ch. 506; [1947] 2 All E.R. 854.

59 (1966), 15 I. & C.L.Q. 937, at p. 943.

60 (1965), 114 C.L.R. 20; 39 A.L.J.R. 357; [1966] A.L.R. 423.

61 The approach is trenchantly criticized by J. D. McLean in (1969) 43 A.L.J. 183.

62 (1870), L.R. 6 Q.B. 1, at pp. 28, 29.

63 It should be recalled, however, that it is only Barwick, C.J., and Windeyer, J., who propound the question in this form. The observations of the other justices are neutral.

64 (1967), 10 F.L.R. 151.

the second limb of the *Phillips v. Eyre* rule, that is the one that formulates the test of the act being "not justifiable" by the law of the place of commission. For *Hartley v. Venn* was the factual converse of the *Anderson* situation. Here the negligently committed act occurred in New South Wales but action was brought in the Australian Capital Territory courts. The plaintiff was guilty of negligence; this was at the relevant time a complete defence under the law of New South Wales but matter for apportionment of liability only under the Territory law. Kerr, J., had, therefore, to determine the application of the "not justifiable" test as there was no doubt that the other test was satisfied. His approach clearly involves the view that its satisfaction is a jurisdictional or at least a "threshold" matter.[65] Now in the *Anderson Case,* with the exception of Kitto, J.,[66] the members of the High Court regarded "actionable" in the statement of the *first* requirement of the *Phillips v. Eyre* rule as meaning prima facie actionable,[67] that is to say matters of defence were not to be explored at this stage.[68] In substance Kerr, J., applied the same approach to the question of whether the act was "not justifiable". In his reasoning he was even able to rely on the judgment of Kitto, J., in the High Court case because that learned judge, although he considered that the act of the defendant was not an actionable wrong, thought the defendant's act was a wrongful act, one that was tortious in the sense of being legally unjustifiable. Hence in the instant situation Kerr, J., was able to conclude that the conduct of the defendant was "not justifiable" in New South Wales either because it was "actionable" in the sense used by Windeyer, J., in *Anderson's Case* or a non-justifiable tortious act in accord with the concept employed by Kitto, J., in the same case. Hence, despite his negligence, the plaintiff was "over the threshold", as there was no doubt that the act would have been actionable if committed in the Territory.

It is submitted that Dr. Nygh[69] is incorrect in stating that the approach of Kerr, J., was that adopted in the very much discredited case of *Machado v. Fontes.*[70] He (Kerr, J.) was not stating that it

65 It is somewhat difficult to regard the *Phillips v. Eyre* rules as something additive to the normal rule that requires service of the writ on the defendant. Why should there be this further requirement in the case of foreign torts and not in the case of foreign contracts? Is there something essentially *taboo* in the notion of suing in delict which is absent when one sues in contract? Consequently if the statement in *Phillips v. Eyre* is to be regarded as spelling out something other than a plain choice of law requirement, it seems better to refer to such requirement as a "threshold" requirement rather than one which goes to jurisdiction.

66 (1965), 114 C.L.R. 20, at p. 29; [1966] A.L.R. 423.

67 It must be said, however, that with the clear exception of Windeyer, J., and the less clear one of Barwick, C.J., their Honours of the High Court were far from unequivocal on this issue.

68 Of course they came in later in *Anderson's Case,* once the jurisdiction was established, because the law applied by the court was the *lex fori.*

69 (1968), 41 A.L.J. 435.

70 [1897] 2 Q.B. 231.

was enough that the act was "not innocent"; he was insisting on some act in the nature of tortious or civilly delictual conduct. What he was doing was transferring the view of Windeyer, J., which was applied to the first limb of *Phillips v. Eyre*, to the second limb. This was indeed a bold step and may well be inconsistent with the suggestion of the High Court in *Koop v. Bebb*[71] that the act must give rise to a civil *liability* by the law of the place of commission. It is probably inconsistent with the reasoning of Chamberlain, J., in *Li Lian Tan v. Durham*,[72] though in the instant case there was no question of different causes of action being involved.

Once the plaintiff was "over the threshold" in *Hartley v. Venn*, his way was clear. Kerr, J., followed the High Court in *Anderson's Case* in regarding the applicable law on the choice of law level as the *lex fori* and of course that law here said that contributory negligence did not defeat a claim. He did throw out a suggestion that once one approached the stage that the *lex fori* was to be applied, then perhaps the *lex fori* is to be taken as including a principle that defences available under the law of the place of commission are available.[73] The source of this is a reference by Windeyer, J., in *Anderson's Case*[74] to a passage from the 7th edition of Dicey to the effect that any defence valid under the *lex loci delicti* is available to a defendant irrespective of the *lex fori*. It seems, however, that Windeyer, J., is discussing the jurisdiction point and that the passage from Dicey is merely one dealing with the general applicability of the two limbs of the *Phillips v. Eyre* rule at a time when the modern niceties which seem to treat them as purely jurisdictional questions had not been conceived. If those two limbs are purely jurisdictional pre-conditions, then they should have been left behind once Kerr, J.'s plaintiff had passed the threshold. In any event the defendant did not in *Hartley v. Venn* take the point and hence Kerr, J., did not pursue it.

Full faith and credit—revenue laws

The judgment of Dunphy, J., in *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson*[75] in the Supreme Court of the Australian Capital Territory has now been overruled by the High Court of Australia[76] but on a different point and one which did not compel a decision on the question whether what may be roughly called the Australian "full faith and credit" provisions remove the old common law rule that the revenue laws of a foreign State cannot be sued upon as a local cause of action. Consequently the decision of his Honour remains of considerable interest. The factual situation, which may have been the result of some careful thinking on the part of some legal adviser, was that the testatrix, who died domiciled in New South Wales, had made

71 (1951), 84 C.L.R. 629, at p. 643.
72 [1966] S.A.S.R. 143.
73 (1967), 10 F.L.R. 151, at pp. 155, 156.
74 (1965), 114 C.L.R. 20, at p. 44; [1966] A.L.R. 423.
75 (1967), 9 F.L.R. 424.
76 (1969), 43 A.L.J.R. 42.

two wills, one dealing with her New South Wales assets and another dealing with her assets in the Australia Capital Territory to which latter jurisdiction she had transferred the bulk of her assets a short time before her death. A different executor was appointed under each will. The New South Wales executor applied the whole of the New South Wales assets in payment of New South Wales death duties but this left a balance of duties still unpaid. As the New South Wales statute purported to impose death duty on assets situate outside New South Wales where the testatrix had died domiciled in New South Wales, the New South Wales Commissioner for Stamp Duties claimed the balance duty from the Territory executor, who had taken out probate of the Territory will in the Territory court. Dunphy, J., was satisfied of the territorial competence of the New South Wales legislature to impose such a law. He also decided that the amount of balance duty constituted a debt due to the Crown out of the estate of the deceased and that this debt was due irrespective of the identification of the persons liable to pay that debt.[77] At this point he was faced with the existence of the common law rule that the courts of one country will not entertain a suit to recover taxes due under the laws of another country.[78] The question was whether s. 118 of the Constitution, perhaps reinforced by s. 18 of the State and Territorial Laws and Records Recognition Act 1901-1964, removed this disqualification as between two States of the Commonwealth.

Dunphy, J., first was of the opinion that for the purposes of s. 118 a Commonwealth Territory was a part of the Commonwealth wherein full faith and credit must be given to State laws.[79] On the question of the application of full faith and credit doctrine, he turned to American decisions. One difficulty with these was that most of the decisions favourable to the applicability of the full faith and credit principle were cases of suits on a sister-State *judgment* for tax[80] and many dicta in the American courts seemed to draw a distinction between a suit on a judgment for tax brought in another State and a direct action on a "foreign" State tax. The case in which direct recovery of a tax was allowed, viz. *State of Oklahoma v. Rogers,*[81] moreover, was arguably affected by special considerations of reciprocal legislation. However, the learned judge relied strongly on a more recent case of *State of Ohio v. Arnett,*[82] which he thought was unaffected by these special considerations. He came to the conclusion that there was no reason why the full faith and credit provision, extending—as it was stated to do—to the public Acts of every State, should not extend to a public Act which also happened to be a taxing statute.

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77 These are the matters in respect of which Dunphy, J., was reversed in the High Court. It is not proposed to discuss them here.

78 *Government of India v. Taylor,* [1955] A.C. 491.

79 See *Lamshed v. Lake* (1958), 99 C.L.R. 132, at p. 142.

80 E.g. *Milwaukee County v. M. E. White Co.* (1935), 296 U.S. 268.

81 (1946), 238 Mo. App. 1115; 193 S.W. 2nd 919 (Missouri Court of Appeals).

82 234 S.W. 2d. 722 (Court of Appeals of Kentucky).

It may perhaps be thought that Dunphy, J., went beyond the American authorities in much the same way as Fullagar, J., had done years previously in *Harris v. Harris.*[83] Nevertheless, his conclusion seems an eminently common-sense one in the Australian federal situation where it seems a rather strange use of language to refer to a sister-State taxation Act as a "foreign" revenue law.[84]

One matter that Dunphy, J., did not take into account was whether his correct course was to consider the matter as between executors and regard the question as being whether he should order remission of the surplus assets to the New South Wales executor for administration. In that case he would have had, on general principles, a discretion whether to so act or not[85] and it at least seems very arguable that that discretion would exist notwithstanding the existence of the full faith and credit mandate.

83 [1947] V.L.R. 44.

84 Dunphy, J., stresses this point at (1967), 9 F.L.R. p. 436.

85 In accordance with *Re Lorillard,* [1922] 2 Ch. 638; [1922] All E.R. Rep. 500.