BEYOND THE INELUCTABLE:

AN EXAMINATION OF CHOICE OF LAW RULES IN PROPERTY

(Volumes I and II)

VOL. 1

JANEEN MARGARET CARRUTHERS

Thesis submitted for the degree of Ph.D.

School of Law

Faculty of Law and Financial Studies

University of Glasgow

March 2002

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Abstract

This thesis comprises an examination of choice of law rules in property. The study is principally concerned with the Scottish rules of international private law, but these, in turn, rely heavily upon, and in many respects are indistinguishable from, the equivalent English rules. Indeed, they seem in places to be mutually dependent.

An examination is conducted of choice of law methodology, including in particular, an analysis of the configuration of choice of law rules. Consideration is given to the role of the connecting factor, and to the definition thereof, in its spatial, temporal and dimensional contexts. Throughout the thesis, a contrast is drawn between the jurisdiction-selecting approach of Scottish and English international private law, and the rule-selecting techniques which are employed in the United States of America.

Central to the thesis is an examination of the role and definition of the connecting factor in the particular context of choice of law rules in property. The study traces the development of the *lex situs* rule, and its application to dealings with immoveable property, corporeal moveable property and incorporeal moveable property, as well as the special case of dealings with 'cultural property'. Arguments in favour of, and against, the *lex situs* rule, in these various contexts, are considered, and special attention is paid to instances of latent and patent avoidance of the *lex situs* rule.

In order to integrate the methodology analysis with the detailed study of choice of law in property, two alternative Models of suggested choice of law rules in property are presented for consideration; Model 1 is intended to be a draft international instrument, whereas Model 2, the more moderate proposal, is intended only as a draft national measure. The Models seek to embody the author's desire to inject a greater degree of flexibility into choice of law rules in property, and to attempt to formulate even-handed solutions to the complex problems (of space, time and policy) which arise in this area of the conflict of laws.

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Janeen M Carruthers
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1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

1974 UNIDROIT Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Moveables

1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes

1980 European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children

Hague Convention on the Civil Aspects of International Child Abduction

Rome Convention on the Law Applicable to Contractual Obligations

United Nations Convention on Contracts for the International Sale of Goods

1985 Hague Convention on the Law Applicable to Trusts and on their Recognition

1988 UNIDROIT Convention on International Factoring

UNIDROIT Convention on International Financial Leasing

1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons

1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

1999 UNCITRAL Draft Convention on Assignment in Receivables Financing

2000 Hague Convention on the International Protection of Adults

2001 Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

Chapter One

Choice of Law Methodology

The structure of conflict rules

Choice of law rules are typically expressed in the form of an abstract proposition that a given matter is 'governed' by the 'law' of a particular country. Falconbridge has described the structure of a choice of law rule thus, "*The subject of a conflict rule is a legal question arising from a factual situation, and the conflict rule indicates the local element in the factual situation which is important as regards that legal question. This local element constitutes the connecting factor, that is, the element which connects the factual situation with a particular country and thus indicates that the law of that country is the proper law governing the legal question; that is, the law which should be applied to the factual situation for the purpose of affording a definitive answer to the legal question.*" [1]

It is not intended to examine in detail applications of the art of characterisation (that is, whether or not a particular issue in dispute may be subsumed within the abstract proposition specified in the conflict rule).[2] It is, however, intended to analyse the

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[1] Falconbridge, J D, '*Conflict of Laws*' (1954), 2nd edition, p69; Falconbridge, J D, '*Conflict Rule and Characterisation of Question*' (1952) 30 Can. Bar Rev. 103, 264.

[2] The literature on characterisation (or classification) is immense (*e.g.* Beckett, W E, '*The Question of Classification in P.I.L.*' (1934) XV B.Y.B.I.L. 46; Bland, A J, '*Classification Re-classified*' (1957) 6 I.C.L.Q. 10; Dine, J M, '*Choice of Law by Characterisation*' 1983 J.R. 73; Ehrenzweig, A E, '*Characterisation in the Conflict of Laws: An Unwelcome Addition to American Doctrine*' (1961); Forsyth, C, '*Characterisation Revisited*' (1998) 114 L.Q.R. 141; Lipstein, K, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 5 – Characterization*' (1999); Morse, J, '*Characterisation: Shadow or Substance*' (1949) 49 Col. L.R. 1027; Overton, E E, '*Analysis in Conflict of Laws: The Problem of Classification*' (1951) 21 Tennessee Law Rev. 600; Pound, R, '*Classification of Law*' (1924) 37 Harv. L. Rev. 933; Robertson, A H, '*Characterisation in the Conflict of Laws*' (1940); and Unger, J, '*The Place of Classification in P.I.L.*' (1937) 19 Bell Yard 3.) The complexities of the subject are familiar to conflicts scholars: "... *classification is not unique to the*

formulation and purpose of the '*local element*' which links the '*legal question arising from a factual situation*' with the *lex causae*.

The role of the connecting factor in choice of law methodology

The unique quality of choice of law rules is the fact that, in contrast with internal or domestic law rules, they indicate merely the legal system which is to supply[3] the substantive relief or remedy sought in the particular case.[4] Choice of law rules, *per se*, are not generally concerned with the substantive outcome of disputes. Instead of directing the forum to a particular substantive provision (*i.e.* to a "*decisional norm*"),[5] the choice of law technique which is applied by jurisdiction-selection systems merely directs the forum's attention to a certain legal system.[6] The forum should identify the system of law from which a substantive solution to a particular issue is to be supplied, "*... by identifying within the circumstances of the case an element which seems to link those circumstances most strongly with a particular legal system.*"[7] The forum is then expected to extract from within that legal system's body of rules, the decisional norm which that legal system considers should be applied to the issue presented. The choice

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problem of conflict of laws, though the problem is of greater importance in that field than in any other field." (Overton, *ibid.*, p602). Morris explained that, "*Even if, by some miracle, all countries in the world adopted the same formulation of the same conflict rules, it would still not follow that the same case would be decided in the same way irrespective of the country in which it was litigated. This is because, lying hidden beneath the identical formulation of the conflict rules, there would still remain differences of view as to the categories which these rules were intended to cover.*" (Morris, J H C, '*Falconbridge's Contribution to the Conflict of Laws*' (1957) 35 Can. Bar Rev. 610, 618) The indefatigable puzzle and appeal of the subject is plain from the words of Professor Cheshire, who stated, in 1947, that, "*I have modified my views on the baffling problem of classification, probably not for the last time.*", and subsequently, in 1952, that, "*The problem of classification has lost its terrors so far as I am concerned ...* [a] *happy, though probably transient, state of mind.*" ('*Private International Law*', Preface, 3rd edition and 4th editions)

[3] Except, that is, in cases where *renvoi* operates.

[4] Rabel noted that this unique quality resides in the localizing element which "*... prescribes the legislative domain in which the question should be 'localized'.*" (Rabel, E, '*The Conflict of Laws: A Comparative Study – Volume I*' (1958), p47/8; Falconbridge (1954), *ibid.*, p52.

[5] Rosenberg, M, '*The Comeback of Choice-of-Law Rules*' (1981) 81 Col. L.R. 946, at p948.

[6] *Cf.* Baxter, I F, '*Recognition of Status in Family Law*' (1961) 39 Canadian Bar Review 301, at pp341/2: "*Rules for choice of law ... are reduction mechanisms ... enabling the courts of the forum to localize a problem to one system.*"

[7] Anton, A E, '*Private International Law*' (1990), 2nd edition, p72.

of law problem is deemed to have been solved just as soon as the applicable law has been designated by the mechanical allocation or jurisdiction-selecting process. Exceptionally, if the forum were to consider that the rule thus extracted would defeat a 'just' outcome,[8] then rather than ratifying the perceived injustice, the forum may resort to certain escape devices (*e.g.* public policy).[9]

The pivotal element in any choice of law rule is the connecting factor, or localising agent. Vischer has defined this determinant as "*... the element forming one of the facts of the case which is selected in order to attach a question of law to a legal system ... the link between the relationship or the legal issue defined in the conflict rule and a legal system.*"[10] The facts which are localised by the connecting factor constitute the 'matter connected', and the connecting factor, in turn, signifies the proximity which exists between the matter connected and the *lex causae*. If, as Savigny believed, the purpose of choice of law rules is "*To discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is*

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[8] According, that is, to the forum's conception of justice.

[9] Rosenberg considers that devices such as public policy are "*... escape devices that superficially preserve the integrity of the actual choice-of-law system, but actually riddle it with subterfuge.*" (*ibid.*, p948) Only in exceptional circumstances will the result to which the putative *lex causae* leads be taken into account: "*If the result to which application of the designated law leads is repugnant to the concepts of justice and morality of the forum or hurts strong policies underlying the forum law, the foreign rules which would produce such an effect can be set aside as violating the international 'ordre public' of the forum country. Thus, regard is being paid to the substantive rule of the foreign law, but only by way of exception at the end of the allocation process.*" (Sauveplanne, J G, '*New Trends in the Doctrine of P.I.L. and their Impact on Court Practice*' (1982) II *Receuil des Cours* 13, at p24) In a colourful depiction of the traditional approach, Sauveplanne has drawn an analogy with the seventeenth century Italian painter, Luca Giordano's allegorical depiction of justice: "..., *contrary to customary representations, she is not blindfolded but her feet rest on an ostrich and it is well known that this bird has the habit of putting his head into the sand ... when the problem of conflict of law arises, the ostrich raises his head and looks around with a view to choosing the most closely connected legal system. As soon as he has discovered this system he bends his neck over the territory where that system governs and puts his head into the sand, so that he is unable to see what happens when the rules of law from that system are being applied. Only when the result is so shocking that the cry of 'ordre public' is raised with such force that it reaches his ears, he raises his head out of the sand and looks around.*"(*ibid.*, pp24/25)

[10] Vischer, F, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 4 – Connecting Factors*' (1999), p3.

subject (in which it has its seat)",[11] determination of the connecting factor should, in theory, signify the law of the country to which the 'legal relation' in question 'belongs'.[12]

Designation of a connecting factor amounts, in effect, to a policy decision on the part of the *lex fori*, insofar as the connecting factor constitutes a "*signpost to the relevant legal system.*"[13] As Professor Anton has explained, where different connecting factors would point towards different legal systems, "... *the choice of one rather than the other is likely to be dictated by the desire to give effect not only to the policies of the conflicts system of the forum, but to those of the branch of the internal law into which the question falls.*"[14]

In seeking to resolve a choice of law problem, it is necessary to answer two questions, first, what is the connecting factor designated by a particular choice of law rule of the *lex fori*, and secondly, according to which system of law should that factor be defined?[15]

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[11] Savigny, F C, '*A Treatise on the Conflict of Laws*' (1869), p89, paragraph 360.
[12] Savigny, *ibid.*, p89, para 360. As *per* note 3, *supra*, however, determination of the connecting factor will not necessarily determine the *lex causae*, since the legal system indicated by the connecting factor may operate the doctrine of *renvoi*.
[13] Anton, *ibid.*, p72. *Cf.* Vischer, *ibid.*, p3, "*The choice of the connecting factor ... always involves a policy decision, perhaps the most important one in conflict of laws.*"
[14] Anton, *ibid.*, p72. Dine has suggested that a choice of law problem should, in fact, be characterised "... *in the light of the reason for applying a particular connecting factor to a particular type of problem.*" (*i.e.* instead of weighing the merits of competing substantive laws - as interest-analysis theorists would recommend - the forum should weigh the merits of the competing (abstract) connecting factors) (Dine, *ibid.*, p77) Dine submits, at p91, that "... *a comparison of the classification and evaluation of the possible connecting factors ... would be valuable*", since "*the root of the problem ...* [is] *why are we applying a particular law to the question?*" (*ibid.*, p100) It is submitted, however, that the weighing of abstract connecting factors would merely result in the forum being torn by loyalty to different policies enshrined within its various choice of law rules.
[15] *Cf.* Graveson, R H, '*Private International Law*' (1974), 7th edition, p68.

Defining the connecting factor – spatial definition

The range of factual scenarios, or legal relationships, which, for purposes of choice of law, may require to be connected with a legal system, is incalculable.[16] Similarly, the number of potential connecting factors is, in theory, infinite.[17] To instil a degree of pragmatism and control into the choice of law process, legal categories have been defined in relation to which choice of law rules have been formulated. The legal categories and corresponding choice of law rules are relatively broad, and the number of connecting factors, relatively few.[18]

Where a connecting factor is 'factual' (*e.g.* ordinary, and possibly habitual, residence), the definition or interpretation thereof should not present particular difficulties.[19] Where, on the other hand, the factor is 'legal' (*e.g.* domicile,[20] *locus delicti*,[21] *locus contractus*,[22] *locus actus*, or *locus rei sitae*[23]), difficulties of definition and interpretation may be anticipated.

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[16] Consider Cohn's observation that "... *the difficulties facing private international law are so complicated and so extensive that it is completely impossible to draft general rules ... in anticipation of conflicts.*" (Cohn, G, '*Existenzialiasms und Rechtsmissenschaft*' (1955), p119, *per* Neuheus P H, '*Legal Certainty Versus Equity in the Conflict of Laws*' (1963) 28 Law and Contemporary Problems 795, p800)

[17] Lipstein, *ibid.*, p3. *Cf.* Reese, W L M, "*Restatement of Law Second, Conflict of Laws*" (1971) (hereinafter 'the Second Restatement'), paragraph 6, comment c: "[A] *statement of precise rules in many areas of choice of law is made even more difficult by the great variety of situations and of issues.*"

[18] According to Vischer, "*Normally the same connecting factor is adopted for several legal questions falling within the same legal category or legal concept.*" (*ibid.*, p3)

[19] Consider, however, Von Mehren & Trautman's remark that, "*To the extent that the term 'contact point' has ... physical connotations, it is not particularly felicitous ... What is involved is not necessarily a physical connection or a 'point' in any relevant sense.*" (Von Mehren, A T, and Trautman, D T, '*The Law of Multistate Problems – Cases and Materials on Conflict of Laws*' (1965), p103)

[20] *Bell v. Kennedy* (1868) 6 M. (HL) 69; *Udny v. Udny* (1869) 7 M. (HL) 89. And arguably the definition of 'habitual residence' has become as rule-laden (though with less certain rules) as that of domicile.

[21] *Evans & Sons v. Stein & Co* (1904) 7 F. 65.

[22] *Benaim v. Debono* [1924] A.C. 514; *Entores Ltd. v. Miles Far East Corp.* [1955] 2 Q.B. 327.

[23] See Chapter Four, *infra* – 'Defining the '*Situs*''.

In principle, a connecting factor should be defined by the *lex fori*,[24] since conflict of laws rules comprise part of the internal law of the forum[25] (*e.g.* if a Scots forum, applying Scots conflict rules, considers that succession to moveable property is governed by the *lex domicilii* of the deceased, 'domicile' should be determined according to the *lex fori*[26]). The reason for this is clear: as Overton has explained, "*We cannot … refer to the law of any state or nation until we have agreed upon the contact point. We can not* [sic] *use the contact definition of the state whose law will ultimately control because until we define the contact point we do not know whose law will ultimately control.*"[27] In the same way, however, that an enlightened *lex fori* approach should regulate the characterisation process,[28] so too, it is submitted, the forum should adopt an enlightened approach to the definition and interpretation of connecting factors.[29] (*e.g.* If the forum considers that certain property, say, a fixture, is situated in state X, but state X considers that the property is, in fact, situated in state Y, it may be appropriate for the forum to defer to the view of state X).

Defining the connecting factor – temporal definition[30]

Difficulties of definition and interpretation of a connecting factor may arise, not only on the spatial plane, but also on the temporal one. An important distinction exists

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[24] An exception to this rule pertains in relation to nationality (*Oppenheimer v. Cattermole* [1975] 1 All E.R. 538), and possibly in relation to *situs* (See Chapter Four, *infra* – 'Defining the '*Situs*'').

[25] Unger, *ibid.*, p4; Lipstein, *ibid.*, p4; and Vischer, *ibid.*, p21. Hence, the designation '*International Private Law*' is more accurate than '*Private International Law*', for choice of law rules comprise part of the Private Law, not International Law.

[26] *Re Annesley* [1926] Ch. 692.

[27] Overton, *ibid.*, p608.

[28] See Chapter Nine, *infra* – 'The Contract/Conveyance Borderland'.

[29] *Cf.* Vischer, *ibid.*, p21: "*The interpretation of a connecting factor should always take into account the purpose of the conflict rule; it should serve to co-ordinate the national conflict rules with the rules of other states using the same connecting factor … A broader autonomous interpretation seems indicated.*"

[30] See Chapter Four, *infra* – 'Defining the '*Situs*''.

between static, or constant, connecting factors, and dynamic, or variable, factors.[31] Many connecting factors comprise one or more elements which may be altered by the will of the parties in question (*e.g.* domicile,[32] or the *situs* of moveable property). If the relevant connecting factor is variable, there may emerge a '*conflit mobile dans le temps*',[33] and the *lex fori* will be required to determine the precise moment at which the law designated by the connecting factor is to be ascertained.

Temporal conflicts may arise from a change in the connecting factor itself (*e.g.* where A loses his domicile of origin in state X, and acquires a domicile of choice in state Y), or from a change in the substantive law designated by the connecting factor (*e.g.* where the rules of succession applicable in state Y are altered between the date of A's acquisition of a domicile of choice in Y, and the date of A's death, with or without retrospective effect).

When considering *conflits mobiles*, it is necessary also to distinguish between the relevant date on which a connecting factor should be determined, and the period of time which appertains to the finding of facts incidental to that determination (*e.g.* the forum may determine that the *propositus* was domiciled in state X on his or her date of death, but the factual investigation necessary to support such a conclusion may range over the entire life of the *propositus* and, potentially, that of his or her parents).

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[31] "[A connecting factor] *may be of such nature that it necessarily refers to a particular moment and none other, so that further definition can be dispensed with, or it may refer to conditions which extend over a period of time so that a definition of the relevant moment is required.*" (Mann, F A, '*The Time Element in the Conflict of Laws*' (1954) 31 B.Y.I.L. 217, 221) *Cf.* Webb, P R H, and Brown, D J L, '*Casebook on the Conflict of Laws*' (1960), p54.

[32] Noting, however, that it is the combination of intention *and* residence ('*animo et facto*') which is significant. Consider Dr Crawford's explanation: "*Acquisition of a domicile of choice involves a change of both residence and intention ... Retention of a domicile of choice involves retention of either residence or intention ... Abandonment of a domicile of choice involves a change of both residence and intention.*" (Crawford, E B, '*International Private Law in Scotland*' (1998), p78, paragraph 6.08)

The formulation of connecting factors

Connecting factors may be personal[34] or territorial,[35] voluntary[36] or involuntary.[37] More interesting perhaps, is the formulation of connecting factors. The factors referred to thus far (*i.e. locus domicilii, locus rei sitae, locus actus, locus contractus, locus solutionis, locus celebrationis, locus delicti,* and place of incorporation) may be termed 'single-contact' connecting factors, referring specifically, and exclusively, to one legal system.[38] Single-contact connecting factors expressly curtail the range of facts which is deemed relevant to a determination of the *lex causae*. This has invited criticism since, "*Where, as in choice of law cases, the problem is essentially complex, the rules developed must contain variables to permit some degree of accommodation to these complexities whose precise nature cannot be anticipated.*"[39]

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[33] See generally Mann, *ibid.*, and Kahn-Freund, O, '*General Principles of Private International Law*' (1980), p252 *et seq.*

[34] *E.g.* Nationality or domicile: "*... the relevant element is the social connection of an individual with a legal system.*" (Vischer, *ibid.*, p7). Vischer also cites, as an example of a personal connecting factor, adherence to a particular religious community (*e.g. The Sinha Peerage Claim* [1946] 1 All E.R. 348; *Lendrum v. Chakravarti* 1929 S.L.T. 96; and *MacDougall v. Chitnavis* 1937 S.C. 39).

[35] *E.g. locus rei sitae; locus actus; locus contractus; locus solutionis; locus celebrationis; locus delicti; locus concursus* (the state in which bankruptcy proceedings are opened); and place of incorporation.

[36] *E.g. locus actus; locus contractus; locus celebrationis*; domicile of choice; and more broadly, any permitted exercise of party autonomy.

[37] *E.g. locus delicti*; nationality; domicile of origin; and derivative or dependent domiciles.

[38] *Cf.* Von Mehren & Trautman, *ibid.*, at p103: "*Conventional thought calls for identification of 'contact points', that is, of the factual elements of a transaction that connect it with various jurisdictions ... From among these various contact points, traditional thought calls for the selection of the primarily significant contact point.*" ; and Kay: "*The traditional approach focuses on the location of a single conceptual event, generally the state in which the rights asserted by the claimant vested.*" (Kay, H H, '*Testing the Modern Critics Against Moffatt Hancock's Choice of Law Theories*' (1985) 73 Cal. L. Rev. 525, 526)

[39] Cavers, D F, '*A Critique of the Choice-of-law Process*' (1933) 47 Harv. L. Rev. 173, p194. *Cf.* Vischer, *ibid.*, p19: "*The single contact approach has been criticized for exaggerating the importance of the contact chosen, especially in case the legal relationship to which the connecting factor refers englobes a wider range of legal issues.*" This is especially true in cases where an incidental or preliminary question which arises in the course of the principal action is referred to the *lex causae* pertaining to the primary question: reliance is placed upon an *incidental*, single-contact connecting factor

Sometimes, choice of law rules incorporate what may be termed 'multiple',[40] or 'cumulative',[41] connecting factors, the effect of which is to impose a stricter rule of choice of law than would pertain in terms of a single-contact connecting factor.[42]

In contrast with multiple factors, a more liberal approach to choice of law is apparent from the application of rules of 'alternative connection', in terms of which, satisfaction of any one of a range of factors will validate the transaction or other act in question.[43] 'Alternative connection' connecting factors exude a preference for a particular substantive result (*e.g. in favorem* contractual, or testamentary, validity). Rather than achieving a certain substantive result by means of an entirely open-ended connecting factor (*e.g.* the law which upholds the formal validity of the contract or will), the desired result is secured by operation of a rule of delimited optional reference.[44]

Further latitude exists in the freedom, in any conflict of laws case which arises in a Scottish or English forum, for parties to refrain from pleading or proving the relevant

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[40] *E.g.* In terms of section 46(2)(a)(i) of the Family Law Act 1986, recognition, in Scotland, of an overseas divorce *etc.*, obtained otherwise than by means of proceedings, depends, *inter alia*, upon *each* party to the marriage being domiciled in the country in which it was obtained, at the relevant date.

[41] *E.g.* The common law rule (preserved for use, in certain cases, by section 13 of the Private International Law (Miscellaneous Provisions) Act 1995), of double actionability in delict, according to which an act must be actionable as a delict according to the *lex loci delicti, and* by the *lex fori* (See Crawford, *ibid.*, p288, paragraph 13.13)

[42] *Cf.* Vischer, *ibid.*, at p20: "*In the final analysis, the strictest law prevails.*"

[43] *E.g.* Article 9(1) and (2) of the Rome Convention, regarding the formal validity of a contract; and section 1(1) of the Wills Act 1963, concerning the formal validity of a will: compliance with any one of the *lex loci actus*, the *lex domicilii* (at date of execution, or date of the testator's death), the testator's residence (at date of execution, or date of the testator's death), or the testator's nationality (at date of execution, or date of the testator's death), will suffice to make the will formally valid. (Crawford, *ibid.*, p364, paragraph 17.22) It is submitted that the theories variously applied to determine the essential validity of a marriage, namely, the traditional theory (which is itself a 'cumulative' connecting factor, applied distributively, according to which *each* party must have capacity to marry according to his or her ante-nuptial domicile), and the intended matrimonial domicile theory (in terms of which each party must have capacity to marry according to the intended matrimonial domicile), do not constitute an 'alternative connection' connecting factor, but rather amount to rival rules of choice of law.

foreign law, and thereby to induce (albeit indirectly) reference to the *lex fori*. This procedural quirk may be exploited so as to reduce what is a multiple, or cumulative, connecting factor, to a single-contact connecting factor,[45] and to consign a single-contact connecting factor to oblivion. Furthermore, in certain single-contact instances (notably the 'personal' connecting factors), the rules of onus of proof may favour one party over the other (*e.g.* the rules of domicile acquisition, which stand against change).

It is submitted that what are commonly termed 'proper law' rules of choice of law constitute a hybrid of single and multiple contact connecting factors. Proper law connecting factors are generally only ascertainable *ex posteriori*.[46] On the face of it, the 'proper law' epithet points only to *one* connecting factor, typically, to the law with which the transaction (or right) in question is most closely connected.[47] In order to ascertain what that law is, however, account must be taken of connections which exist, first, between the transaction (or right) in question and the putative *lex causae*, and secondly, between that transaction (or right) and other systems of law.[48] In short,

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[44] Vischer has suggested that choice of law rules of this nature are "... *partly conflict rules and partly international substantive rules. By favouring a certain result they attempt to eliminate the blind reference to a foreign law inherent in bilateral conflict rules*." (*ibid.*, p19)

[45] Whilst a Scots forum would have judicial knowledge, in an appropriate case, say, of the choice of law rule of double actionability (*e.g.* where the case fell within section 13 of the Private International Law (Miscellaneous Provisions) Act 1995), if neither party were to plead or prove the foreign *lex loci delicti*, the content of that law would be presumed to be the same as the Scots *lex fori*. Technically, the cumulative connecting factor would still apply, but, in practice, it would amount to no more than a single-contact connecting factor.

[46] Although they must exist *ab initio*: *The Armar* [1981] 1 All E.R. 498. Consider Crawford, *ibid.*, p253, at paragraph 12.34: "... *the proper law was held to attach ... at the time the contract was made, even though it might not be visible and might require to be discovered*." But see further Plender, R, and Wilderspin, M, '*The European Contracts Convention: The Rome Convention on the Choice of Law for Contracts*' (2nd ed.) (2001), paragraph 5-05 (suggesting that a contract – at common law – could be regarded as governed by its proper law objectively ascertained, until the event occurred or option was exercised to 'fix' the governing law; and to similar effect under the Convention (paragraph 5-06).

[47] *E.g.* Article 4(1) of the Rome Convention: "... *the contract shall be governed by the law of the country with which it is most closely connected*."

[48] *E.g.* Article 3 of the Rome Convention, where the law chosen by the parties has not been expressed, but rather has been "... *demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case*."; and Article 4(5): "... *the presumptions in paragraphs 2, 3 and 4 shall be*

a 'single-contact' connecting factor disguises what transpires to be a 'multiple-contact' reference. It is submitted, therefore, that 'proper law' rules constitute 'complex' or 'aggregate' connecting factors. In contrast with 'multiple' or 'cumulative' contact connecting factors, it is suggested that 'complex' or 'aggregate' factors necessitate a qualitative, rather than a purely quantitative, evaluation of contacts.[49]

If the choice of law rule in question should take the form of a presumptive proper law,[50] generally it will be necessary, in order for the presumption to operate, that the 'primary' connecting factor (*i.e.* the factor in favour of which the presumption operates)[51] should be buttressed by subsidiary connections. Otherwise, the presumption will likely be rebutted.[52]

Recent trends in the formulation of connecting factors

Since the 1970s, there has been a change[53] in American conflict of laws theory and practice. The modern tendency in choice of law is to "... *suppress the choice of connecting factors by the lawmaker and to replace it by a choice of connecting factor*

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disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country." *Cf.* Vischer, *ibid.*, p14, "*A legal relationship can be localized by taking into account a variety of circumstances without giving beforehand preference to any specific contact. The goal is to identify ex post the law with which the relationship or legal transaction has the closest and most real connection.*"

[49] See note 121, *infra*.

[50] *E.g.* Article 4(2), (3) and (4) of the Rome Convention.

[51] *E.g.* The habitual residence of the characteristic performer (Article 4(2), Rome Convention); the *situs* of immoveable property (Article 4(3), Rome Convention); or the carrier's principal place of business (being also the country of loading or discharge, or the principal place of business of the consignor) (Article 4(4), Rome Convention).

[52] *E.g.* The corrective mechanism contained in Article 4(5) of the Rome Convention. *Cf.* Vischer, *ibid.*, at p19, "*In a system of grouping of contacts, the main connecting factor is relevant only if it is reinforced by other contacts pointing to the same law.*"; and Lagarde, P, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 11 – Public Policy*' (1994), p3.

[53] Described by some as a 'revolution'. (*E.g.* Jeunger, F K, '*Amercian and European Conflicts Law*' (1982) Am. Jo. of Comp. Law 117, 132; Trautman, D T, '*The Revolution in Choice of Law: Another*

in each case ad hoc by the decision maker."[54] This 'softening' process represents, in the U.S.A. at least, the "*dominant characteristic of the contemporary development of private international law.*"[55] The process has occurred against the backdrop of the rule-selection regime, and has entailed the replacement of 'hard' connecting factors (*i.e.* traditional, single-contact factors), with 'soft' ones (*i.e.* complex, or aggregate, connecting factors). The softening phenomenon, which has been dubbed "*legal impressionism*",[56] also comprises the rejection of strict, inflexible rules and "... *the adoption of principles which owing to their generality and indistinctness leave as much as possible to the decision of the individual case.*"[57]

Arguably, the germ of the softening process was inherent in Savigny's doctrine of the '*sedes obligationes.*'[58] The *sedes* principle, the purpose of which was to localize the

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Insight' (1986) 99 Harv. L. R. 1101; and Vitta, E, '*The Impact in Europe of the American "Conflicts Revolution"*' (1982) 30 Am. Jo. of Comp. Law 1)

[54] Kahn-Freund, *ibid.*,p260.

[55] Kahn-Freund, *ibid.*, p260. *Cf.* The remarks of Vitta: "*Such a softening process characterises all of the American theories. European scholars might then profit from the perspectives afforded by American proposals and experiences.*" (*ibid.*, p8); and Kegel: "*Altogether it seems to be a sign of the times to soften up strict forms.*" (Kegel, G, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 3 – Fundamental Approaches*' (1986), p63)

[56] Loussouarn, '*Course Général de droit international privé*' (1973) II *Receuil des Cours* 271, 338 (*per* Kahn-Freund, *ibid.*, p264).

[57] Kahn-Freund, *ibid.*, p261. Kahn-Freund argued that the advent of more flexible concepts was a necessary reaction to the growth of, and changing techniques employed in, international trade: "*All attempts to cope with the problems of international commercial law with the help of 'hard' concepts ... foundered on the facts of life.*" (*ibid.*, p262) He considered that the basis of this methodological metamorphosis was a "*plea of necessity.*"(*ibid.*, p274) *Cf.* Kegel, who opined that, "*The hostility of the* [American] *innovators to 'rules' and their inclination towards decisions ad hoc, based on far-reaching considerations of legal policy, has its origin in realism.*" (*ibid.*, p65) The perceived inadequacy of 'hard' rules prompted Kahn-Freund to argue that, "*It is useless simply to lament the sacrifice of predictability upon the altar of 'equity' ... or to deny such tendencies as 'nihilism'.*" (*ibid.*, p261) *Cf.* Ehrenzweig, A A, '*A Treatise on the Conflict of Laws*', (1962) p548.

[58] Consider, for example, Audit's observation that, "... *the 'Bealian' rules of the 1st Restatement and the Continental (or 'Savignian') rules rested on quite different bases. The latter are founded on much the same analysis that was developed in the United States to depart from the former. The approach incorporated in the 2nd Restatement is thus more likely to close the gap between American and European solutions or bring them closer together than they were under the 1st Restatement (or would have been had the Restatement been faithfully applied).*" (Audit, B, '*A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles*' (1979) 27 Am. Jo. of Comp. Law 589, p590)

seats of particular obligations,[59] enhanced the power of the decision-maker. More conspicuously, the softening process both triggered, and resulted from, the substitution in the United States of the Second[60] for the First[61] Restatement of Conflict of Laws. While 'hard' connecting factors, amounting to "... *crystallisations of a policy to find the system of law with which a type of issue has its closest link*"[62] were the hallmark of the First Restatement,[63] the Second Restatement embodied the widespread preference for 'soft' connecting factors.[64]

The choice of law process: 'rules' v. 'approach'?

Related to the question whether it is preferable to employ 'hard' as opposed to 'soft' connecting factors, is the question whether it is better to construct a framework of choice of law *rules*[65] (exemplified by the technique of jurisdiction-selection), or to cultivate a fluid *approach*[66] to choice of law (exemplified by the technique of rule-selection). The choice between application of mechanical rules, and implementation of a flexible approach, rests ultimately upon whether it is deemed preferable to employ precise rules which may prove inappropriate, or inadequate, in a *particular*

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[59] Savigny considered that, "... *the whole problem comes to be – To discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).*" (Savigny, *ibid.*, p89, paragraph 360) Later, Savigny suggested that the proper enquiry should be, "*Where is the true seat of each obligation; at what place is its home?*" (*ibid.*, p148, paragraph 369)

[60] (1971), Reporter Willis Reese.

[61] (1934), Reporter Joseph Beale.

[62] Kahn-Freund, *ibid.*, p263.

[63] *E.g.* Paragraph 257: "*Whether a conveyance of a chattel which is in due form and is made by a party who has capacity to convey it is in other respects valid, it determined by the law of the state where the chattel is at the time of the conveyance.*"

[64] Note 81 *et seq.*, *infra*.

[65] "*By 'rule' is meant a phenomenon found in most areas of the law, namely a formula which once applied will lead the court to a conclusion. To be sure, there will inevitably be questions as to the proper scope of the rule, including questions as to how the words that comprise the rule should be defined. But once it has been decided what a rule means and how it should be applied, a conclusion will be reached through the rule's application.*" (Reese, W L M, '*General Course on Private International Law*' (1976) II *Receuil des Cours* 2, at p44)

[66] "*By 'approach' is meant a system whose application will not of itself lead to a conclusion since it does no more than state what factor or factors should be considered in arriving at a conclusion.*" (Reese, (1976), *ibid.*, at p44)

case,[67] or to adopt a discretionary approach which may engender greater difficulty in its *general* application.[68]

Traditionally, choice of law rules (classically formulated), were few in number,[69] and all embracing in character (*e.g.* the rule that *all* questions concerning the cross-border transfer of property should be governed by the *lex situs*). It is said that rules of this type foster certainty and predictability, and thereby facilitate the judicial task. Reliance upon strict rules, however, places a heavy onus on the effective operation of the characterisation process. This is less true of discretionary approaches to choice of law, which seek only to identify the law with which a particular matter is most closely connected. In the recent case of *Raiffeisen Zentralbank Österreich v. Five Star Trading LLC*,[70] Mance, LJ. adverted to the sometimes-artificial constraints of the characterisation process, warning that, "... *the conflict of laws does not depend like a game or even an election upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.*"[71] The contest between '*rigid rules*' and '*appropriate principles*' mirrors that which pertains between 'hard' and 'soft' connecting factors.[72]

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[67] Von Mehren & Trautman, for example, wrote of the "*troublesome*" matter of "... *individualization of the rule to fit the facts of particular cases.*" (*ibid.*, p104) This, of course, is true of all rules.
[68] *Cf.* Carter, P B, '*Rejection of Foreign Law: Some P.I.L. Inhibitions*' (1984) 55 B.Y.B.I.L. 111, 112.
[69] Consider Dr Crawford's comment that, "... *the remark has been made to me that it* [international private law] *could all be written down on the back of an envelope.*" (Crawford, E B, '*What Happened to Indyka?*', p176, in Gamble, A J (ed.), '*Obligations in Context*' (1990))
[70] [2001] 2 W.L.R. 1344.
[71] *Ibid.*, p1356. As Binchy has advised, however, "... *ordinary life, let alone the legal process, would become unmanageable if we were to avoid the categorisation process.*" (Binchy, W, '*Irish Conflicts of Law*' (1988), p28) *Cf.* Von Mehren & Trautman, *ibid.*, at p437: "*The use of abstractions and categories are necessary to render manageable the infinite detail of immediate experience ... appropriate use of abstraction economizes on time and energy.*" Characterisation, however, must necessarily involve some loose ends; these, it has been suggested, rest more easily with a choice of law *approach*, than with a system of strict choice of law *rules*.
[72] See generally Kegel, G, '*Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*' (1979) 27 Am. Jo. of Comp. Law 615.

In favour of '*rigid rules*' – jurisdiction-selection

As has already been indicated,[73] legal systems which adhere to jurisdiction-selection methodology[74] allocate factual situations or legal relationships to systems of law (the *lex causae*), "*... by means of pre-established connecting factors without taking into account the concrete circumstances of the case.*"[75]

Jurisdiction-selection mandates that the forum adopt a mechanical approach to choice of law: "*The judge's attention is diverted from the problems of policy posed by the facts and the alternative solutions suggested by the dispositive rules to the remote and taxonomic issue of assigning the dispositive rules to some general rubric of law.*"[76] The methodology relies heavily upon rote application by the forum of connecting factors, particularly factors which do not necessitate evaluation or appraisal by the forum of competing contacts. The technique has been condemned by American

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[73] Note 6, *supra*.

[74] Consider Carter's remark that jurisdiction-selection is a "*fundamental assumption of orthodox private international law.*" Carter suggests that the technique "*... remains firmly embedded in English private international law doctrine.*" (*ibid.*, p112)

[75] Sauveplanne, *ibid.*, p34. Cavers argued that, within the context of the allocation method, "*... considerations* [of justice and social expediency] *are still harnessed to the old task of devising (or justifying) rules for selecting the appropriate jurisdiction whose law should govern a given case.*" (Cavers (1933), *ibid.*, p178) *Cf.* Currie's description of jurisdiction-selection: "*When a conflict-of-laws case comes before a court, the court is not supposed to adjudicate it - that is, to bring its intelligence to bear upon the reason and policy and history of the laws in question, and their application to the facts at hand, so as to do justice to the parties under law.* [The judge] *is supposed to feed the data into the machine, using certain standard procedures, and to write down as his decision the result that comes out of the machine. He is not supposed to question the wisdom, or soundness, or justice of the result, nor to think, or even talk in terms of competing policies.*"(Currie, B, '*Selected Essays on the Conflict of Laws*' (1963), p138/9); Kegel, G, '*The Crisis of Conflict of Laws*' (1961) II Receuil des Cours 95, p177; and Cavers, "*... a court faithful to the conventional approach will turn in search of a conflicts of law rule to determine the jurisdiction whose law should govern the question at issue. The conflicts rule indicates in which jurisdiction the appropriate law may be found. Assuming the law offered to be from that jurisdiction, the court will proceed with the case, employing that law as a rule of decision. Not until its admission for that purpose does the content of that law become material.*" (Cavers (1933), *ibid.*, p178)

[76] Hancock, M, '*Three Approaches to the Choice-of-Law Problem: the Classificatory, the Functional and the Result-Selective*', p367. (In '*XXth Century Comparative and Conflicts Laws – Essays in Honour of Hessel E Yntema*') (1961)

scholars, as "*metaphysical in concept, mechanistic in operation and myopic as to consequences.*"[77]

In favour of '*appropriate principles*' – rule-selection

The theme that unites 'modern' theories about choice of law methodology, is censure of the mechanical application of pre-determined connecting factors. Traditional methodology has been portrayed as an example of "... *robot-like machinery, operating at random, producing spurious results, without bothering about their soundness and disregarding social realities.*"[78] In contrast, rule-selecting theorists replace choice of law *rules* with a choice of a law *process*.[79]

Rule-selection adherents consider that regard should be paid to the particular nuances of individual cases and to the policies of interested states. Otherwise, it is contended, the routine application of hard rules may lead to a result which furthers the interests of no particular state, and which, in addition, may infringe the interests of more than one.[80] This belief has resulted in the expansion of rule-selecting techniques, the most favoured of which is interest analysis. Interest analysis will be discussed in detail in Chapter Seven, *infra*, but it suffices to note that, for reasons there outlined, it is not

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[77] Rosenberg., *ibid.*, p948.

[78] Vitta, *ibid.*, p7. *Cf.* Cavers' verdict that, "*The court ... is engaging in a blindfold test. The court must blind itself to the content of the law to which its rule or principle of selection points and to the result which that law may work in the case before it. The conflicts rule having pointed out the jurisdiction in which the appropriate law may be found, judicial scrutiny of that law, except for the purpose of its application, is henceforth proscribed.*" (Cavers (1933), p180); and De Nova's finding that the 'blindfold test' operates as if the reference were to "... *closed boxes, only the chosen to be opened and scrutinised for its contents after the choice has been made on the basis of external factors.*" De Nova alternatively compared the jurisdiction-selecting approach to a coin which, "... *when inserted in the doctrinal slot machine, produces the appropriate jurisdiction, provided the coin fits the slot.*" (De Nova, R, '*Glancing at the Content of Substantive Rules Under the Jurisdiction-Selecting Approach*' (1977) 41 Law and Contemporary Problems 1, p5) Such portrayals amount to a '*caricature*' of the traditional method, viewed invariably through the '*distortions of American spectacles*'. (Van Hecke, G, (1969) *Receuil des Cours* 329, 399, *per* Vitta, *ibid.*, p7)

[79] Kegel (1986), *ibid.*, p43.

[80] Reese, W L M, '*Major Areas of Choice of Law*' (1964) I *Receuil des Cours* 315, 330.

considered that the theory would favourably, or usefully, be imported into Scots or English choice of law methodology. Whilst it may be argued that interest analysis epitomizes a 'soft' approach to choice of law, the theory is concerned less with the formulation of connecting factors, than with the interests and policies underlying rules of substantive law. Of greater relevance to a consideration of connecting factors, is the localising agent utilised in the Second Restatement of Conflict of Laws, namely, the '*most significant relationship*' test (hereinafter, 'the MSR test').

The Second Restatement[81] adopts as the basic criterion for choice of law, the law of the state with which the issue[82] in question has the most significant relationship.[83] Within the Second Restatement, one can discern qualities reminiscent of the objective theory of the proper law of a contract,[84] and of the 'centre of gravity' and 'grouping of contacts' theories developed in the U.S.A., first in relation to choice of law in contract, and later, choice of law in tort.[85] According to the latter of these theories, the

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[81] The Second Restatement has been described by Morris as, "... *the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time.*" (Morris, J H C, '*Law and Reason Triumphant – or – How Not to Review a Restatement*' (1973) 21 Am. Jo. of Comp. Law 322, 330) According to Kegel, "[it] *represents a compromise between traditional conflicts law and modern American doctrines*." (1986, *ibid.*, p62)

[82] The MSR test is issue-oriented, proceeding on an issue-by-issue basis. (Shapira, A, '*The Interest Approach to Choice of Law*' (1970), p210) Shapira has suggested that, "*this growing quest for particularization in the choice-of-law process introduces into traditional conflicts thinking a fresh, progressive element, which is perhaps of a more radical significance than is ordinarily perceived.*" (*ibid.*, p211)

[83] Proceeding from the MSR basis, it is explained that, "*Those chapters in the Restatement ... which are concerned with choice of law state the rules which the courts have evolved in accommodation of the factors listed in* [paragraph 6]*(2).*" (paragraph 6, comment c)

[84] *E.g. The Assunzione* [1954] P. 150; and *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co., The Al Wahab* [1983] 2 All E.R. 884.

[85] *E.g. Auten v. Auten* 308 N.Y. 155, 124 N.E. 2d 99 (1954); *Babcock v. Jackson* 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963) (*per* Shapira, *ibid.*, p209). Decisions such as these prompted Reese's remark that, "*... the conflict of laws is in a state of flux. This is particularly true of that most difficult area of the subject ... choice of law ... This surely is a time for soul-searching and re-evaluation.*" (Reese, W L M, '*Conflict of Laws and the Restatement Second*' (1963) 28 Law and Contemporary Problems 679, at p679)

jurisdiction "*most intimately connected with the outcome of* [the] *particular litigation will be accorded control over the legal issues implicated in the controversy.*"[86]

It was surmised by the drafters of the Second Restatement that, in course of time, fixed rules would be proved wrong or inadequate. In the reformers' learned view, what was required was that, "*... in each case, all of the policies must be considered and a choice of law rule developed that will give effect to what are the most important policies for the precise purpose at hand.*"[87] Accordingly, the Restatement stipulates that the MSR criterion should be ascertained in accordance with the principles listed in paragraph six of the Restatement, *viz.*:-

"*(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law;*

(2) Where there is no such directive, the factors relevant to the choice of the applicable rule of law include: -

(a) needs of the interstate and international systems;[88]

(b) relevant policies of the forum;[89]

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[86] *Auten v. Auten*, *ibid.*, *per* Fuld, J.

[87] Reese (1963), *ibid.*, p698

[88] Professor Reese, Reporter for the Second Restatement, outlined how "*Choice of law rules ... should seek to further harmonious relations between states and to facilitate commercial intercourse ... Adoption of the same choice of law rules by many states will further the needs of the interstate and international systems.*" (paragraph 6, comment c)

[89] A strong sense of interest analysis is introduced in this factor, *viz.*: "*If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made.*" (paragraph 6, comment b) Consider, in contrast, paragraph 9, which states that, "*A court may not apply the local law of its own state to determine a particular issue unless such application of this law would be reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved.*" It is interesting to note that the revised Restatement was written from the perspective of a neutral forum having no interest of its own to protect. (Reese (1963), *ibid.*, p692) As Kegel has noted, however, only rarely in a conflicts case is the forum entirely neutral. (1986, *ibid.*, p62)

(c) *relevant policies of other interested states and the relative interests of those states in the delimitation of the particular issue;*[90]

(d) *protection of justified expectations;*[91]

(e) *basic policies underlying the particular field of law;*[92]

(f) *certainty, predictability and uniformity of result;*[93] *and*

(g) *ease in the determination and application of the law to be applied."*[94]

Professor Reese reported that the paragraph 6(2) factors were not intended to be exclusive.[95] Furthermore, he advised that, "*Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law.*"[96] This is inevitable, for even a brief consideration of the paragraph 6(2) principles will demonstrate how certain factors will, on occasion, pull the court in different directions[97] (*e.g.* ease in determining the applicable law (paragraph 6(2)(g)), does not sit comfortably with the principle of paying due consideration to the policies of other interested states (paragraph 6(2)(c)).

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[90] This factor intensifies the interest-analysis character of the Restatement, requiring not only that the forum should ascertain the policies and interests of a particular state, but also that it should weigh the respective strengths of those policies and interests.

[91] This factor disregards the fact that such expectations as exist generally pertain to substantive result, not choice of law. (paragraph 6, comment d)

[92] The same objections may be made in respect of this factor, as may be levied against interest analysis generally. See Chapter Seven, *infra* – 'Cracks in the Monolith – Particular Instances'.

[93] Significantly, Professor Reese expressed the view that, "... *it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules.*" (paragraph 6, comment f) This statement possibly captures the primary divergence between rule-selection and jurisdiction-selection supporters.

[94] Akin to the sentiments expressed in note 89, *supra*, the Reporter advised that, "*This policy should not be over-emphasised, since it is obviously of greater importance that choice of law rules lead to desirable results.*" (paragraph 6, comment g)

[95] Thus, says Kegel, "... *the elasticity of the basis is increased.*" (1986, *ibid.*, p59) Significantly, however, as Kegel has noted, "... *these unspecified factors are not mentioned again as the Restatement unfolds.*" (*ibid.*)

[96] Reese, paragraph 6, comment (c). *Cf.* paragraph 222, comment b: "*The factors listed in paragraph 6(2) vary somewhat in importance from field to field.*"

[97] Professor Reese acknowledged that, "... *any choice of law rule, like any other common law rule, represents an accommodation of conflicting values.*" (comment (c)) *Cf.* Kegel (1986), *ibid.*, p59.

The MSR test applies to the full spectrum of choice of law issues. Its application to property matters[98] is expressed in paragraph 222, *viz.*: "*The interests of the parties in a thing are determined, depending upon the circumstances, either by the 'law' or the 'local law' of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in para 6.*"[99]

As regards the transfer of interests in immoveable property, it is considered that, "*... the factors listed in para 6(2) lead to the application of the law that would be applied by the courts of the situs.*"[100] Professor Reese's commentary regarding the transfer of interests in moveable property is less prescriptive.[101] Instead of the 'quasi-presumption' in favour of the *lex loci rei sitae*, it is merely provided that, "*In determining the state of the applicable law, greater weight will usually be given to the location of the chattel ... at the time of the conveyance than to any other contact.*"[102]

In situations where the *situs* is transient or fortuitous, the premise that the *situs* will be

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[98] From the wording of paragraph 222, comment b, it appears that this rule is intended to apply to moveable *and* to immoveable property.

[99] It is stated in paragraph 222, comment a, that, "[The] *principle is applicable to all things, to all interests in things and to all issues involving things*."

[100] Paragraph 222, comment b. On account of the general wording of paragraph 6, however, this can constitute no more than a presumption in favour of the *lex situs*.

[101] The introductory note to paragraph 244, which may be rebutted in the exceptional case, recognises that, "*A state is unlikely to have the same interest in a chattel within its territory as it has in land situated there.*" (Reese, 1971, p65) *Cf.* paragraph 244, comment f, and paragraph 251, comment g. Note also paragraph 244, comment c: "*The principles stated in paragraph 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship with respect to the particular issue, of the potentially interested states to the parties, the chattel and the conveyance.*"

[102] Paragraph 244, comment f. Later in this commentary, the Reporter indicates that, "*In determining the state of most significant relationship and thus of the applicable law, the forum will consider other contacts in addition to the location of the chattel ... Thus, the forum will consider the domicile, nationality, place of incorporation and place of business of the parties. Also where it is understood that a chattel will be moved to a more or less permanent location following the conveyance ... the place of its intended destination.*"

given greater weight, is displaced,[103] as is also the case where the transfer in question concerns aggregate moveables.[104]

To some extent, the perceived value of the flexibility of the MSR approach has been undermined by Professor Reese's declaration that, "*I believe that one ultimate goal, be it ever so distant, should be the development of hard-and-fast rules of choice of law. I believe that in many instances these rules should be directed, at least initially, at a particular issue.*"[105] The hope, it seems, was that from broad guidelines, narrow rules would ensue. The remark conveys an impression that choice of law 'rules' are, in fact, caught in a cycle: hard-won, 'hard' rules may gradually be diluted until such time as application of the exception(s) is more frequent than application of the rule itself. As a result, the rule and exception(s) evolve into a softer 'proper law' approach, from which, in time, inchoate, and ultimately, refined rules develop.[106]

In 1982, Professor Reese defended the approach of the Second Restatement, asserting that, "*American choice of law is not as unruly and chaotic as is generally*

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[103] The Reporter stated that, "*The importance of a chattel's location at the time of the conveyance ... depends upon the intended permanence of this location ... when it is understood that the chattel will be kept only temporarily in the state where it was located at the time of the conveyance ... it is more likely that, with respect to the particular issue, some other state will have the most significant relationship to the parties, the chattel and the conveyance and be the state of the applicable law.*" (paragraph 244, comment f) *Cf.* paragraph 251 (concerning security interests in chattels), comment e: "... *when it is understood that the chattel will be kept only temporarily in the state where it was located at the time the security interest attached ... it is more likely that, with respect to the particular issue, some other state will have the most significant relationship to the parties, the chattel and the security interests and be the state of applicable law.*" *E.g. Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc* 717 F.Supp.1374, 917 F.2d. 278.

[104] "*If ... the chattels composing the group are scattered more or less evenly throughout a number of states, the forum will give predominant weight to other contacts* [*i.e.* other than location] *in determining the state of the applicable law.*" (paragraph 244, comment f)

[105] Reese (1976), *ibid.*, p180; Cheshire & North, '*Private International Law*' 13th edition, p29. This endorses Reese's previously expressed wish that, "*What is needed ... is a large number of relatively narrow rules that will be applicable only in precisely defined situations.*" (Reese (1963), *ibid.*, 681. *Cf.* Shapira, *ibid.*, p211)

[106] *E.g.* The development of Scottish and English rules of choice of law in delict.

supposed."[107] It is submitted that the truth of the Reporter's statement is supported by an examination of the operation of the MSR test in the case of *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*[108] The case concerned a claim by the Republic of Cyprus, and its Church, against the purchaser of four stolen Byzantine mosaics, for recovery of possession thereof. One of two choice of law issues which arose[109] concerned the law applicable to determine the validity of the transfer of title to the mosaics, to the defendant. The matter was litigated in an American forum, and the question for the U.S. District Court (Indianapolis Division) was whether the law of Indiana,[110] or the law of Switzerland, should apply.

Supporting the application of Swiss law was the fact that when the purchaser took possession and control of the mosaics, they were situated in Switzerland. In contrast, application of the law of Indiana was supported by the following facts: the purchaser, Peg Goldberg, was a citizen of Indiana; the defendant corporation had its principal place of business in Indiana; the purchase of the mosaics was effected principally through the efforts of an Indiana art dealer; the purchase was financed by a loan from an Indiana bank; several Indiana residents were entitled to profits realised upon the eventual re-sale of the mosaics by Goldberg; the original re-sale agreement provided that the law of Indiana would govern any disputes; and, finally, the mosaics were situated in Indiana at the time of the action.[111]

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[107] Reese, W L M, '*American Choice of Law*' (1982) 30 Am. Jo. of Comp. Law 135, 146. Consider, for example, Kegel, who suggested that the Restatement does no more than "... *define the task of conflicts law, which is to determine the law which justice requires to be applied.*" (Kegel, 1986, *ibid.*, p63)

[108] 717 F.Supp.1374, 917 F.2d. 278.

[109] The second choice of law issue concerned the operation of rules of prescription and limitation of actions (in respect of which, see Chapter Twelve, *infra* – 'The '*Situs*' Rule – For and Against').

[110] *Including* its choice of law rules (*per* Bauer, CJ., at 917 F.2d 278, paragraph 286).

[111] 717 F.Supp.1374, paragraphs 3 and 1394, *per* Noland J. *Cf.* 917 F.2d 278, *per* Bauer, CJ., at paragraph 287.

Having weighed these various factors, the District Court concluded that "... *because the place where the mosaics were purchased, Switzerland, has an insignificant relationship to this suit,*[112] *and because Indiana has greater contacts and a more significant relationship to this suit,*[113] *the substantive law of the state of Indiana should apply to this case.*"[114] According to the law of Indiana, Goldberg obtained no title to, or right to possession of, the stolen items,[115] and accordingly, was unable to pass any right of ownership to subsequent purchasers.[116] As a result, possession of the mosaics was awarded to the plaintiff. The defendant's appeal was refused by the U.S. Court of Appeals, Bauer, CJ. affirming Noland, J.'s application of the law of Indiana.[117]

It is important to note that the plaintiff's suit was an action in replevin, that is, "*An action for the repossession of personal property wrongfully taken or detained by the defendant.*"[118] Strictly, Indiana law was applied on the basis of the choice of law rule in *tort*, not the rule of *property*. The relief sought, however, was clearly proprietary: as Noland, J., explained, "*Under Indiana law, replevin is the proper legal theory for the recovery of personal property ... the issue necessarily decided in a replevin action*

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[112] Noland, J. advised that, "*Switzerland's lack of significant contacts is also highlighted by the fact that the mosaics never entered the Swiss stream of commerce. The mosaics were on Swiss soil no more than four days, during which time they remained in the free port area of Geneva airport. The mosaics never passed through Swiss customs ... The Swiss bank merely served as a conduit to pass the funds from Merchants in Indianapolis to Goldberg ... most of the negotiations for the sale occurred in The Netherlands, not Switzerland. Any contacts Switzerland may have had to the transaction at the heart of this suit were fortuitous and transitory. Switzerland has no significant interest in the application of its law to this suit ... Switzerland 'bears little connection' to this suit; its contacts to this case are insignificant.*" (*ibid.*, paragraph 1394)

[113] "*Indiana's contacts to this suit are more significant than those of any other jurisdiction ... Indiana has a significant interest in the application of its law to this transaction ... the Court concludes that Indiana has the most significant contacts to this suit.*" (*ibid.*, paragraph 1394, *per* Noland, J.)

[114] *Ibid.*, Summary of Decision.

[115] *Ibid.*, paragraphs 1398/9.

[116] *Ibid.*, paragraph 3.

[117] 917 F.2d 278. Bauer, CJ., explained, at paragraph 286, that "... *we find Judge Noland's analysis under Indiana law to be free of error, and we affirm his conclusion that Indiana law applies.*"

[118] Garner, B A, (ed.), '*Black's Law Dictionary*', 7th Deluxe edition (1999).

is the right to present possession."[119] It is submitted, therefore, that application of the MSR test in this instance may correctly be used as a precedent for cases which, strictly, may be characterised as proprietary. Interestingly, on appeal, Bauer, CJ. remarked that "*We note Goldberg claims error in Judge Noland's decision similarly to look to tort principles, and expends a great deal of effort arguing conflict of laws principles used in actions involving the transfer of chattels, which is apparently how this action would be characterized under Swiss law. As to the application of Indiana law and principles, Goldberg's argument entirely misses the mark.*"[120] The end result, justifying an award of possession in favour of the plaintiffs, was that the contact between the mosaics, the parties and the Swiss *situs*, was *not* deemed to be more significant than the overall contacts which existed between the mosaics, the parties and the law of Indiana.

Although operation of the MSR test may be relatively straightforward in cases such as the Cypriot mosaics, it is suggested that it would be less easily applied in cases where the various contacts were more evenly distributed between, or among, two or more states. In such a scenario, the forum would be called upon to make, not only a *quantitative* decision (that is, concerning the *number* of contacts between the circumstances and a particular state), but also a *qualitative* one (*i.e.* concerning the *intensity* of connection evinced by the contact(s) in question).[121] The forum would then be required to evaluate the significance of each contact, and to determine in which state the (qualitative) preponderance of contacts lay. To the extent that the Second Restatement does not specify any presumptions as to what may be the most

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[119] *Ibid.*, paragraphs 1395/6.
[120] 917 F2d. 278, paragraph 286.

significant contact (*e.g.* territorial, as opposed to personal, contacts), or prescribe a hierarchy of contacts, ultimately, the balancing exercise and choice of law decision would fall to the discretion of the court.[122]

The bottom line: certainty v. flexibility

It has been observed that "... *the struggle between legal certainty and equity is as old as the law itself.*"[123] Furthermore, in a conflict of laws context, "... *the conflict between legal certainty and justice (equity) will never come to an end*",[124] since, as Neuheus has suggested, one or other of these "*twin objectives*" will inevitably underpin the prevailing choice of law methodology, in different jurisdictions and from time to time.

A sense of the struggle between the desiderata of certainty and flexibility may be gleaned from a cursory review of the American experience. The rules of the First Restatement of Conflict of Laws were "*simple, relatively few in number, and dogmatic. They* [were] *consistent with the vested rights theory and they* [*gave*] *little indication of the fluidity and of the complexities and uncertainties of the subject.*"[125] The rationale of the First Restatement was simply that "... *it is in the nature of men to*

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[121] To some extent, of course, the two types of decision are related, since a gathering of contacts between a set of circumstances and a particular state will, inevitably, increase the significance of that connection.

[122] Commentators have suggested various means by which qualitative judgments might be made. *E.g.* Leflar's better law approach. Leflar advocated that American courts should seek to resolve choice of law issues by reference to five 'choice-influencing considerations'. In no particular order of priority, the factors were: (a) Predictability of result; (b) Maintenance of interstate and international order; (c) Simplification of the judicial task; (d) Advancement of the forum's governmental interests; and (e) Application of the better rule of law. (Leflar, R A, '*American Conflict of Laws*' (1986) 4th edition, p277-279). With the exception of (e), these largely mirror the factors listed in the Second Restatement Second. Factors (d) and (e) promote forum-preference. Factor (e) is questionable since it "... *confuses the issue of the reform of the substantive law of one country with that of choosing the most appropriate law to govern a dispute with links with two or more countries.*" (Cheshire and North, *ibid.*, p30)

[123] Neuheus, *ibid.*, at p795.

[124] Neuheus, *ibid.*, p796.

[125] Reese (1963), *ibid.*, p680; and Kegel (1986), *ibid.*, p58.

seek certainty and simplicity in the law. They will wish to regulate a field by a few simple rules if rules of this nature can be devised to handle adequately the problems involved."[126] By 1952, however, discontent with the dogmas of certainty and simplicity was evident, and by 1971, the MSR formulation was determinative. In the course of fewer than forty years, the choice of law pendulum had swung from a streamlined system of strict rules, to an approach which advocated evaluation of all relevant interests and policies.[127]

Proclamation of a 'new era' in American conflicts thinking stirred doubts and concerns in Europe, not only regarding the wisdom of jurisdiction-selection, but also regarding the value of choice of law 'rules', *per se*. Freedom of movement of persons, goods and services has made Europe as much of a conflicts paradise as the U.S.A., and prudence would suggest that the American experience should be embraced as an aid to, but not necessarily a model for, Europe.[128]

Choice of law certainty (in the sense of predictability) is a virtue, insofar as it aids the protection of cross-border social, commercial, and economic relationships.[129] Clear, unequivocal rules of law (whether choice of law, or domestic) promote certainty, to the extent that they assist parties in regulating their own behaviour, and in assessing the significance of the conduct of others. Whilst choice of law rules which incorporate

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[126] Reese (1963), *ibid.*, p680.

[127] It is interesting to note Kegel's perspicacious remark that, "... *it is ... easier to go without legal certainty in the Law School than in the practice of laws.*" (1986, *ibid.*, p66)

[128] Consider generally Jeunger, *ibid.* Jeunger has expressed the hope that, "*Perhaps our* [U.S.] *experience can help you* [continental systems] *save it* ['continental' I.P.L.] *from becoming a conflicts hell.*" (*ibid.*, p132) Jeunger has admitted that, "... [the] *conflicts revolution has made ours* [the U.S.] *an untidy law. However, it seems ... that in most of our cases justice was done. If the end is clear but the means are not, fumbling may be the best policy.*" (*ibid.*, p132) In view of their conflicts revolution, the Americans are now able to offer "*an emporium of hard-won empirical lessons.*" (*ibid.*, p132)

[129] Consider Cavers' remark that, "... *in many instances ... the consequences of the application of either law are not as important as the predictability of its application.*" (Cavers (1933), *ibid.*, p198)

single-contact connecting factors epitomize the desired transparency,[130] they do not, it is submitted, accommodate the special (possibly unique) facts and circumstances of particular cases. At the other extreme, the softening process is acceptable only to the extent that it does not deprive the choice of law framework of its character "... *as a body of legal norms.*"[131] As Vitta has indicated, choice of laws rules should be more than mere "*suggestions*".[132] It would be wrong to adopt a choice of law approach comprising of no more than "... *a set of elastic formulae which can be manipulated to produce almost any result desired.*"[133] It is submitted that, from the perspective of certainty and predictability, choice of law *rules* are preferable to a choice of law *approach.* It is further submitted that certainty and predictability are better protected by jurisdiction-selection, than by rule-selection. Whilst jurisdiction-selection is piloted by the operation of choice of law rules, rule-selection relies too heavily on the exercise of judicial discretion. In rule-selection, for instance, the following matters would be subject to judicial discretion: identification of the policy(ies) underlying a particular rule of law; determination of whether those policy(ies) or interest(s) is/are advanced by application of the rule to the dispute in question; ascertainment of the intended ambit of the rule's operation; and appraisal of the merits or demerits of applying competing rules.[134] It is contended that such an approach leaves too much to the whim of the forum.

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[130] Save, of course, for the inescapable difficulties concerning the definition and interpretation of connecting factors, in the spatial, temporal and dimensional (*i.e.* inclusive or exclusive of *renvoi*) contexts.

[131] Vitta, *ibid.*, p14.

[132] Vitta, *ibid.*, p14.

[133] Hancock (1961), *ibid.*, p379. Yntema considered the chief vice of an abstract theory to be the fact that, "... *because the symbols used are too remote from reality to represent it, they force those whose thoughts are limited to these symbols finally to regard them as reality and to believe that by employing them in the process of formal logic 'correct' results may be obtained.*" (Yntema, H, (1928) 37 Yale L J 468, 477, *per* Hancock (1961), *ibid.*, p379)

[134] *Cf.* Cavers' view that, "*The suggested* [interest analysis] *approach would preclude the attainment of either certainty or uniformity in the conflict of laws because under it the decision of a case involving a*

Whilst it is contended that certainty and predictability are better protected by a combination of *jurisdiction*-selection methodology and choice of law *rules*, it is nevertheless submitted that the rules themselves should admit some flexibility. The requisite flexibility, it is suggested, should emanate from *within* the rules. In short, flexibility should derive from the *connecting factor*.

The adoption of 'soft' rather than 'hard' connecting factors would offer flexibility, but without disavowing the tenets of the classical method. It is submitted that a more equitable result may be secured, especially in atypical or exceptional cases,[135] by reference, not to 'single-contact' connecting factors, but to 'complex' or 'aggregate' factors, which themselves contain a flexible corrective.[136] Flexibility should emanate not from an open-ended exercise of judicial discretion, but rather, from the actual configuration of connecting factors.[137]

Where the apposite connecting factor is a single-contact factor (*e.g.* the *lex situs*), it is submitted that, "... *it cannot be maintained that real legal certainty is the certainty that justice will prevail.*"[138] Rules incorporating 'complex' or 'aggregate' connecting factors come closer, it is submitted, to providing the 'certainty of justice': while such

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choice of law would depend on the content of the conflicting laws and the relative desirability of their application in light of the facts in controversy in litigation." (Cavers, 1933, *ibid.*, p197)

[135] *i.e.* Cases which derive from special or unique circumstances such as would justify the rebuttal of a general presumption in favour of a certain connecting factor, or which would trigger displacement of a general rule in favour of that factor.

[136] Consider, for example, the model of the 1980 Rome Convention on the Law Applicable to Contractual Obligations (hereinafter 'the Rome Convention'), and the structure of sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995.

[137] *Cf.* "*It then appears preferable to continue to submit cases with a foreign element to the law indicated by a specific connecting factor ... However, if such a factor does not work, then a way out may be found by including in the conflict rule an alternative, more flexible factor.*" (Vitta, *ibid.*, p16)

factors would not enable parties to predict the substantive results of disputes, they would nevertheless allow them to map out the process by which the choice of law decision would be reached.

Conclusion

In 1963, Professor Reese indicated that "*Choice of law, even now, is not ripe for restatement in the sense that it is rarely possible to state hard and fast rules with the reasonable assurance based on precedent and the resources of human reasoning and imagination that these rules will work well in all situations to which they literally can be applied.*"[139] This predicament pertains still. Scottish and English choice of law rules of property have tended to over-simplify the problem; choice of law subtleties have been disregarded and problems which, in fact, are diverse and complex, have been subsumed within a broad and blunt rule.[140]

One objective of a new 'restatement' should be to strike a finer balance between certainty and flexibility, to honour the tradition of jurisdiction-selecting rules, but, simultaneously, to respect the uniqueness of individual cases.[141] In accompanying the present author in this pursuit, the reader is respectfully invited to hold to words penned by Sir Francis Bacon,[142] *viz.*:

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[138] Neuheus, *ibid.*, p796. There is a danger that traditional, single-contact connecting factors elevate the importance of certainty to an unwarrantable level, forsaking, as they do, consideration of other relevant factors. In such an event, it is submitted that the price of certainty is too high. *Cf.* note 94, *supra*.
[139] Reese (1963), *ibid.*, p681.
[140] Chapters Eight ('The Transfer of Corporeal Moveable Property') and Eleven ('The Assignation of Incorporeal Moveable Property'), *infra*.
[141] *Cf.* Neuheus, *ibid.*, p799. The Second Restatement itself was intended to be "... *a compromise between ad hoc decisions and rules. While refraining from providing rigid rules it seeks to establish guidelines for reaching decisions.*" (Kegel, 1986, *ibid.*, p58)
[142] Sir Francis Bacon, (1561) – (1626).

"*If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.*"[143]

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[143] '*The Advancement of Learning*' (1605). (*per* Ratcliffe, S (ed.), '*The Little Oxford Dictionary of Quotations*' (1994), p51)

Chapter Two

The Land Taboo

In the closing decades of the twentieth century, Scots and English rules of choice of law were subjected to substantial re-modelling. In the United Kingdom, whilst the underlying theory and processes of the subject have remained largely unchanged (archetypally, characterisation of the cause of action, identification of the *lex causae*, proof and application thereof, and, where appropriate, limitation of that law), in several branches of the subject significant changes have been wrought regarding the connecting factors to be applied.

In choice of law in delict, for example, the rule of double actionability now bears little more than historical interest.[1] In contract, the cherished[2] common law rules for identifying the proper law of the contract and determining its ambit have, for the most part,[3] been rendered superfluous by the Contracts (Applicable Law) Act 1990. In consistorial matters, the Family Law Act 1986, bolstering and replacing the provisions of the Recognition of Divorces and Legal Separations Act 1971, has, for the time being, curbed the arguably undesirable permissiveness heralded by the House of Lords in *Indyka v. Indyka*.[4] The 1986 Act, in its turn, has been emasculated by

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[1] Section 10 of the Private International Law (Miscellaneous Provisions) Act 1995. Noting, of course, the saving provisions of section 13 in relation to defamation claims.

[2] *E.g.* Nussbaum, '*Principles of Private International Law*' (1943), p168 (*per* Morris, J H C, '*The Proper Law of a Tort*' (1951) 64 Harv. L. Rev. 881, at p881).

[3] Save as regards contracts concluded prior to the statutory commencement date of 1 April 1991, and in respect of the express exclusions enumerated in Article 1(2) of the Rome Convention on the Law Applicable to Contractual Obligations, and in areas where Rome's provisions are not comprehensive (*e.g.* Articles 10 and 11), or where they permit discretion (*e.g.* Article 4(5)).

[4] [1969] 1 A.C. 33.

'Brussels II',[5] which, among Contracting States, operates (since 1 March 2001) so as to regulate jurisdiction and the recognition and enforcement of judgments in matrimonial matters.[6] This is an example of the new order in the new century; a century which seems destined to endure an excess of legal regulation and to witness many more examples of legal overlap and conflict than hitherto anticipated – not only 'traditional' conflict of laws problems, but also problems between and within Conventions.[7]

Likewise, changes have been wrought in respect of the connecting factors designated by the conflict rules concerning married persons,[8] children,[9] trusts,[10] insolvency[11] and procedure.[12]

It is with mixed feelings that one reflects upon the words penned by Cheshire in the Preface to the first edition of his principal work, *viz*:, "[*Private International Law] ... is not overloaded with detailed rules; it has been only lightly touched by the paralysing hand of the Parliamentary draftsman; it is perhaps the one considerable*

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[5] Council Regulation (EC) No. 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses. (29 May 2000)

[6] See also the European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001(S.S.I. 2001/36) and Act of Sederunt (Ordinary Cause Rules) Amendment (European Matrimonial and Parental Responsibility Jurisdiction and Judgments) 2001 (S.S.I. 2001/144). For equivalent provisions in England and Wales, and Northern Ireland, see S.I. 2001/310 and S.I. 2001/660.

[7] *E.g.* Brussels II, Article 37.

[8] Part II, Private International Law (Miscellaneous Provision) Act 1995.

[9] Child Abduction and Custody Act 1985; Council Regulation EC No. 1347/2000. Consider also the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which is currently the subject of consultation in Scotland (Scottish Executive Justice Department Consultation Paper, December 2000), and the European Commission Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matters of Parental Responsibility (OJ [2001] C332 E/269).

[10] Recognition of Trusts Act 1987.

[11] Council Regulation EC No. 1346/2000 on Insolvency Proceedings (29 May 2000).

department in which the formation of a coherent body of law is in course of process."[13] It is the aim of the present author neither to extol, nor to condemn, the trend towards statutory intervention in international private law; rather, the intention is merely to observe the changing mien of our conflict rules, and to consider the metamorphosis which occurs as choice of law rules develop so as better to respond to the needs of society, and more effectively to contend with the demands and challenges of technology, Europeanisation and globalisation.

It is against this background that we turn to consider a rule which has triumphantly withstood this climate of change and which, today, remains largely the same, and as apparently invincible, as it was in the early years of the twentieth century, and before. Certainly as regards the transfer of immoveable property, generally as regards the *inter vivos* transfer of corporeal moveable property and frequently in the case of the *inter vivos* transfer of incorporeal moveable property, the *lex situs* (as defined in each case[14]) has long been considered to be the apposite connecting factor. Indeed, such is the status of the *lex situs*, at least in relation to immoveable property, that commentators now speak, from varying perspectives of resignation, frustration and pride, of the 'land taboo'. Moffatt Hancock explained the nature of this *quasi*-sacred rule, *viz*: "*'The land taboo' – what an excellent phrase to describe the curious doctrine, so popular with English and American commentators, that every conceivable question affecting the transfer of title to land must invariably be*

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[12] Section 4 of the Prescription and Limitation (Scotland) Act 1984; and Council Regulation (EC) No. 1348/2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (29 May 2000) (OJ [2000] L160/37).

[13] *Private International Law*, 1935, Preface; *Private International Law*, 13th edition, p*viii*.

[14] See Chapter Four, *infra* – 'Defining the '*Situs*''.

determined by the domestic law of the situs."[15] Whilst the expression 'land taboo' has been strongly associated with Hancock (Andreas Lowenfeld later explained that, "*I had supposed that Hancock invented the phrase, which he uses frequently, here and elsewhere*"),[16] the term did not, in fact, originate with him. Commending the label, however, Hancock attributed it to the unnamed author of a 1938 note entitled '*Choice of Law for Land Transactions*'.[17]

The 'unequivocal' certainty of, and support for, the *situs* axiom is, for many commentators, a source of some pride. Joseph Beale declared in 1907 that "*The law of the situs governs title to land. No more generally accepted doctrine, or one more clearly based upon principle and reason, exists in the whole body of the law.*"[18] It is hardly surprising, therefore, that, in 1934, when the First Restatement of the Conflict of Laws (hereinafter 'the First Restatement') was published, under the supervision of its Chief Reporter, Joseph Beale, it should reinforce the 'incontrovertible' control of the *lex situs*: "*Following Professor Beale's mechanical and territorially oriented approach, the Restatement referred all questions regarding real property to the law of the situs. As with the earlier English cases, the Restatement made little attempt to justify the situs rule … the situs rule must have seemed self-evident.*"[19]

Beale was merely following the pattern already established by preceding American jurists, particularly Joseph Story. As Alden has remarked, the *situs* rule has

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[15] Hancock, M, '*Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: the Disadvantages of Disingenuousness*' 1967 (20) Stanford L Rev 1.
[16] Lowenfeld, A F, '*Book Review: Revolt against Intellectual Tyranny*' 1985-6 (38) Stanford L. Rev. 1411, 1418.
[17] 1938 (28) Colum. L. Rev 1949, 1051; Lowenfeld, A F, *ibid.*
[18] Beale, J H, '*Equitable Interests in Foreign Property*' 20 Harv. L. Rev. (1906-07) 382.
[19] Alden, R, '*Modernizing the Situs Rule for Real Property Conflicts*' 1987 (65) Texas L. R. 585, 589.

persevered in the United States for more than one hundred and fifty years.[20] Whilst Joseph Story is generally considered to be the father of American conflict rules, Hancock has observed that Story was not alone in promoting the *situs* rule. Hancock, taking a pragmatic view, explains that, " ... *since choice-of-law questions are relatively rare in litigation, judges and lawyers have little experience in dealing with them and are inclined to accept as gospel the views of the text writers, especially when the latter are in agreement. Since the time of Story, American text writers have (with rare exceptions) unanimously supported the land taboo in all its ramifications. Garnishing it with superficial, abstract arguments, they have contrived to make it appear to be one of the fundamental principles of American conflict of laws.*"[21]

'Contrived' is indeed the appropriate word to describe their conduct, for Hancock goes on to remark that several commentators and judges have propped up the rule with '*vague sophistries*'[22]: "*Thoughtfully considered, these attempts to justify the situs formula are reminiscent of the medieval canonists' attempt to justify the prohibition of marriage within seven degrees of kinship.*"[23] This *quasi*-religious adherence to the *situs* rule, coupled with the relative infrequency with which international property disputes are reported,[24] has resulted in the rule becoming entrenched, for reasons which include simple respect for the length of its tenure; in law, as in life, old age is

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[20] Alden, *ibid.*, p585.
[21] Hancock, *ibid.*, p8.
[22] Hancock, *ibid.*, p10.
[23] '*All manner of fanciful analogies, however, could be found for the choice of this holy number. Were there not seven days of the week, and seven ages of the world, seven gifts of the spirit and seven deadly sins.*' – Pollock & Maitland, '*History of England before the Time of Edward I*' (1899) (2nd edition), p388 (*per* Hancock, *ibid.*, p10).
[24] Which, some might claim, is due (at least in part) to the *situs* rule itself. Consider however Graveson's remarks, "*It is impossible to state dogmatically that one theory governs to the exclusion of all others since most English decisions have not been based on a direct conflict between the leges situs, actus and domicilii or any two of them. The effect of the reasons for decision in favour of the lex situs ... is accordingly diminished. While, therefore, a preponderance of authority exists in favour of the lex situs, it does not justify rejection of the lex actus as a possible alternative (whatever theoretical defects*

worthy of respect.[25] Even today, in America as in the United Kingdom, the *situs* rule enjoys unrivalled potency as a conflict rule, having survived the philosophical *volte-face* inflicted upon most American choice of law rules by the Second Restatement.

Walter Cook first articulated the 'self-evidence' of the *situs* rule in 1939, declaring that the rule "*... is accepted by nearly all Anglo-American writers as more or less self-evident.*"[26] Three years later, he endorsed his earlier remarks, explaining that, "*It is not the purpose of the present paper to attack the principle as unsound or in any way irrational, but quite the contrary: it will be accepted as in origin based upon principles of obvious social convenience.*"[27] Also observing this irrefutable quality of the *situs* rule, and even identifying an unspoken "anxious fear" of applying non-*situs* law, Brainerd Currie noted that "*People ... are* [not] *readily separated from their faith in sonorous and seemingly self-evident formulas. Perhaps the argument is suspected of being a tour de force, which silences a less articulate opponent without really disproving his case.*"[28] This imputed 'self-evidence' of the *situs* rule, that is, the presupposed interest of the *lex situs* in any *and every* dispute involving land (and indeed other property), is proclaimed, not out of recognition for or acknowledgement of the legitimate concerns of the *lex situs*, but rather as an absolute denial of the potential interest of any other legal system in the resolution of the dispute in hand.

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that alternative may possess)." (Graveson, R H, '*Conflict of Laws Private International Law*', 7th edition (1974), p463)

[25] See also Alden, *ibid.*, p586/7.

[26] Cook, W W, '*Immovables and the Law of the Ditus*' (1939) 52 Harv. L. Rev. 1246, 1246/7.

[27] Cook, W W, '*The Logical and Legal Bases of the Conflict of Laws*' (1942), p253.

[28] Currie, B, '*Full Faith and Credit to Foreign Land Decrees*' (1954) 21 Uni. of Chi. L. Rev. 620, 631/2.

This latter notion is supported by Weintraub who christened the *situs* rule, "... *this most monolithic of all choice-of-law rules.*"[29] Commentators have remarked that "... *there is no denying ... that the situs rule is dominant ... It muddies innumerable opinions ... Land is something rather sacrosanct. And 'title' has a derivative magic ... which no one has dared challenge ... Thus it is taboo to allow a law other than the law of the land to control questions involving that land ... title must certainly be left inviolate.*"[30]

That this approach was evident in America and in England even in the latter part of the nineteenth century is clear from the case law. In 1869, in America, in the case of *McGoon v. Scales*[31] Mr Justice Miller, delivering the opinion of the court, referred to the *situs* principle, stating that: '*It is a principle too firmly established to admit of dispute at this day, that to the law of the state in which the land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances. Applications of the broad principle are easy to find. ... It would be affectation to multiply instances, for the general principle is well known and thoroughly established.*"[32] So also, in England, as early as 1873, in *Freke v. Carbery*[33] Lord Selborne stated "*a point upon which I need no authority*", namely, that "*The territory and soil of England ... is governed by all statutes which are in force in England. This leasehold property ... is part of the territory and soil of England, and the fact that the testator had a chattel interest in it, and not a freehold*

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[29] Weintraub, R J, '*An Inquiry into the Utility of Situs as a Concept in Conflicts Analysis*' (1966) 52 Cornell L.Q. 1, 2. See also Scoles and Weintraub, '*Cases and Materials on Conflict of Law*' (1972), p573; Hay P (ed) '*Property Law and Legal Education; the Situs Rule in European and American Conflicts Law – Comparative Notes*' (1988), p109.

[30] Schott & Rembar, '*Choice of Law for Land Transactions*' (1938) 38 Columbia L. Rev. 1049, 1050/1.

[31] (1869) 9 Wall. 23, 27 (U.S.).

[32] See also Goodrich, H F, '*Two States and Real Estate*' (1941) 89 Uni. of Pen. L. R. 417, 418.

[33] (1873) L.R. 16 Eq. 641.

interest, makes it in no way whatever less so."[34] For the purpose of the present discussion, however, it is interesting to note that Clarence Smith later remarked that "*Lord Selborne's pronouncement in 1873 was not a restatement of existing law – at least as commonly understood – but a radical innovation.*"[35] But such was the universally accepted mastery of the *situs* rule, that this 'innovation' went unchallenged;[36] unchallenged, perhaps, for certain legitimate reasons, both theoretical and practical. For example, Cheatham stated in 1960 that "*On some matters certainty is the first requisite and other elements may be subordinated to it. It is so as to the title to land.*"[37] So too, Ernst Rabel has commented that, "*The quasi unanimity in this field is easily understandable, since here sheer territorialism is assumed in the most modern systems ... an old and unchallenged tradition has resulted in a universal principle, natural in view of the physical and economic integration of the property in the territory and affording the easiest available certainty to the state of the situation, to all interested parties, and to prospective successors and creditors.*"[38] Admittedly, Rabel's view cannot reasonably be denied in respect of what might be termed the fundamental aspects of a transfer of immoveable property (*e.g.* the essential validity of the transfer). As regards transfers of moveable property, however, and likewise as regards certain incidents of transactions concerning immoveable property (*e.g.* capacity to transfer), it is submitted that there may exist alternative, more suitable, yet hitherto obscured, connecting factors. The scheme of the First Restatement, framed in the years before 1934 and subjecting all matters concerning the transfer of chattels to

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[34] *Ibid.*
[35] Clarence Smith, J A, '*Classification by Site in Conflict of Laws*' (1963) 26 M.L.R 16, 19.
[36] *E.g.* Gardner, J C, '*The Decreasing Influence of the Lex Situs*' (1934) 46 J.R. 244.
[37] Cheatham, E E, '*Problems and Methods in Conflict of Laws*' (1960) 99 I *Hague Receuil* 237, 314.
[38] Rabel, E, '*The Conflict of Laws: A Comparative Study*', Volume IV (1958), pp31/2.

the control of the *situs* at the time of the conveyance,[39] is not necessarily one that should rigidly and unthinkingly be adhered to at the beginning of the twenty first century.

The trouble with the taboo is that, although there is promulgated an impression of a rule widely recognized and enforced, that impression is betrayed by exposé of the stratagems which courts sometimes employ to circumvent the rule's strict application. As Hancock has explained, "*Despite its overwhelming support in the literature, ... some sensitive American judges have recoiled from the harsher applications of this drastic formula, often invoking one device or another to avoid it.*"[40] More recently, instances of American judicial indulgence in evasive tactics have prompted Weintraub to suggest that "*... an increasing number of recent cases ... are displacing the most hallowed of all the traditional choice-of-law rules – that applying the law of the situs to determine interests in real property.*"[41] Regrettably, however, it seems that displacement is not manifesting itself in the form of a clear exception to, or modification of, the *situs* principle, but rather, that it has entered surreptitiously, under cover of various guises (*e.g.* manipulative characterisation), leaving courts and commentators free still to proclaim their enduring allegiance to the *situs* monolith. Hay, showing more candour, has more recently concluded that, "*The approach to immoveables in the conflict of law may no longer be monolithic, but it is confused.*"[42]

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[39] *Viz.*: capacity to convey chattel (paragraph 255); formalities of conveyance (paragraph 256); substantial validity of conveyance (paragraph 257); and the nature of interest created by the conveyance (paragraph 258). See also Carnahan, C W, '*Conflict of Laws and Life Insurance Contracts*' (1958), p348.

[40] Hancock, *ibid.*, pp1, 3 and 7, giving the example, albeit from the realm of succession, of *In re Estate of Barrie* 338 U.S. 815 (1949), where four dissenting judges took a stance against application of the Iowa *lex situs*. Nevertheless, a five-judge majority cleaved to the traditional choice of law formula. See Chapter Seven, *infra* – 'Cracks in the Monolith – Particular Instances'.

[41] Weintraub, R J, '*Commentary on the conflict of laws*' (1986), pvii.

As far as the position in Scotland and England is concerned, one might ponder the words of Peter Carter, namely, "*In this sphere of law, somewhat ironically and uncharacteristically, the rules of private international law can be, and largely are, relatively simple.*"[43] Whilst one might endorse Carter's sentiment that a more difficult (yet profitable) challenge would be "*the formulation of a sophisticated and acceptable pattern of uniform internal or domestic law*"[44], it is submitted that Carter's verdict concerning our property rules would be more accurate if it pronounced, not that our rules are '*relatively simple*', rather that they are '*deceptively simple*'.[45]

In America, Weintraub has acknowledged the tenacity of the *situs* 'myth': "*Courts that have cast off territorial rules in other substantive areas are only now beginning to do the same when determining interests in realty.*"[46] The task now at hand in respect of Scottish (and English) conflict rules, is to consider the extent of the 'myth' in our own system. In view, however, of the (apparent) unparalleled loyalty to the *situs* rule, when now daring to formulate and recommend an alternative connecting factor, it is necessary, first, that any purported defects in the *situs* rule be set forth, and that any alleged instances of defection from the existing rule be disclosed. It is intended, therefore, to survey the cracks in the *situs* monolith.

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[42] Hay (1988), *ibid.*, p121.
[43] Carter, P, '*International Sales of Works of Art*' (in Lalive, P, ed.) (1988), p330.
[44] *Ibid.*
[45] For difficulties of definition and interpretation, for example, see Chapter Four, *infra* – 'Defining the '*Situs*''.
[46] Weintraub, R J, '*The Conflict of Laws Rejoins the Mainstream of Legal Reasoning*' (1986) 65 Texas L. R. 215, 229/230.

Chapter Three

The Distinction between Moveable and Immoveable Property

The law of property "*consists of all the rules conferring, defining and regulating legal rights vested in individuals over material and immaterial things, rights of ownership, possession, use, alienation and disposal. It is a large and important subject of law because of the great number, importance, utility and value of the kinds of objects of property recognised, and of the number and variety of the kinds of legal rights which may be exercised in relation thereto.*"[1] In short, the law of property is concerned with the creation, acquisition, disposal, transmission and extinction of rights in, and over, particular objects of property.

Where questions of international private law arise in conjunction with a standard property issue, the nature of the particular transaction and the precise description of the property rights involved can become rather clouded.[2] As Pierre Lalive has explained, "... *in order to differentiate the rights created, transferred or destroyed by a transaction, it is a natural step for a court to examine the things over which these rights give a power ... The fact that some objects can be transported from one country to another increases the frequency of conflict of laws and the difficulty of finding a*

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[1] Walker, D M, '*The Scottish Legal System*' (2001), p224.

[2] Consider Robertson's view that, "*The characterisation of property probably represents the most difficult problem in the whole field of characterisation.*" (Robertson, A H, '*Characterization in the Conflict of Laws*' (1940), p190) Robertson's general approach to the problem has been criticised by Cook, *viz.*: "*Robertson frequently forgets ... that he is dealing with the characterisation of 'interests in land' and so characterises the land rather than the legal interest as the immoveable* (*e.g.* p196)." (Cook, W W, '*The Logical and Legal Bases of the Conflict of Laws*' (1942), p288) Cook notes, with some despondency, that "... *of course judges often talk the same way.*" (*ibid.*) Consider too Walker, "*Note that the word 'property' may mean either the legal rights of property of owning, holding, using and disposing of a thing, or the thing itself over which legal rights subsist. The former is the more correct legal meaning of the word.*" (Walker, *ibid.*, p224, note 79)

suitable connecting or localizing element."[3] In international property disputes, it is necessary to distinguish the constituent elements of the problem, first, to determine the character of the property affected and, secondly (stemming from that characterisation), to ascertain the conflict rules appropriate to the situation at hand. As Story explained, "... *every nation, having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character which it shall choose, and no other nation can impugn or vary that character.*"[4] Almost immediately, of course, the difficulties inherent in the characterisation process become apparent: how can one determine the specific nature of the property affected until the apposite conflict rule has been identified? The scenario gives rise to a *circulus inextricabilis*, for how is it possible to ascertain the apposite conflict rule before characterising the property as moveable or immoveable?

Intrinsic to the process of determining the character of the property concerned is the division of property into certain categories, according to its nature. Division '*according to nature*', however, may be a flawed criterion. In *Ross v. Ross's Trustees*, Lord Meadowbank outlined how the trustees of the late General Ross were forced to maintain, without the aid of any legal decision, that there is a division in nature itself of all rights into moveable and immoveable. His Lordship concluded that, "*There is no solid foundation for this argument; for, first, there is no natural division into moveable and immoveable, even in things ... There is nothing absurd in reducing all these things to a classification; but it is in vain to contend that classification is*

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[3] Lalive, P A, '*The Transfer of Chattels in the Conflict of Laws: A Comparative Study*' (1955), p5.
[4] Story, '*Commentaries on the Conflict of Laws*', p654, paragraph 447. Moreover, the character impressed may be chameleon; see note 31 *et seq*, *infra*.

pointed out by nature itself."[5] The domestic law of Scotland has traditionally drawn a distinction between heritable and moveable property.[6] Whilst heritable property basically comprises land and buildings, heritable rights need not necessarily constitute land; on the other hand, whilst moveable property usually consists of objects which are themselves physically moveable, rights associated with land may, "*for certain purposes be held to be moveable.*"[7] Professor Walker makes clear the position, namely that, "*This is not a distinction drawn entirely on logical grounds, but stems from the dualism of rules of succession on death whereby for reasons explicable only by legal history some property (heritable property) descended to the person designated by the law as heir, and some (moveable property) descended to the persons designated by the law as next-of-kin.*"[8] In England, the customary demarcation between "*proprietary interests in things*" is the "*historical and technical distinction*" between realty and personalty.[9]

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[5] *Ross v. Ross' Trustees* July 4 1809 F.C., at p380. *Cf. Macdonald v. Macdonald* 1932 S.C. (H.L.) 79, *per* Lord Tomlin, at p85, "*Where a foreign asset is immoveable by nature or in the contemplation of the lex rei sitae, a claim to render it subject to the legitim of Scots law is really a claim that it should devolve contrary to the lex rei sitae and cannot be supported consistently with the principles of private international law.*" (Emphasis added).

[6] Bell, *Commentaries*, II.V.1.1., "*The distinction between heritable and moveable property is one of the most important in practical jurisprudence.*"; and Stair, *Institutions*, II.I.2.: "*The distinction of moveable and heritable is very necessary to be here known, as being the common materials of real rights, and having a general use, in the constitution and transmission of rights amongst the living, and from the dead.*"

[7] Anton, A E, '*Private International Law*' (1990), p597. *E.g.* Section 117 of the Titles to Land Consolidation (Scotland) Act 1868 (heritable securities are deemed to be moveable in a creditor's succession).

[8] Walker, *ibid.*, p224.

[9] Dicey and Morris, '*The Conflict of Laws*' (13th ed., 2000), p918, paragraph 22-004. Consider *Chatfield v. Berchtoldt* L.R. 7 Ch. 192 where, in the words of Clarence Smith, "*the court shares the ignominy of having 'inadvertently' referred to realty and personalty when it 'meant to say' immoveables and moveables.*" (Clarence Smith, J A, '*Classification by Site in Conflict of Laws*' (1963) 26 M.L.R. 16, 20). Commenting upon the different characterisations of moveable/immoveable property and personalty/realty, Falconbridge has remarked that, these are "... *not only substantially divergent ... but are also, so to speak, distinctions in different planes, one being a distinction between different kinds of things, the other being a distinction between different kinds of interests in things.*" (Falconbridge, J D, '*Essays on the Conflict of Laws*' (1947), p434) *Cf.* Von Mehren & Trautman, who state that the realty/personalty characterisation, "... *is said to go not to the physical nature of the thing, but to*

In contrast to the domestic classifications, the distinction which is preferred in both Scots and English conflict of laws is that between moveable and immoveable property.[10] It has been suggested that the conflict categories of moveable and immoveable were first articulated in *Jarman on Wills*.[11] An exposition of the difference between the distinction drawn in the conflict of laws and that which pertains in the domestic sphere has been furnished by Lord Tomlin in the Scottish House of Lords case of *Macdonald v. Macdonald,*[12] *viz.*: "*The Scots law distinguishes between property which is heritable and property which is moveable and except to this extent does not any more than English law recognise for internal purposes the antithesis between moveables and immoveables. But each system, when brought into*

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interests in things." (Von Mehren, A T, and Trautman, D T, '*The Law of Multistate Problems – Cases and Materials on Conflict of Laws*' (1965), p194)

[10] Although it would appear that errors (which, one hopes, are semantic rather than substantive) occasionally occur *e.g. Downie v. Downie's Trustees* (1866) 4 M. 1067, *per* Lord President McNeill, "*The principle has been recognised and settled that the character of the subject, whether heritable or moveable, depends on the law of the country where it is placed. That being ascertained, the right of participation in it* [*i.e.* legal rights] *must be regulated by the law of this country, in which it is to be distributed.*" (p1070). Lord Deas echoed the nomenclature employed by the Lord President, *viz.*: "*... it is an Australian deed, and must be dealt with, not according to our law, but according to the foreign law, so far as regards the question whether the contents are heritable or moveable.*" (p1071). (Emphasis added) Consider, however, *Moss' Trustees v. Moss* 1916 2 S.L.T. 31. In this case, Lady Moss' contention was that "*foreign law was wrongly appealed to for the determination of the question whether the subject was heritable or personal, the real question being whether it was moveable or immoveable.*" (p34) Lord Hunter's response to this assertion was surprising, namely, "*According to Scots law, subjects are considered as real or heritable on the one hand, and personal or moveable on the other. It is unnecessary to introduce the word 'immoveable' ... Personally, I am quite unable either to understand or to follow the course of reasoning by which I am supposed, by manipulation of words strange to Scots jurisprudence, to be entitled to reach a result contrary to a series of decisions which are binding upon me.*" (p34) Lord Hunter referred to the dictum of Lord President McNeill *in Downie v. Downie's Trustees*, and to that of Lord Glenlee in *Newlands v. Chalmers' Trustees* (1832) 11 S. 65, *viz.*: "*It is the law of the country where the subject is situated that must regulate the character of the subject as heritable or moveable.*" (Emphasis added) In the case of *In re Hoyles, Row v. Jagg* [1911] 1 Ch. 179, Cozens-Hardy M.R. and Farwell, LJ. suggested, at p183, that the division of property into moveable and immoveable property was only operative where English courts had to determine rights as between an English domiciliary and a foreign domiciliary, and doubted its expediency when the potential *leges causae* derived from the common law. This suggestion, however, was subsequently rejected: Morris concluded that, "*The suggestion of Farwell LJ. ... that our courts only adopt the distinction between movables and immovables when the conflict is between English law and the law of some civil law country and not when the conflict is between English law and another common law country, looks plausible, but is (it is submitted) unsound. At any rate, it has not been followed: Macdonald v. Macdonald; Re Cutliffe.*" (Morris, J H C, '*Cases on Private International Law*', 4th ed. (1968), p325)

[11] A footnote to p4 of the 1st edition (1884) (*per* Clarence Smith, *ibid.*, p17).

[12] 1932 S.C. (H.L.) 79.

contact with a foreign system does, in accordance with the principles of what is called private international law, recognise the antithesis ..."[13]

It is perhaps on account of the inconsistent, sometimes illogical, nature of our traditional, domestic distinction between moveable and heritable property that the conflict of laws distinction between moveables and immoveables has been widely recognised as more universal and more cogent in its application, being based essentially on physical criteria.[14] For this reason, the moveable/immoveable distinction is considered to be capable of application in situations involving even the most eclectic systems of law.[15] In the case of *Re Hoyles*, it was stated that in order "... *to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, our courts recognise and act upon a division otherwise unknown to our law into moveable and*

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[13] *Ibid.*, p84. *Cf.* Robertson: "*The method of characterisation in the conflict of laws, then, must be something indigenous to the conflict of laws, and neither the same as that of the internal law, nor as that of the potentially applicable foreign law.*" (Robertson, *ibid.*, p223)

[14] *Re Hoyles* [1911] 1 Ch. 179; *Re Berchtold* [1923] 1 Ch.192. Consider Falconbridge, who refers to the "*relatively simple classification of tangible things according to their physical nature, corresponding with the natural distinction.*" (1947, *ibid.*, p433) Von Mehren & Trautman suggest that "*Perhaps as a consequence of thinking in terms of physical power it is said to be desirable to use the physical characterisation for conflicts purposes.*" (*ibid.*, p194) Robertson, exhorting characterisation by the *lex situs*, asks rhetorically, "*What criterion could be better than the objective test of fact? ... By adopting the objective test of the de facto nature of the property, the conflict of laws may avoid an excessive addiction to fictions and provide a simple and sure criterion for one problem of characterisation.*" (1940, *ibid.*, pp205, 211). This is subject to the caveat, however, that "*This rule will apply most appropriately to the cases of interests in land, but not necessarily to de facto moveables.*" (*ibid.*, p206). Robertson accepts, for instance, that the character of *intangible* property as moveable or immoveable can only be ascertained *de iure*, and not *de facto.* (*ibid.*, p212). *Cf.* Erskine, *Institutes*, II.2.1.: "*Incorporeal things did not admit of being handled, but consisted in jure, and so were more properly rights than subjects.*"

[15] Consider, however, Clarence Smith, who poses the question, "*If the law of the site must be asked to put the property in question into one or the other of these categories* [moveable or immoveable], *what if it has no knowledge of such categories, either internationally or internally?*" (*ibid.*, p25) In such a case, it is submitted that the *forum rei sitae*, if willing to adopt, *ex comitate*, the 'international' division of property (according, at least, to Scottish and English rules of international private law), should classify the property in question purely according to the object's physiognomy.

immoveable."[16] Accordingly, a distinction accepted in other legal systems has successfully been received into Scottish and English jurisprudence.[17]

The adoption of this internationally recognised distinction underlines the cosmopolitan character of the subject,[18] and the benefits of an enlightened approach. The distinction enables a court (whose ultimate aim is to ascertain, and thereafter to apply, the appropriate *lex causae*) to engage in the characterisation process, adopting a less insular approach than its own domestic characterisation would otherwise permit. This, in itself, is laudable, even if it should later be discovered that the line of demarcation between moveable property and immoveable property is not drawn alike by every system of law, and that differences in characterisation may, in any event, arise (*e.g.* the character of fixtures and fittings).

Although the dictum of Farwell LJ. in *Re Hoyles* might mistakenly be understood to imply that all systems of law have now reached consensus as to the proper characterisation of property (which "... *despite their use of the same words, is far from being true*"),[19] it nevertheless seems prudent that the Scots system of international private law should adopt, for use in its international dealings,

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[16] *Re Hoyles* [1911] 1 Ch. 179, *per* Farwell LJ., p185.
[17] Crawford, E B, '*International Private Law in Scotland*' (1998), p307, paragraph 14.01; and Cheshire and North, '*Private International Law*' (13th ed., 2000), p923.
[18] *Cf. Re Bonacina* [1912] 2 Ch. 394.
[19] Clarence Smith, *ibid.*, p17. Consider also Clarence Smith, "... *it is assumed that apart from a few local quirks there is universal agreement on the meaning of moveable and immoveable.*" (*ibid.*, p22) Consider, however, Kahn Freund's warning (albeit in a different context) of the dangers inherent in the hidden homonym: "*The hidden homonym is one of the most fruitful roots of misunderstanding in private international law. The builders of the Tower of Babel must be assumed to have realised that they did not understand one another's speech. We are now dealing with situations in which people are struck by the Curse of Babel and do not know it.*"(Kahn Freund, O, '*General Problems of Private International Law*' (1980), Ch.X.iii) Consider too the remarks of Gambaro, *viz.*: "... *it is not important that a European Civil Code institutes a uniform law of property, and certainly not of real property. But it is necessary that lawyers come up with a reasonably homogeneous language with which to discuss property problems ... a grammar of property law.*" (Gambaro, A, '*Perspectives on the Codification of the Law of Property: An Overview*' 1997 (5) European Review of Private Law 497, 500)

terminology which is untarnished by its domestic prejudices or preconceptions. It is generally accepted that the benefits of an internationally employed distinction are self-evident, although an element of dissensus does still persist. Minority opinion has been articulated to the effect that the difficulty in finding a coherent explanation for preferring one pair of categories (*i.e.* moveable and immoveable) over another (*i.e.* moveable and heritable, or personalty and realty) is basically due to the distinction itself being irrational: "*The different treatment given to realty in some countries and to moveable property in others is a relic in both cases of the feudal importance of land, for apart from feudalism, there is no difference in kind between property which can be moved and property which cannot.*"[20] Now, in view of the increasing awareness of intellectual property rights, and the burgeoning exploitation thereof, the traditional belief that land has far greater commercial value than other items of property cannot necessarily be upheld.[21] In spite of this, however, "*with or without an explanation, the authority for the categories being moveable and immoveable is now conclusive.*"[22]

Property accordingly falls into two categories, moveable and immoveable, according to what is "*roughly speaking, a natural division.*" [23] The object of the distinction is to secure a harmony of decision by "*abandoning the internal classifications of interests*

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[20] Clarence Smith, *ibid.*, p17. *Cf.* Savigny who, in 1869, remarked that, "*On impartial consideration, it must be admitted that the great changes in respect of property and commerce which have taken place in modern times, tend to the abandonment of that sharp distinction* [between moveable and immoveable property]." (Savigny, F C, '*A Treatise on the Conflict of Laws*' (1869), p93) Savigny further explained that "*German writers have in modern times ever been more and more inclined to give up the strict separation between immoveable and other estates ... The English writers, on the contrary, with the Americans ... adhere to the distinction with great tenacity and the French writers appear to take the same side.*" (*ibid.*, p94)

[21] Consider Troller's remarks that, "*Since, as a rule, the purpose of an intangible is to be exploited and used as far as possible throughout the world, its creation opens up a potentially unlimited international economic area.*" (Troller, K, '*International Encyclopaedia of Comparative Law, Volume III, Ch.22 – Industrial and Intellectual Property*' (1994), p7)

[22] Clarence Smith, *ibid.*, p17.

in property, which may be artificial and idiosyncratic, for a classification of those interests which is more likely to command international acceptance."[24] Academic favour naturally rests upon a distinction which is more obvious and realistic than are our native domestic categories of heritable or real, and moveable or personal, since the international private law distinction rests not on rights (*e.g. qua* heir, or *qua* next-of-kin), but rather on actual things. Walter Cook, taking the opposite stance, once declared that "... *the law, unlike engineering, deals with rights and not with things.*"[25] This observation stemmed from the rather strained view that "... *nothing is really immoveable, even relatively to the earth, except empty space, which is not a thing, but an absence of things.*"[26]

It is submitted that, in the international context, it would be inappropriate for the distinction between different types of property to be based upon *rights*: this would be to beg the very question in issue, since the underlying premise of international rules of property is the fact that the definition and regulation of rights in and over property may be governed by one of a number of possible legal systems and not exclusively by the *lex situs*.[27] To characterise an object of property as moveable or immoveable according to the rights possibly attaching to it would be inappropriate since it may subsequently be discovered that those rights do not, in fact, exist in the eyes of the legal system which is ultimately to regulate the treatment of that item of property.

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[23] Lalive (1955), *ibid.*, p7, and bearing in mind the remarks made at note 5 above.
[24] Anton, A E, '*Private International Law*' (1967) p386. (This section would appear to have been omitted from the 2nd edition.)
[25] Cook (1942), *ibid.*, p301.
[26] Cook (1942), *ibid.*, p304. *Cf.* Clarence Smith's opinion that, "*the annexation of things to a position is artificial, because no thing is physically so annexed to a position that it cannot by the exertion of adequate effort be detached from it.*" (*ibid.*, p28)
[27] Consider Falconbridge's explanation that, "*Persons may have interests in things. In other words the things may be the subject of interests. These interests are of course themselves intangible legal concepts which may be various in kind and variously classified in different systems of law.*" ((1947)

That said, it is conceded that the "*so-called physical criterion*"[28] cannot comprise the *only* touchstone in every case, since certain objects of property may be inherently "*ambiguous in their nature.*"[29]

In reality, the question whether the subject-matter of ownership is physically moveable or immoveable generally presents no difficulty. A more complex problem does, however, arise in those cases where a right over what is physically moveable is regarded by a particular legal system as being a right over an immoveable *e.g.* fixtures, title deeds *etc*. It is always open to a legal system to determine that "*a thing in its nature moveable shall, for some or for all legal purposes, be subject to the rules generally applicable to immoveables*"[30] and *vice versa*. Accordingly, no legal system is bound absolutely by the restraints of physical criteria.

In 1907, the difficulties concerning the characterisation of fixtures ("*tangible property whose status as realty or personalty is indeterminate*")[31] were highlighted by

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ibid., p433) Further, "*It is ... important that things and interests in things be not confused.*" (*ibid.*, p436)

[28] Lalive (1955), *ibid.*, p12.

[29] *E.g.* Fixtures, a prefabricated house, or an exhibition tent. *Cf.* Hellendall, "*The definition and characterisation of things as moveables or immoveables must be kept distinct from notions of daily language.*" (Hellendall, F, '*The Characterization of Proprietary Rights to Tangible Moveables in the Conflict of Laws*' (1941) 15 Tulane L. Rev. 374, 384). Robertson makes the point that, "... *jurisprudentially speaking, all property is both moveable and intangible. 'Property', in its strict sense, means a legal relationship, or 'bundle of rights' and not the physical object with which the relationship is concerned, or over which those rights exist. The relationship, or rights, clearly must be intangible.*" (Robertson, *ibid.*, p192). Consider Story (cited with approval by Farwell, LJ. in *In re Hoyles*), who advised that, "*the question ... is not so much what are, or ought to be, deemed ex sua natura, moveables or not, as what are deemed so by the law of the place where they are situated.*" (Story, J., '*Commentaries on the Conflict of Laws*', p654, s.447)

[30] Dicey & Morris, '*The Conflict of Laws*', (13th ed., 2000), p917, paragraph 22-002.

[31] Bingham, J W, '*Some Suggestions Concerning the Law of Fixtures*' (1907) 7 Colombia L. Rev. 1, 4. Story had previously noted the problem: "... *moveables may become annexed to immoveables, either by incorporation or as incidents, and then they take the character of the latter. Such are the common cases of fixtures of personal property ... whether for use or ornament ... Among the class of immoveables are also ranked ... heritable bonds by the Scottish law, and ground rents, and other rents charged on land.*" (Story, *ibid.*, p557) Bingham depicted various disputes which might arise concerning fixtures, including, *inter alia*, disputes between (a) the chattel claimant and the owner of land to which the chattel has been annexed without the chattel claimant's consent or fault; (b) the chattel owner who

Bingham. Falconbridge has proposed that courts should adopt what may be termed a purposive approach to the characterisation of fixtures, namely, "... *regard should be had, not so much to the characterisation of things annexed to land or connected with land as moveables or immoveables in themselves, as to the question whether social convenience or practical expediency requires that they should be treated as falling within the rules of law applicable to the land.*"[32] This approach is, nevertheless, limited, insofar as the same author further states that, "*if* [chattels] *are susceptible of being severed from the land, they may, on severance, resume their character of moveables, and, if they are taken to another country, may be dealt with under the law of their new situs, without regard to the fact that under the law of their former situs they may still be regarded as so closely connected with the land that they should be subject to the law of the former situs.*"[33] Falconbridge was, in effect, suggesting a proper law approach to the characterisation of property, where the circumstances are such (*i.e.* where a closer connection exists between the object and the 'first' *situs*, than with the 'subsequent' *situs*), as to justify an exception to the norm of characterisation by the *lex situs*. Beale had previously remarked, "*Suppose ... the owner of land carried his house key into another state; would it be regarded as having a situs in that*

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has annexed his chattel to another's land, without that other's consent, and the landowner; (c) the chattel claimant who has annexed his chattel to land while in adverse possession, and the owner of a better title to the land who has recovered possession; (d) the transferor of land and the transferee; and (e) the mortgagor of land and the mortgagee. (Bingham, *ibid.*, p20 *et seq.*) Other types of problem might also arise (*e.g.* the Permanent Bureau of the Hague Conference has asked, "*Do the benefits and income derived from a particular estate, for example, immoveable property situate in country A, accrue to that estate, or does the law applicable to them depend on their character as immoveable or moveable property? This question is not devoid of practical importance ... Immoveable property may well yield sizeable amounts of income.*" ('*Actes et Documents de la Seizième Session, Tome II*' - Droz, G, '*Commentary on Succession Questionnaire*', p21)

[32] Falconbridge (1947), *ibid.*, p442.

[33] Falconbridge (1947), *ibid.*, p442. (Emphasis added) (*i.e.* if the *situs* of a constructively annexed moveable object [*e.g.* title deeds to a house, or a house key] should change, that object will thereafter fall under the control of the new *lex situs*, which could, of course, entail absurd consequences.) *Cf.* Prott, L V, '*Problems of Private International Law for the Protection of the Cultural Heritage*' (1989) 217 II *Receuil des Cours* 215, 241, *viz.*: "*If detached elements are found in another country and classified as moveables to be dealt with according to the law of the place where they are currently*

state? It is pretty clear that it would not."[34] He justified this conclusion not by relying on a rule of closer connection (as did Falconbridge), but by maintaining that the key, by virtue of a legal fiction, is permanently situated on the land (*i.e.* in the 'first' *situs*); when the owner (or, indeed, any other party) takes it to another jurisdiction, it is necessarily in transit until returned again to its putative permanent position.[35] This appears to rely on a rather tenuous distinction between physical, and legal, situation.

For the sake of completeness, it should be noted that *only* physical criteria are important in determining the secondary distinction between tangible or corporeal, and intangible or incorporeal, property. This secondary characterisation cuts across the principal division of property into moveable and immoveable objects. Items of incorporeal immoveable property (*e.g.* leases, servitudes, titles of honour), although

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located, the protection of the state of origin will not follow them and the dismemberment will be established."

[34] Beale, J H, '*The Situs of Things*' (1919) 28 Yale L. J. 256.

[35] Beale, *ibid.*, p262. *Cf.* Cook: "*If by 'situated' is meant merely 'physically situated' clearly the second state ... need pay no attention to what the first state has previously said about the 'moveable' or 'immoveable' character of the object concerned: the object is now in the second state, and the latter's power or jurisdiction is ... complete ... The way out for those using the conventional confused terminology is to say that the object is still 'legally situated', or 'by operation of law' has a 'situs' in some state in which it once was, even though it is now physically situated within the borders of a second state.*" (Cook, W W, '*Immoveables and the Law of the Situs*' (1939) 52 Harv. L. Rev. 1246, 1254). *Cf.* A case concerning the removal, in 1955, by the Contessa Maria Lucheschi, of a cycle of Tiepolo frescoes from the walls of her Venetian Grand Canal Palazzo. The Contessa sold the denuded Palazzo to one Luigi Franchin, and, simultaneously, she sold the frescoes (now valued at approximately $600,000) to a Milanese collector for $10,000. In a subsequent tri-partite dispute, the Italian court employed (in practice, if not in name), the physical/legal *situs* distinction, taking the view that "*the parts are indivisible from the whole, meaning that the frescoes were 'automatically transferred' with the palazzo. It is of little importance that at the moment of sale the frescoes were not there 'since the material factor of the separation did not make the tie less binding.*'" (Bronson, C G, International Foundation for Art Research Journal 1998, Vol.1, No.3, p10) Since the problem was internal to Italy, this seems to have been a satisfactory solution, but one wonders what would have been the result if, say, the frescoes had been sold to a Swiss collector and immediately annexed to the walls of his Alpine *schloß*. It is submitted that Falconbridge's approach is more appealing than Beale's since it relies less heavily upon a legal fiction.

less common perhaps than objects of incorporeal moveable property (*e.g.* goodwill, trademarks, debts *etc.*), do nevertheless exist.[36]

It has been suggested[37] that a more logical characterisation of property would, in fact, be between: -

(1) Corporeal or tangible things (which may be either moveable or immoveable); and

(2) Incorporeal or intangible things.[38]

According to the authors of Dicey and Morris, however, "*common practice*" (at least for the purposes of the conflict of laws) classifies all things as being moveable or immoveable, and includes within the category of moveable objects, corporeal *and*

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[36] Contrast the view of Falconbridge, who says that, "*The terms immoveable and moveable cannot be applied in any real sense to intangible interests in things as distinguished from tangible things ...*" (1947, *ibid.*, p434)

[37] For example, by Falconbridge: "*Intangible things, having no actual situs, cannot properly be described as being either moveable or immoveable, so that things should be classified as being (1) tangible things – which may be either (a) moveable or (b) immoveable, and (2) intangible things.*" (1947, *ibid.*, p435)

[38] Consider the approach of the Institutional writers, including, Bell (*Commentaries*, II.V.1.1.): "*According to the division of the Roman law, things were corporeal or incorporeal; the former comprehending such property as is perceptible to sense, the latter such as consists in legal right merely. This is a division consistent with nature, and which ought not to be discarded ... Things corporeal are distinguished in law as heritable or moveable, first, By their own nature and description; secondly, By their connection with other things; thirdly, By the destination towards such connection.*"; Bell (*Commentaries*, II.V.1.II.), "*... rights of an incorporeal nature partake of the character of heritable or moveable, either, 1. By their nature; 2. By connection; or, 3. By destination.*" Erskine (*Institutes*, II.2.1.), in a section headed '*Of heritable and moveable rights*' commences, "*By the Roman law, things or subjects were divided into corporeal and incorporeal.*" The air of simplicity suggested by the corporeal/incorporeal distinction may be deceiving: Cook has warned that, "*At first sight these words* [tangible and intangible] *seem largely self-explanatory, but we soon find ourselves lost in a verbal fog when we attempt to follow the actual use of these terms by judges and writers.*" (1942, *ibid.*, p284) *Cf.* Cheshire, "*An unfortunate practice ... has grown up by which moveables are distinguished ... into tangible things and intangible things. This is a linguistic solecism, for it is a little difficult to conceive of a moveable thing that cannot be touched. Loose and inaccurate terminology ... causes no serious harm, provided that it does not lead to false analogies and obscurity of thought. This is just what the expression 'intangible things' has done.*" (Cheshire, G C, '*Private International Law*', 3rd ed. (1947), p550)

incorporeal objects, and even ascribes to the latter an artificial *situs* "*in order to bring them within the scope of rules of law expressed in terms of situs.*"[39]

The distinction between moveable property and immoveable property is not merely a matter of fact; rather, the forum must engage in a process of *legal* characterisation of the property in question.[40] The choice of what law governs the characterisation process is relatively restricted insofar as the characterisation of property is concerned. The choice is whether the court should resort to the *lex fori* or to the *lex situs* in order to ascertain the nature of the property transferred. "*Prevailing legal opinion rightly adopts the second solution.*"[41] In *Ross v. Ross's Trustees*,[42] Lord Meadowbank pondered, "*By the law of what country, the nature of a property, the character of which was disputed, should be determined;* ... [it] *must be decided by the law of the country where the subject itself is situated ... the question, what forms a personal estate, is altogether different from the question, to whom does the personal estate*

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[39] Dicey & Morris, *ibid.*, p920, paragraph 22-010. See Chapter Eleven, *infra* – 'The Assignation of Incorporeal Moveable Property'. It should be noted that there has been a call to abandon the distinction between moveable and immoveable property as far as 'cultural property' is concerned, on the basis that "*cultural property ought not to be accorded greater or lesser protection depending on whether it is an integral part of a whole or has been detached from it, or on whether it is qualified as moveable or immoveable property.*" (Reichelt, G, '*International Protection of Cultural Property*' (1985), Uniform Law Review 43, 99; and Prott, *ibid.*, p241) Reichelt and Prott are concerned less with the characterisation of particular types of property than with the formulation of a bespoke, flexible, choice of law rule concerning cultural property. Consider too in this regard Merryman's proposal for the additional sub-categories of 'culturally moveable' (cultural objects which can be "*moved abroad without significant danger to the objects themselves or to their contexts and without harm to their culture of origin*") and 'culturally immoveable' ("*objects, whose exports would result in significant cultural loss*" To determine whether an article is culturally immoveable, the author suggests that three factors should be considered, namely, (a) whether the culture/belief system from which the object came is still alive; (b) whether the object was made to be used in religious or ceremonial ways; and (c) whether the object would be used by the state of origin in the manner so intended.) (Merryman, J H, '*A Licit International Trade in Cultural Objects*' 3, at p17, in Briat, M and Freedberg, J A, ed. '*International Sales of Works of Art, Volume 5: Legal Aspects of International Trade in Art*' (1996)) The answers to these three questions would be highly subjective and the factors, it is suggested, would very likely prove unworkable.

[40] Lalive (1955), *ibid.*, p14.

[41] Lalive (1955), *ibid.*, p15; *Downie v. Downie* (1866) 4 M. 1067, 1070; and *Monteith v. Monteith* (1882) 19 Sc.L.R. 740, 742. Although it might be argued, as in other areas, that characterisation by the *lex situs* incurs the difficulties inherent in any process of characterisation by the *lex causae*.

[42] July 4 1809 F.C.

devolve; the question, whether the subject be personal or not ought to be decided by the lex rei sitae."[43] As Clarence Smith has written, "*It used to be accepted – and still is accepted in the textbooks – as axiomatic that the law of the site of the property in question at the time in question should classify that property for all purposes of private international law.*"[44] If there is a conflict between the *lex situs* and the *lex fori* as to whether an object of property is moveable or immoveable, it is well settled that the *lex situs* at the relevant moment (*i.e.* at the time when ownership is alleged to have passed, or at the time pertinent to which the dispute has arisen) must determine the characterisation.[45] Of course, no real difficulty of characterisation emerges if the

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[43] *Ibid.*, p389.

[44] Clarence Smith, *ibid.*, p23. However, a rather significant rider follows this axiom, namely, "*Robertson more soberly* (p191) *says that only the law of the site 'can effectively determine' how the property is to be classified ... With all respect, even this is pure fantasy: moveable property may well, at the time for decision, be outside the country where it was at the relevant date and even immoveable property may have been sold and the proceeds removed.*" (*ibid.*, p23) Consider too Savigny, *ibid.*, at p134: "*... the position in space of moveables may be so indeterminate and fluctuating as entirely to preclude any definite knowledge of this position, as well as of the territory in which the local law subsists.*"

[45] *Macdonald v. Macdonald* 1932 S.C. (H.L.) 79, *per* Lord Tomlin, at p84: "*The English view is that the law of the asset's situation must determine whether it is moveable or immoveable ... In this respect the Scots law does not appear to differ.*" *In re Berchtold, Berchtold v. Capron* [1923] 1 Ch. 193, *per* Russell, J., at p199: "*It is further conceded that whether particular property is a moveable or an immoveable is decided according to the lex situs.*" *In re Cutliffe's Will Trusts, Brewer v. Cutliffe* [1940] 1 Ch. 565, *per* Morton, J., at p571: "*I start with this rule which is, I think, well established that the question whether particular property is a moveable or an immoveable is decided according to the lex situs.*" Morris has remarked that the decision in *Cutliffe* would "*appear to be perfectly correct.*" (Morris, J H C, '*Cases on Private International Law*', 4th ed. (1968), p325). *Cf.* Collier, who has advised that, "*... for our courts to classify* [property] *in a manner opposed to that of the lex situs would often be a waste of time, as there may be little our courts could to do enforce their ideas and solutions.*" (Collier, J G, '*Conflict of Laws*' (2001), p243) See also Hellendall (1941), *ibid.*, p386/7. *Contra* Robertson, who has noted (as regards intangible property at least) that the criterion of *situs* may result in the court's assuming that which is yet to be proved, "*... to refer to that situs in order to discover the nature of the property when it is in dispute is to assume the point in issue.*" (*ibid.*, pp191, 193). Similarly, Kaye has indicated that, "*Whether lex situs should be resorted to in order to determine the nature of property as being immoveable in the context of Article 16(1)* [Brussels Convention] *is debatable ... the meaning of connecting or jurisdictional factors and of concepts contained therein is principally to be ascertained according to the interpretation they bear under English law itself as lex fori, since ... it would beg the question to adopt the meaning of a foreign law, before that law were found to be applicable or its courts to be competent.*" (Kaye, P, '*Civil Jurisdiction and Enforcement of Foreign Judgments*' (1987), p895) Kaye admits, however, that if the *lex fori*, instead of the *lex situs*, were to characterise the property, there would be a risk of jurisdictional conflict in the event that the *lex fori* considered the property to be moveable and the *lex situs* considered it to be immoveable. *Cf.* Schlosser Report (1978), p121, paragraph 168(c): "*If an action relating to immoveable property is brought in a particular State and the question whether the action is concerned with a right in rem within the meaning of Article 16(1) arises, the answer can hardly be derived from any law other than that of the situs.*" Consider too Rabel's statement that "*The traditional principle that the lex situs*

different characterisations of the *lex fori* and the *lex situs* would, in any event, lead to the same choice of law rule being invoked in the particular case. Alternatively, when the property would be classified in an identical manner by all possible laws "*there is no necessity for ascertaining which law is applicable for this would be a purely academical pursuit.*"[46] In the event, however, that a different conflict rule pertains for each kind of property, characterisation is clearly a pivotal stage in the resolution of the case.[47]

The only law which can effectively determine whether property should be treated as moveable or immoveable is the law of the country which has immediate control of the property, that is to say (at least if the property is corporeal), the law of the country where it is situated.[48] Dicey and Morris state quite starkly that "*The law of the country where a thing is situate (the lex situs) determines whether (1) the thing itself is to be considered an immoveable or a moveable; or (2) any right, obligation or document connected with the thing is to be considered an interest in an immoveable or a moveable.*"[49] If the subject matter, whether of ownership, possession or of some lesser proprietorial right, is regarded as being immoveable by one system of law, but as moveable by another, then Scots law, English law and most other foreign legal systems would collectively respond by stating that the definitive characterisation should be that rendered by the *lex situs*. "*If the law of the situs attributes the quality of*

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determines whether a thing or interest is immoveable still prevails but has been challenged by a recent and growing group of writers with their creed that the lex fori does everything." (Rabel, E, '*The Conflict of Laws: A Comparative Study – Volume I*' (1958), p15)

[46] *Re Hoyles* [1911] 1 Ch 179,185; and Lalive (1955), *ibid.*, p14.

[47] Cheshire made a similar observation in the 3rd edition of his work, namely, "*The first task of the court in a conflict of laws case ... is to decide whether the res litigiosa is a moveable or an immoveable. Upon this preliminary decision depends the legal system that will be applicable to the case.*" (1947, *ibid.*, p547)

[48] *Chatfield v. Berchtoldt* [1872] L.R. 7 Ch. App. 192; *Macdonald v. Macdonald* 1932 S.C. (HL) 79; and *Re Fitzgerald* [1904] 1 Ch. 573.

[49] Dicey & Morris, *ibid.*, Rule 111, p917, paragraph 22R-001.

moveability or of immoveability to the object in question, the English court which is seised of the matter must proceed on that basis."[50] The equivalent approach of the Scottish courts is well-established,[51] and there is currently little doubt that the *lex situs* should determine whether an object itself, or a right connected with it, is to be considered as immoveable or moveable.[52]

Scottish and English courts will likewise acquiesce in foreign characterisations of foreign situated property, and will admit the right of another country to determine whether property situate within that country's jurisdiction falls within the class of moveable or immoveable, as that foreign country alone shall decide. There may, however, be a degree of limitation on this principle of characterisation by the *lex situs*: "*It is commonly and confidently said that in an English court the preliminary classification of property is in fact to be made by the law of the site (unlike any other classification), but subject to the qualification that the categories, wherever the site, are the civil law categories of immoveable and moveable.*"[53] It should be noted, however, that Clarence Smith cites no authority in support of this proposition.

The significance of the characterisation process lies in the fact that the assertion that an asset is moveable or immoveable is simply, "... *a shorthand form of asserting that*

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[50] Cheshire & North, *ibid.*, p924; and *Johnstone v. Baker* (1817) 4 Madd. 474.
[51] *Ross v. Ross's Trustees* July 4 1809 FC.
[52] Consider cases at note 45 above. *Macdonald v. Macdonald* 1932 S.C. (HL) 79 - character of Canadian assets determined by *lex situs*; *Downie v. Downie's Trustees* (1866) 4M. 1067 - nature of Scottish mortgage determined by Scots law; *Train v. Train's Executors* (1899) 2F. 146 - character of bonds and dispositions in security determined by the Scottish *lex situs*; *Breadalbane's Trustees v. Dowager Marchioness of Breadalbane* (1843) 15 Scot. Jur. 398; *Monteith* (1882) 9R. 982; and *Moss's Trustees* 1916 2 S.L.T. 31. Consider, however, the remarks of Anton, that, "*In light of the reasoning of the House of Lords in the case of Macdonald, it is thought that the earlier Scottish decisions of Train v. Train's Executors and Moss's Trustees v. Moss must be regarded as incorrect.*" (Anton (1967), *ibid.*, p387) In *Train*, the deceased's widow received a two-fold benefit as a result of an irregular process of re-characterisation of a bond over heritage in Scotland. See note 58, *infra*.
[53] Clarence Smith, *ibid.*, p17.

a number of legal propositions should be applied to the one or the other; it has no bearing upon the real nature of the thing."[54] According to Scots rules of international private law, rights over immoveable property are determined by the law of the *situs* whereas rights over moveable property are not necessarily governed by that law.[55] Since the *situs* principle constitutes a "*simple and effective rule*" for questions relating to physical things and to immoveables, there is a tendency to "*extend it to all questions and to regard it as the general determinant of rules for choice of law concerning choses in action. This is a false analogy. Moreover, it frequently leads to forcing a rule, eminently adapted to one set of circumstances, to fit circumstances for which it is entirely inappropriate .... one must be aware of the danger of straining rules to fit categories.*"[56] Historically, questions regarding moveable property have been solved by reference to a variety of connecting factors.[57]

Although selection of the applicable law is based upon the moveable/immoveable distinction, once the applicable law has been so selected, if its domestic rules are founded upon some other idiosyncratic distinction (*e.g.* realty and personalty, or

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[54] Lalive (1955), *ibid.*, p14. *Cf.* Hellendall, who, in considering whether property is tangible or intangible, states, "*This questions is no more a 'natural' question than the question whether a thing is to be regarded as moveable or immoveable ... it is a question of pure law; it is the question whether the forum's rules of conflict of laws applying to tangible things or those applying to intangible things shall determine the rights to a thing which is the subject matter of the dispute.*" (1941, *ibid.*, p392) More recently, Carter has opined that, "*generally speaking in English private international law the distinction between moveable and immoveable property is only important in cases of general or universal transfer (as distinct from particular transfer) which occur on occasions such as bankruptcy and death.*" (Carter, P B, '*Transnational Trade in Works of Art: The Position in English Private International Law*' in Lalive, P, ed. '*International Sales of Works of Art*' (1988), p318)

[55] For – among other considerations – it then depends on what is meant by '*situs*'. For reasons which will be set out in Chapters Eight and Eleven, *infra* – 'The Transfer of Corporeal Moveable Property' and 'The Assignation of Incorporeal Moveable Property' – it is not easy to narrate the rule regarding moveables - particularly incorporeal moveables - in any more definitive a manner.

[56] Cheshire & North, *ibid.*, p927.

[57] Consider generally Lalive, P A, '*The Transfer of Chattels in the Conflict of Laws: A Comparative Study*' (1955), and Zaphiriou, G A, '*The Transfer of Chattels in Private International Law: A Comparative Study*' (1956). Consider, however, Venturini's view that, "*In reality the distinction between moveables and immoveables, which is generally acknowledged ... is of little practical importance today ... for ... the lex rei sitae is applied practically everywhere both in respect of*

heritage and moveables), that internal categorisation and the consequences thereof will be respected: "*This is because the case has now reached a stage when it has passed out of the domain of the conflict of laws into the domestic domain.*"[58] Whilst within the conflicts domain, however, it is evident that the moveable/immoveable distinction looks set to prevail over any other possible characterisation of property. On this basis, therefore, it is necessary now to consider the steps which must be taken in the judicial process when the nature of the property has been so determined, namely, to consider what is the localizing element or connecting factor as regards the acquisition, disposal, transmission or extinction of rights in, and over, particular items of immoveable or moveable property.

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moveables and immoveables." (Venturini, G C, '*International Encyclopaedia of Comparative Law, Volume III, Ch.21 – Property*' (1976), p8)

[58] Dicey & Morris, *ibid.*, p918, paragraph 22-007. *Cf.* Crawford, *ibid.*, p308, paragraph 14.02; and Falconbridge (1947), *ibid.*, at p438: "*The* [moveable/immoveable] *distinction is material for the purpose of the conflict rules of the forum, but it is immaterial for the purposes of the domestic rules of the proper law if ... that distinction is not a feature of those rules.*" Consider too Wolff's view that the "*natural, extra-judicial* [moveable/immoveable] *distinction is everywhere the starting-point for the legal distinction. But only the starting-point.*" (Wolff, M, '*Private International Law*' (1950), p502) Wolff later expands upon this point, stating, "*The help given by the* [*lex situs*] *is limited to one small component of the problem: after having made known to the English court that the thing situate in France is moveable as understood by French law, that law withdraws, and the English court will apply the English conflict rule concerning moveables.*" (*ibid.*, p504/5) *Cf.* Clarence Smith, who has advised that, "*a classification for the choice of law does not preclude a different classification for the purpose immediately in hand.*" (*ibid.*, p20) Furthermore, "*After the controlling law has been selected, that law may classify the right differently, but not by way of treating as annexed to any site anything which the law of that site does not annex to it.*" (*ibid.*, p33)

Chapter Four

Defining the '*Situs*'

The principal connecting factor concerning property in the conflict of laws, is the *lex situs*.[1] Although this concept is often assumed to be self-explanatory, it is important that the precise meaning of the factor be articulated as regards immoveable property, corporeal moveable property and incorporeal moveable property, respectively, for although these three categories of property differ quite radically in nature, the same connecting factor (nominally, at least), is applied to choice of law disputes concerning all three categories.[2] Widespread use of the '*lex situs*' factor persists only because, as Carnahan has explained, "... *the term 'situs' is itself an expression of a conclusion which a court has made after consideration of the relationship of the particular kind of property to various states with which it may have a possible connection.*"[3]

The *lex situs* – Immoveable property

In 1919, Joseph Beale remarked that, "*The situs of land can offer no serious difficulty. Land has by its nature a permanent situs; and that situs must necessarily be within the state in whose boundaries it lies. It cannot change its location. Its sovereignty may*

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[1]Sometimes also referred to as the *lex loci rei sitae* or the *lex rei sitae*. Consider, in this regard, Bingham's remark that, "*Nothing so tends to confusion in any science as misuse or loose use of terms.*" (Bingham, J W, '*Some Suggestions Concerning the Law of Fixtures*' (1907) 7 Col. L. R. 1, 2)

[2]Consider Hancock's citation of Cook (whom he christens '*the great fallacy-hunter*'), *viz.*: "*The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.*" (Hancock, M, '*Fallacy of the Transplanted Category*' (1959) 37 Can. Bar Rev. 535, 575, citing Cook, W W, '*The Logical and Legal Bases of the Conflict of Laws*' (1942), p159)

[3] Carnahan, C W, '*Conflict of Laws and Life Insurance Contracts*' (1958), p440. (Emphasis added) *Cf.* Hellendall, F, '*The Characterization of Proprietary Rights to Tangible Moveables in the Conflict of Laws*' (1941) 15 Tulane L. Rev. 374, 392: "*The situs is a connecting factor, a 'local element which connects the factual situation with a particular country.' As such it must be determined by the lex fori.*"

indeed be changed; it may lie within the territory of one sovereign, now within that of another. But even in such a case its situs remains constant."[4] Venturini, however, has drawn attention to one complication which could possibly (albeit infrequently) arise in connection with land, or other immoveable property, namely, a situation where the asset in question straddles the border between two contiguous states (*e.g.* the sale of an estate on the Scottish/English border). In such a scenario, however, the problem, according to Venturini, is easily solved, "*by dividing this economic unit into two distinct parts and thus by submitting each of them to the law of the country in which it is situated.*"[5] Whilst this may be reasonable for the purposes of jurisdiction, insofar as a plea of *forum non conveniens* may, if appropriate, be upheld so as to unify or streamline what would otherwise be separate proceedings concerning the 'one' estate, it is submitted that in a case where the land in question is owned by a single proprietor and is, to all intents and purposes, one estate, Venturini's rule is unsatisfactory for the purposes of choice of law.[6] While the formal requirements of the respective *leges*

(Emphasis added) In theory, different forums might ascribe a different *situs*, given the same problem on which to adjudicate.

[4] Beale, J H, '*The Situs of Things*' (1919) Yale L. J. 525, 526. *Cf.* Dicey & Morris, '*The Conflict of Laws*' (13th edition), p935, at paragraph 22-052: "*Land could not without absurdity be treated as situate in any country other than that where it is situated. Any interest in land is situate where the land is situated.*"; "*The situs of an immoveable is ordinarily fixed and does not change, but this is not so in the case of moveables which may be in one place now and in another subsequently ...*" (Spiro, E, '*The Incidence of Time in the Conflict of Laws*' (1960) 9 I.C.L.Q. 357, 363); and "*As regards immoveables ... no great difficulties arise.*" (Venturini, G C, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 21 – Property*' (1976), p10)

[5] Venturini, *ibid.*, p10.

[6] Consider *Scherrens v. Maenhout* Case 158/87 [1988] E.C.R. 3791, which concerned an agricultural lease of a contiguous estate comprising five hectares of land in Belgium and twelve hectares of land in the Netherlands. According to the Commission's written observations, "*By virtue of being a unit, treated as such by the parties in their contractual dealings, it might in certain circumstances be more practical for a single court to give judgement over the whole property rather than for two separate courts to do so in respect of its two parts.*" (p3795) "... [T]*here might, in appropriate cases, be an overriding reason for making an exception to the general rule under which, in the case of a lease for property over two separate parts of the land, two different courts have jurisdiction over two separate parts of the land. Such an exception might be made for land which technically forms a single unit, or when virtually the entire land is situated in one of the two contracting states, and only a small, insignificant part of it in the other, or when the land concerned forms a single economic unit in the sense that neither of the component parts can profitably be farmed as a separate entity ...* [but] *confined to cases where the land is in fact physically a whole.*" (*ibid.*) The effect of the Commission's

causae could be satisfied (*e.g.* registration or recording requirements), there could be difficulties in submitting certain matters of essential validity (*e.g.* questions of capacity to transfer, or to acquire, land) to more than one law, where those laws would draw different conclusions regarding the problem at hand.

The *lex loci rei sitae* – Corporeal moveable property

As regards the treatment of corporeal moveable property, the term *lex rei sitae* has been almost invariably employed by commentators on the conflict of laws, from Story and Savigny onward, to denote the law of the place where the property is situated. Use of this term is hermeneutically inaccurate, since its literal translation is 'the law of the thing situated.' The emphasis which this translation places on the actual object of property is inappropriate since no individual object can ever have a law depending upon it as such. Goudy has remarked that, "*Despite its sanction by long usage and great names, I venture to object to it as an inexact and improper mode of expression ... the best English and American writers, though not all of them avoid it, employ correctly in its place either the term lex situs or the terms lex loci rei sitae.*"[7] If the term *lex rei sitae* is compared with other analogous idioms commonly employed in international private law, its inappropriateness becomes apparent (*e.g. lex domicilii* and *lex fori* are accurately-named connecting factors since domicile and forum indicate a definite *locus* or territory; *lex delicti*, *lex celebrationis* and *lex solutionis*, however, are more properly framed in the manner *lex loci delicti*, *lex loci celebrationis* and *lex loci solutionis*). Goudy compares the phrase '*lex rei sitae*' with the equivalent French phrase: "*a French writer never speaks of la loi de la chose situeé, which would be a literal translation, but of la loi de la situation, which is the*

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suggestion would be to create in respect of the smaller (or less valuable) plot, a notional *situs*, at the

equivalent not of the lex rei sitae, but of the lex situs."[8] Accordingly, it is stated that although either of the terms *lex loci rei sitae* or *lex situs* is semantically correct, the latter, as the shorter, is to be preferred. Perhaps, though, for accuracy, or for its mind-directing quality, the former has its advantages.

Equivalent to the possible exception to the general rule regarding immoveable property straddling two contiguous states, is the exception which might also pertain regarding the treatment of certain types of corporeal moveable property, namely, 'aggregate moveables.'[9] The commentary to paragraph 256 of the First Restatement of Conflict of Laws declares that, " *The* [American Law] *Institute expresses no opinion whether the conveyance of an aggregate unit of moveables may not be governed by the law of the place where the various items are aggregated as a unit, or that a conveyance of an aggregate unit made up of a number of units, themselves aggregates, may not be governed by the law of the place where the entire unit is managed so far as such conveyance is not contrary to the public policy of a state in which any constituent unit is.*"[10] If a single owner is intent on transferring to a third party, title to 'an aggregate unit of moveables' (particularly goods of the same description and quality), which happen to be situated, whether by chance or design, in more than one state, then the application of multiple *leges causae* to the matter of the

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situs of the larger (or more valuable) plot. See note 29 *et seq.*, *infra*, concerning 'notional *situs*'.

[7] Goudy, H, '*Lex rei sitae*' 1913 (29) L.Q.R. 2.

[8] Goudy, *ibid.*, p3.

[9] Beale, J H, '*Restatement of the Law of Conflict of Laws*' (1934), paragraph 256, comment (b): "*An aggregate unit of moveables is a collection of things which may include tangible things, documents and intangibles, all devoted by the owner to a single use or managed as a single unit ... The fact that a particular item is temporarily separated from the other items constituting the aggregate unit does not prevent it from being included therein.*"

[10] Beale (1934), *ibid.*, paragraph 256, caveat.

essential validity of the transfer of ownership, may give rise to inconvenience or absurdity.[11]

The matter of time is highly significant in determining the *lex situs* of corporeal moveable property, for as Beale has explained, *situs* refers to "*a settled relation of the thing to a particular locality*."[12] But the problem regarding the transfer of corporeal moveable property is a dynamic, not a static one.[13] Connecting factors may be constant or variable; "*The former necessarily refer to a particular event or a constant situation* [*e.g. lex loci celebrationis, lex loci contractus*, or *lex loci delicti*] *at a given moment in time, and no further definition is needed. The latter* [*e.g. lex loci rei sitae, lex domicilii*, or habitual residence] *employ a test which may be liable to change over a period of time and thus it becomes essential that the choice of law rule should define*

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[11] *E.g.* Consider a Belgian jeweller selling to a purchaser in Scotland, by means of a single transaction, a pair of diamonds, one of which is situated, at the point of sale, in Antwerp, and the other of which, in South Africa. It could be argued that it would be more appropriate (at least from the perspective of the transacting parties) for the essential validity of the transfer of ownership of the pair to be governed by one single law, rather than for the transfer of each diamond to be governed *separatim* by Belgian or South African law.

[12] Beale (1919), *ibid.*, p525. In Beale's view, "... *situs does not include the mere temporary location of a thing, but refers to a location which has such a degree of permanence that the thing may fairly be described as settled within the place and as forming a part of the mass of property in that place.*" (*ibid.*) *Sed contra* Beale, *ibid.*, at p528: "*The general principle of situs is that the situs of a chattel is based upon a natural fact, its actual position in space. Its actual position is prima facie its situs, just as a man's actual residence is prima facie his domicile.*" *Cf.* Spiro, *ibid.*, at p364: "... *when locating the situs of a moveable thing one must have regard to the incidence of time.*" Might one compare the notion of '*situs*' with that of 'domicile' (a 'settled' relation between a person and a locality), or with 'habitual residence', in the sense of 'habit'? *Contra* Zaphiriou, G, '*Transfer of Chattels in Private International Law*' (1956), at p194: "*The situs of a chattel is the equivalent of a person's residence, not of a person's domicile.*"

[13] As Grodecki has stated, "... *legal rules may collide on the plane of time as well as that of space.*" (Grodecki, J K, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 8 – Intertemporal Conflict of Laws*' (1976), p3) *Cf.* Spiro, *ibid.*, p357. A temporal conflict of laws may appear in one (or a combination) of three guises, namely, (1) A change in the conflict rule of the forum (*le conflit transitoire*); (2) A change in the domestic rule of the *lex causae*; or (3) A change in the connecting factor. In the third case, the two or more laws consecutively indicated by the changing connecting factor fall into competition with one another. Most commonly the temporal problem which emerges in the context of moveable property is (3), referred to as '*le conflit mobile.*' (This phrase was first coined by Bartin, E, '*Principles de droit international privé*', Volume I, 28 – *per* Grodecki, *ibid.*, p33.) Zaphiriou has remarked that, "... *dynamic conflicts, like the static conflicts, are solved in accordance with the conflict rules of the forum ... the conflict rule must consist of two elements ... it must indicate the connecting factor in space ... it must indicate the connecting factor in time.*" (*ibid.*, p158)

the operative date ... it is thus imperative for the conflict rule to contain an indication of the point in time when reference to a given legal system must be made – only then will it provide an answer to the question what law should be applied."[14]

The situation of a corporeal moveable at a particular point in time may be entirely fortuitous, but as regards the transfer *etc.* of ownership, the relevant *situs* is the situation of the object at the time of its alleged transfer.[15] As Venturini has explained, "*... it is necessary to determine the sphere of operation of each of the legal systems which are applicable in succession when the same goods are transferred from one country to another.*"[16] Difficulties naturally arise where the *situs* of moveable property changes during the course of events (*e.g.* between the time of the first acquisition or transfer of the asset in question, and the point of litigation to determine the ultimate ownership thereof). The *situs* of moveable property is frequently casual and can easily be changed by wrongful act. If the *situs* of the object should change (*i.e.* from state X to state Y), it is straightforward enough to assert that the *lex situs* at the time of the alleged (latest) transfer of ownership should apply, but it is questionable how reasonable it is to apply that law. Nevertheless, it is the case that, "*... the law of the country where the object is situated last in time determines the substance, and thus the very existence of proprietary rights ... all past transactions concerning the acquisition of title in the object are determined by the law of the*

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[14] Grodecki, *ibid.*, p33. *Cf.* Morris, J H C, '*The Time Factor in the Conflict of Laws*' (1966) 15 I.C.L.Q. 422, 425.

[15] Or as Grodecki suggests, the law indicated by the latest crystallisation of the connecting factor (*ibid.*, p35). *E.g. Cammell v. Sewell* (1858) 3 H&N 617, (1860) 5H&N 728; and *Inglis v. Robertson* [1898] A.C. 616. *Contra* immutable matrimonial property régimes which adopt the law indicated by the *first* crystallisation of the connecting factor: *Frankel v. The Master* (1950) 1 S.A.L.R. 220 (South Africa).

[16] Venturini, *ibid.*, p13. He has stated that, "*Grave difficulties arise in respect of the question as to the time at which the place of the situation of the object is relevant for the purposes of private international law.*" (*ibid.*)

country where the object was situated when the alleged acquisition took place."[17] The result is that the wrongful removal of property can be cured, with relative ease, by buttressing the wrongful act with a corrective transfer in a subsequent, well-disposed, *situs*.[18] Doubt as to the logic of applying the (new) *lex situs* must inevitably arise where property has been removed without the consent of the first owner or lawful possessor, to another country, and title has been validly transferred there in conformity with the local law of the supervening *situs*.[19] This shall be considered further in Chapters Eight and Twelve, *infra*.

Finally on the subject of the *situs* of corporeal moveable property, particular mention should be made of goods in transit. As will be outlined in Chapter Eight, *infra*, property of this type is subject to special provision due to the fact that the *situs* of such property is casual, fortuitous or transient, making application of the general rule inappropriate, if not impossible. Savigny explained that, "... *the position in space of moveables may be so indeterminate and fluctuating as entirely to preclude any definite knowledge of this position ... A traveller with his baggage can pass, in a coach or railway, through several territories in one day, without even thinking of the one in which he happens for the moment to be. The same case occurs when a*

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[17] Venturini, *ibid.* p13; *Cammell v. Sewell*, *ibid*; *Todd v. Armour* (1882) 9 R. 901; *Luther v. Sagor* [1921] 3 K.B. 532; and *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718.

[18] Grodecki admits that, "... *the solution very largely sacrifices vested rights in favour of security of commercial dealings.*" (*ibid.*, p36)

[19] Consider Falconbridge's and Beale's respective solutions (in the context of fixtures) for dealing with surreptitiously removed house keys *etc.* (See Chapter Three, *infra* – 'The Distinction between Moveable and Immoveable Property' – note 32 *et seq.*) Might the notion of a fictional *situs* be extended in the present context? Consider too Zaphiriou's comment that, "*In federal states like the USA and Canada where dynamic conflicts are frequent, there is a tendency to recognise as far as possible 'acquired rights' and to subject both their creation and effects to the same law.*" (1956), *ibid.*, p160. *Sed contra*, *Winkworth v. Christie, Manson & Woods* [1980] Ch. 496. Chapter Eight, *infra* – 'The Transfer of Corporeal Moveable Property'.

merchant sends goods to a great distance, as long as these goods are on their way …"[20]

The effect of classifying an object as property in transit is to displace application of the general *lex situs* rule.[21] This displacement principle is primarily one of expediency, since, "*In most of these cases, the court would find it difficult, ex post facto, to ascertain the situation of the chattel.*"[22] In view of the consequences, however, it is important to inquire who, or what law, determines whether an object is, in fact, in transit. In reality, this matter can be determined only by the forum applying the *lex fori*, since, by definition, there is no other court (*i.e.* no relevant *forum rei sitae*) to which the matter can be referred, unless it happens that the goods have temporarily come to rest in a third state. If this should be the case, then the (non-*situs*) forum would presumably defer to the law of that third state in order to ascertain whether or not, in that state's view, the transit had been interrupted.

In principle, goods will be classified as being in transit if they have left the country of dispatch (the *locus expeditionis*), without, in fact, having arrived at their intended

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[20] Savigny, F C, '*A Treatise on the Conflict of Laws*' (1869), p134/5. *Cf.* Hellendall, F, '*The Res in Transitu and Similar Problems in the Conflict of Laws*' (1939) 17 Can. Bar Rev. 7, at p27: "*In these cases there is either no situs at all, or the lex situs cannot be ascertained, or the connection of the goods with their actual situation is so small …*"; Venturini, *ibid.*, at p11:"*... the connection with the country of transit is altogether temporary and without any practical relevance.*"; and Zaphiriou, *ibid.*, at p192/3: "*… at the time of the alleged transfer or the alleged acquisition of a proprietary interest the chattels are without a fixed resting place … a res in transitu may have no connection at all with the territory of a country.*"

[21] Dicey & Morris, *ibid.*, p968, paragraph 24E-015: "*If a tangible movable is in transit, and its situs is casual or not known, a transfer which is valid and effective by its applicable law will semble be valid and effective in England.*"; and Crawford, E B, '*International Private Law in Scotland*', p317, note 58.

[22] Zaphiriou, *ibid.*, p193; Siehr, K, '*International Art Trade and the Law*' (1993) 243 *Receuil des Cours* VI 9, 79: "*Sometimes the locus rei sitae of a moveable cannot be ascertained easily. This is especially true of moveables en route by ship, aircraft or inland transportation.*"; and Hellendall (1939), *ibid.*, p27.

destination (the *locus destinationis*).[23] Moreover, an object will cease being in transit if its passage is suspended. The difficulty, however, in Beale's words, is "*to decide what breaks the continuity of the journey*."[24] It has been suggested that transit will terminate only when a definite connection, physical or legal, can be established with the state where the object is (even temporarily) located.[25]

The *lex situs* – Incorporeal moveable property

A more difficult concept to rationalise is that of the *situs* of an incorporeal moveable right.[26] *Ex sua natura*, an incorporeal right has no physical location.[27] Nevertheless,

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[23] Hellendall (1939), *ibid.*, p27, refers to Niboyet, (Niboyet, J P, '*Des conflits des lois relatifs à l'acquisition de la propriété et des droits sur les meubles*' (1912)), stating that not only must the chattel be *physically* in transit (*i.e.* it must have left the country of dispatch), but it must also be *legally* in transit (*i.e.* it must not have established any legal contact with its present location).

[24] Beale (1919), *ibid.*, p531.

[25] Hellendall (1939), *ibid.*, p27, has stated that, "... *a chattel ceases to be in transitu when the journey is interrupted and a legal contact has been established with the law of the place where the property is situate ... A journey is deemed to have been interrupted when the goods have arrived at the place of their destination stipulated in the contract of affreightment whether originally or subsequently inserted therein. The intention of the owner or the purchaser of the goods to forward them to another country is immaterial ... A contact with the law of the country where a journey is interrupted can be established either by a sale to a person resident in that country, or by an imperative provision of the law of that country* ..." The author is more ambiguous in his statement on p31 to the effect that, " [the goods in transit] *must not enter into any legal connection with the country of transit. Whether such legal connection is established depends on the circumstances of each case.*" The author intends 'legal' connection to be interpreted in the sense of connection with the law, as opposed to 'lawful' connection, as is shown by his remark that, "*It is not necessary that such legal contact is established by lawful acts; even a tortious or criminal act might determine a transit prematurely.*" Consider, for example, *People v. Bacon* (1910) 243 Ill. 313, 90 N.E. 686 and *General Oil Company v. Crain* (1908) 209 U.S. 211, both cited by Beale (1919), *ibid.*, p530: in the former case, grain removed from cars for inspection, weighing, drying, sacking, grading, mixing and reloading, were held to have acquired a fixed *situs* in the state where these activities took place, and in the latter case, crude oil stopped during transit for the purpose of being barrelled was deemed to have acquired a *situs* at the place of barrelling. Contrast *Robinson v. Longley* (1883) 18 Nev. 71 and *Prairie Oil & Gas Company v. Ehrhardy* (1910) 244 Ill. 634, 91 N.E. 680, also cited by Beale (1919), *ibid.*, p529: in the former case, a travelling circus exhibiting in a certain state was held merely to be in transit, and not therefore, liable to tax in the state through which it passed, and in the latter case, a constant flow of crude oil passing through a pipeline between Kansas and Indiana was held to be in transit and not liable to tax in Illinois. Beale takes the view that, "*If ... while the goods are within the state any use is made of them, or any process of manufacture or of preparation for market is applied to them, which is of such a nature as seriously to interrupt the transit, the goods while being so used or while undergoing such a process are usually regarded as having a fixed situs.*" ((1919), *ibid.*, p530)

[26] To be distinguished from a right of property (*i.e.* ownership) in respect of a corporeal moveable object: "*There is no need to assign a legal situs to an interest in a tangible thing as distinguished from the actual situs of the thing which is the subject of the interest. On the other hand, if the thing which is the subject of the interest is itself intangible, neither the so called thing nor the interest in it has any actual situs, and if it should seem to be useful to assign a situs to either of them, that situs must be an*

the connecting factor which generally applies to dealings with incorporeal moveable property relies, *prima facie*, upon the situation of the property. Cook has concluded that the "... *source of confusion is a result of the hypostatization ('thingifying') of relations and abstractions, so that they are dealt with as if they were 'things' in the same sense in which physical objects are 'things'.*"[28]

To circumvent the impossibility of identifying a *physical situs*, courts and commentators have instead utilised a legal fiction, imputing to incorporeal moveable rights an artificial *legal situs.*[29] In the case of *Smelting Company of Australia Limited*

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artificial one, invented, by analogy or otherwise, for the purpose of bringing intangibles within the scope of certain rules of law expressed in terms of situs ... even the use of the word thing as descriptive of the intangible concept involves a reification of what has no real existence." (Falconbridge, J D, '*Essays on the Conflict of Laws*' (1947), p434/5)

[27] *Cf. Lee v. Abdy* (1886) 17 Q.B.D. 309, *per* Day, J., at p312: "*The subject matter of the assignment is a chose in action which has no locality.*"; *Smelting Company of Australia Limited v. I.R.C.* [1897] 1 Q.B. 175 [overruled on a different point by *English, Scottish & Australian Bank Limited v. I.R.C.* [1932] A.C. 238], *per* Lord Esher, MR, at p180/1: "*The expression 'locally situate' cannot apply to something which in truth and in fact has no locality ... the property here in question cannot be touched, or seen, or placed anywhere. It is incapable of being brought within the fair and true meaning of the words 'locally situate' or of being said to exist in any locality.*"; *English, Scottish & Australian Bank Limited v. I.R.C.* [1932] A.C. 238, *per* Lord Tomlin, at p249: "*I share the view ... that it is not easy to form a conception of property having no local situation.*" Consider too an unattributed Note entitled, '*Situs of Intangible Property in Conflict of Laws*' (1956) 30 St. John's Law Review 224, at p224: "*It is an apparent anomaly to discuss the situs of intangible property.*"; Falconbridge (1947), *ibid.*, at p417:"*As an intangible thing has no objective existence, it cannot have a real situs, that is, it is not situated in a given place in the literal sense in which a tangible thing is so situated.*"; Fawcett, J J, & Torremans, P, '*Intellectual Property and Private International Law*' (1998), at p489: "... *how is a situation to be ascribed to intangibles?*"; Hellendall (1941), *ibid.*, at p393: "... *the situs of intangibles, even where there is a corporeal substratum, such as an acknowledgement of a debt or the like, is not the physical situation of the corporeal substratum.*"; Rabel, "... *debts have no situs and lack the all-purpose contact that tangible things have ... because the object is imagined rather than real ... it cannot be localized.*" (Rabel, E, '*The Conflict of Laws: A Comparative Study*', Volume I (1958), p66/7); and Cook (1942), *ibid.*, at p286: "... *if 'things' have no 'physical substance' they can hardly be said to have a 'situs' if that means a location in space.*"

[28] Cook (1942), *ibid.*, p285. *Cf.* Falconbridge (1947), *ibid.*, p417, where the author speaks of the '*reification*' of intangible moveable rights; and *New York Life Insurance Company v. Public Trustee* [1924] 2 Ch. 101, *per* Atkin, LJ., at p119: "*The question as to the locality, the situation of a debt or a chose in action is obviously difficult, because it involves consideration of what must be considered to be legal fictions. A debt, or a chose in action, as a matter of fact, is not a matter of which you can predicate position; nevertheless, for a great many purposes it has to be ascertained where a debt or a chose in action is situated.*"

[29] To a lesser degree, the notion of artificial legal *situs* is also utilised in relation to certain corporeal moveable objects, including, constructive fixtures, goods in transit, sailing vessels, rolling stock and aircraft: a legal *situs* is sometimes imputed to vessels *etc.* at the place of their registration, or alternatively, in the state of the flag under which they voyage. See McNair, A D, '*Municipal Effects of Belligerent Occupation*' (1941) 57 L.Q.R. 33, 70; Venturini (1976), *ibid.*, p10/11; Dicey & Morris,

v. I.R.C.[30] Rigby, LJ., opined that, "*No doubt for certain purposes incorporeal rights and choses in action, such as debts, are treated by a legal fiction as being where the debtor is; but I do not know that we are therefore compelled to say, or ought properly to say, that they have a local situation there.*"[31] The revisionist view of *Smelting Company of Australia Limited* has highlighted the distinction between physical and legal *situs, viz*: "*Lord Esher and Lopes LJ. considered that incorporeal personal property could not be said to be situate anywhere. This is, of course, true, physically speaking, but not, I think, in contemplation of law.*"[32] Lord Lindley continued, "*... the legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature and has, physically speaking, no locality at all. We, however, are not dealing with anything which in fact fills a portion of space, but with a legal conception, or, in other words, with rights regarded as property. But to talk of property as existing nowhere is to use language which to me is unintelligible.*"[33]

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ibid., Rule 22E-057: "*A merchant ship may at some times be deemed to be situate at her port of registry.*", and Rule 22E-060: "*A civil aircraft may at some times be deemed to be situate in its country of registration.*" This is potentially of importance in the context of purported governmental confiscations of vessels *etc.* (*e.g. The Jupiter (No. 3)* [1927] P.250) Consider Beale (1919), *ibid.*, at p532: "*A vessel has no situs at a mere port of call, even though the vessel is making regular trips between that port and another ... the purpose for which the vessel was in the port of call wholly excluded the idea of permanently abiding in the state.*", and at p533: "*The rolling stock of a railroad ... is by nature and use constantly moving from place to place,* [and] *cannot ordinarily be regarded as having an actual situs anywhere.*"

[30] [1897] 1 Q.B. 175.

[31] *Ibid.*, p184.

[32] *I.R.C. v. Muller & Co's Margarine Limited* [1901] A.C. 217, *per* Lord Lindley, at p237/8. Further, *per* Lord Macnaghten, at p223: "*... it is not easy to form a conception of property having no local situation.*"

[33] *I.R.C. v. Muller & Co's Margarine Limited* [1901] A.C. 217, *per* Lord Lindley, at p237. Beware, however, Falconbridge's warning: "*It is common practice ... to speak of the situs of an intangible thing and to express rules of law ... in terms of situs. Language of this kind is of course not to be taken too seriously, because a so-called situs attributed to an intangible thing is obviously a less substantial basis for resort to the lex rei sitae than the actual situs of a tangible thing.*" ((1947), *ibid.*, p417)

The notion of a fictional *situs* was endorsed by Lord Buckmaster in *English, Scottish and Australian Bank v. I.R.C.*,[34] when his Lordship opined that "... *it is true that* [incorporeal property] *has not the attributes of place and substance like a chattel which you can handle and move from one place to another. But debts do, in one form or another, represent property of very considerable value in the modern world, and it appears to me it is desirable that they should possess a locality, even if they are invested with it by means of a legal fiction.*"[35]

Unfortunately, the ascription of a fictional *situs* entails the drawback that the fiction may not be universally recognised or endorsed. The *situs* of an incorporeal moveable right should be determined by the forum applying the conflict rules of the *lex fori*.[36] There is scope, however, for international discord in the event that the forum concludes that the right in question is situated in state X, but state X, in fact, considers it to be situated in a third state, state Y (or, for that matter, in the *forum*).[37] One might

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[34] [1932] A.C. 238, at p246. *Cf.* Lord Warrington, who stated, at p248, that, "... *the task of discovering secundum fictionem legis a local situation for an intangible legal conception has long been a familiar one. One example is that of finding a residence for a company.*" Further, *per* Lord Macmillan, at p254, "*When the question of the local situation of a particular form of property is submitted for judgement I do not think that it will do to say that it has in law no situation anywhere.*"

[35] Consider also Benjamin, J, '*The Law of Global Custody*' (1996), at p80: "*Attributing a location to an intangible such as an interest under a trust is a notional exercise.*"; and the unattributed remarks that, "*Since situs can be essential, intangibles have been artificially located. The application of these fictions has resulted in divergent, and often conflicting, theories of determining situs.*" (Note (1956), *ibid.*, p225). *Cf.* Rogerson, P J, '*The Situs of Debts in the Conflict of Laws – Illogical, Unnecessary and Misleading*' [1990] 49 C.L.J. 441, at p441.

[36] Wolff, M, '*Private International Law*' (1950), p505; and Benjamin, J, '*Determining the Situs of Interests in Immobilised Securities*' (1998) 47 I.C.L.Q. 877, 926. Note the *circulus inextricabilis* inherent in this proposition: the question whether property is moveable or immoveable is to be answered by the *lex situs*. But, the forum determines what is the *situs* of the property. To determine the *situs*, the forum must decide whether the property is moveable or immoveable; this may arise then as an incidental or preliminary question – *Cf.* Sykes, E I, '*Cases and Materials on Private International Law*' (1962), p594. This complication can only be resolved by operation of the doctrine of *renvoi.* (note 66, *infra*)

[37] Consider the dictum of McNair J. in *Rossano v. Manufacturers Life Insurance Company* [1963] 2 Q.B. 352, at p379/80, *viz.*: "... *I should not be deterred from holding that the situs of the debt was not in Egypt on the evidence ... that by Egyptian law the situs of the debt was in Egypt.*"

surmise that this problem would be exacerbated in situations where the incorporeal right in question is one with which the forum is not familiar.[38]

Through experience, rules have emerged in terms of which certain classes of incorporeal moveable right have been accorded fictional *situs*. An incorporeal moveable right may require to be fixed with a notional *situs* for a variety of purposes, including, *inter alia*, the exercise of jurisdiction, the grant of confirmation or the payment of tax.[39] So, for example, a simple debt[40] is deemed to be situated at the place where the debtor resides,[41] because assistance may be required from the courts of the *situs* to secure enforcement of the obligations under the debt, including, if necessary, the use of diligence.[42] Enforcement of a debt at the residence of the debtor

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[38] *E.g. Phrantzes v. Argenti* [1960] 2 Q.B. 19; and *Shahnaz v. Rizwan* [1965] 1 Q.B. 390.

[39] *New York Life Insurance Company v. Public Trustee* [1924] 2 Ch. 101, *per* Atkin, LJ. at p119. *Cf. Smelting Company of Australia Limited v. I.R.C.* [1897] 1 Q.B. 175, *per* Rigby, LJ., at p184: "*The term 'locally situate' may have different meanings for different purposes.*"; and *I.R.C. v. Muller & Co's Margarine Limited* [1901] A.C. 217, *per* Lord Lindley at p237: "*It may perhaps be true that property which has no physical existence, may, if necessary, be treated for some purposes in one locality, and for other purposes in some other locality. But until the necessity for so treating it is apparent, I see no justification for introducing confusion by judicially holding the same property to be legally situate in two different places at one and the same time.*" *Contra* Andrews, F, '*Situs of Intangibles in Suits Against Non-resident Claimants*' (1939) 49 Yale L. J. 241, at p259: "*A debt may have a situs in a number of places at the same time, which, from a strictly theoretical standpoint, seems illogical. From a practical standpoint, however, the situation is no worse than in any other case in which two or more courts have concurrent jurisdiction.*"; and Graveson, R H, '*The Conflict of Laws – Private International Law*' (1974), at p471: "*... although it may possibly only have one situs at any one time, that situs may be as changeable and elusive as a professional debtor.*" Consider too Westlake, J, '*A Treatise on Private International Law*' (1925), at p212: "*Shares in a company registered in England for the purpose of acquiring a business carried on abroad, are property situate in England within the meaning of the revenue laws ... Nevertheless, the shares or stock of a foreign company are, for the purpose of the revenue laws, deemed to be situated in the country where the company has its place of residence and trading, and not in the place where the company is incorporated and registered, if that is different.*"

[40] According to Andrews, a simple debt is "*merely an obligation upon the part of the debtor to pay the given amount to the creditor upon the due date.*" ((1939), *ibid.*, p255)

[41] Dicey & Morris, *ibid.*, p925, paragraph 22-026; *English, Scottish and Australian Bank Limited v. I.R.C.* [1932] A.C. 238, *per* Lord Buckmaster, at p242: "*That for purposes of probate and estate duty a simple contract debt is assumed to be situated where the debtor resides is established by a long series of authorities that stretch back into the mists of antiquity.*"; and *Banque des Marchands de Moscou* [1954] 1 W.L.R. 1108 *per* Roxburgh, J., at p1115: "*I know of no authority for the proposition that a simple contract debt is situate in this country at a time when the debtor is not resident here.*"

[42] *Commissioner of Stamps v. Hope* [1891] A.C. 476, *per* Lord Field, at p481: "*Now a debt per se ... has, of course, no absolute local existence; but it ... is a well-settled rule ... that a debt does possess an attribute of locality ...* [it has] *no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be.*" (*Cf.* Falconbridge (1947), *ibid.*, p418) *Rex v. Lovitt*

is the oldest and most universal of the fictional *situs* rules.[43] Rogerson has explained the background to the rule: "*Originally this place* [the debtor's residence] *was adopted because it was the Ordinary* [the ecclesiastical officer with power to grant probate and to administer legacies[44]] *for that area who had jurisdiction over the debtor and could, therefore, release him from his debt after the death of his creditor.*"[45]

The question of time is interesting in this regard.[46] Normally, in disputes concerning property, the connecting factor is determined as at the point, say, of transfer of ownership of the object in question. In the present context, therefore, one would expect that practice to translate into the *situs* of the debt (*i.e.* the residence of the debtor) at the point, say, when entitlement to repayment of the debt was created or

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[1912] A.C. 212, *per* Lord Robson, at p218: "*The property consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be.*"; and *New York Life Insurance Company v. Public Trustee* [1924] 2 Ch. 101, *per* Warrington, LJ., at p114: "*The rule of law with regard to the locality of simple contract debts is that it is determined by the residence of the debtor at the material moment ... the reason for that is that it is the residence of the debtor which determines the place where he may be sued, prima facie at all events, and is in general the place where the means of satisfying any judgement may be discovered, but whatever the reason is, there is no doubt that that is the rule.*" Further, *per* Atkin, LJ., at p119: "*... it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt ... that is a very material consideration.*"; and *Swiss Banking Corporation v. Boehmische Industrial Bank* [1923] 1 K.B. 673, *per* Bankes, LJ., at p679.

[43] *Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139. Although note also that, on occasion, the choice of *situs* is based not purely upon the debtor's residence: *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, *per* Lawrence, LJ., at p697: "*In the present case the debt is connected in so many ways with England that there is no difficulty in arriving at the conclusion that it has its situation or quasi-situation in England. The contract with the bank was made in England – the nature and extent of the bank's obligations under the contract fell to be determined by English law – the debt is payable in England where the bank is resident and domiciled and England is the place where the debt is properly recoverable.*" (*Cf.* the multiple links identified in *Indyka v. Indyka* [1969] 1 A.C. 33) *Cf. Smelting Company of Australia Limited v. I.R.C.* [1897] 1 Q.B. 175, *per* Rigby, LJ. at p183. Also, reliance has been placed, not necessarily on the debtor's residence, but rather on his presence sufficient to found jurisdiction: *Lorentzen v. Lydden* [1942] 2 K.B. 202, *per* Atkinson, J., at p205, "*The situs of a debt or chose in action is, generally speaking, the country in which the debtor is to be found and sued.*" *Cf.* Westlake (1925), *ibid.*, at p209: "*A debt is situate in the country in which it is properly recoverable.*"; and Benjamin (1998), *ibid.*, at p931: "*... one should be guided by the practicalities of recovery and enforcement, whether or not these lead one to the residence of the debtor.*"

[44] *Attorney-General v. Bouwens* (1838) 4 M&W 171, 191/2.

[45] Rogerson (1990), *ibid.*, p442.

[46] *Cf.* Rogerson (1990), *ibid.*, p455.

assigned. In view, however, of the rationale for adopting the connecting factor of residence (namely, the fact that residence is the place where enforcement of the debt may be exacted against the debtor, on the assumption that he/she will have sufficient assets in that state with which to satisfy the debt), the *tempus inspiciendum* at which to ascertain the debtor's residence would more appropriately be the time when enforcement proceedings are raised against the debtor, rather than the time when the debt was created, or the subsequent assignation effected, for it is quite possible that by the time of raising the enforcement proceedings, the debtor's residence may have changed and his assets removed from the jurisdiction of his erstwhile residence. Although crystallisation of the connecting factor at the later date would incur the disadvantage that the *situs* of the debt would effectively 'float' until such time as enforcement proceedings were commenced,[47] postponed crystallisation would be the honest product of the argument which supports the existing rule.

Although simple debts are among the most common type of incorporeal moveable right arising in the context of international disputes, various other types of right have also been ascribed notional *situs*, and should briefly be considered.

A letter of credit, unlike an ordinary debt, is situate in the place where it is payable against documents, even if the debtor is not actually resident there.[48] Bills of exchange (being in reality corporeal moveable property for which the holder can usually obtain full value at any place where he or she chooses to dispose of them) and other securities which can be validly transferred by mere delivery (with or without

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[47] *Contra*, *The Armar* [1981] 1 All E.R. 498. *Cf.* Chapter One, *supra*, note 46.

[48] *Power Curber International Limited v. National Bank of Kuwait* [1981] 1 W.L.R. 1233. In this case, the letter of credit was considered to situate in the place where it was payable against documents, and

endorsement) are deemed to be situate in the country where the documentation representing the security is, from time to time, to be found.[49] The obvious significance of paper in such a transaction effectively results in the transaction transcending the incorporeal/corporeal moveable property dichotomy.

When one considers company share holdings, one can appreciate the artificiality of assigning a locality to incorporeal property, for shares may have a different location for different purposes (*e.g.* for the purposes of transfer, or for taxation).[50] Accordingly, the purpose for which a location is to be ascribed assumes increasing relevance. A shareholding is intimately connected with the place where the issuing company has its domicile or seat,[51] since, as a matter of course, a share can be transferred only by substitution of the name of the transferee for that of the transferor on the register of shareholders and by the issue of an appropriate share certificate by the company secretary.[52] The register is normally retained at the company's principal place of business and it is entry upon that register (rather than mere possession of a share certificate[53]) which determines actual ownership.[54]

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not at the Bank's place of business. Rogerson observes, however, that neither Lord Denning, M.R., nor Griffiths LJ., cites any authority in support of this assertion. ((1990), *ibid.*, p446)

[49] *Winans v. Attorney-General (No.2)* [1910] A.C. 27.

[50] Consider Dicey & Morris, *ibid.*, p932, paragraph 22-044.

[51] Noting, of course, the difficulties which flow from the dichotomy between the incorporation theory (in terms of which the dominant connecting factor regarding the activities of a corporate entity is the law of the country in which incorporation took place), and the real seat (*siège réel* or *réal*) theory (in terms of which the law of the state in which the corporation has its central management and control is the key localising agent). (Carruthers, J M, and Villiers, C L, '*Company Law in Europe – Condoning the Continental Drift*' 2000 (11) European Business Law Review 91)

[52] Collier has pointed out that, "*Where the share is in bearer form, the situs is where the warrant or other instrument is kept.*" (Collier, [1996] All E.R. Annual Review 78, 90) Also, *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387, *per* Auld, LJ., at p411: "*If the shares are negotiable the lex situs will be where the pieces of paper constituting the negotiable instruments are at the time of transfer.*"

[53] Andrews, *ibid.*, at p284, has explained that share certificates constitute mere evidence of a shareholder's interest, and do not themselves constitute the property in question.

[54] Consider, however, Graveson's remarks that, "*While the transfer of title to registered shares must comply with the lex situs of the register, the independent transfer of the share certificate itself, when in some other country, will probably be governed by its own lex situs, and may accordingly confer limited property rights on the assignee.*" ((1974), *ibid.*, p472)

In *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)*[55] Staughton, LJ., opined that, "*... an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs) ... In the ordinary way ... that is the law of the place where the company is incorporated. There may be cases where it is arguably the law of the place where the share register is kept, but that problem does not arise today.*"[56]

Accordingly, shares are situate in the country in which they can be effectively dealt with as between the shareholder and the company.[57] If, however, there is more than one register (*e.g.* if branch registers are retained for recording transactions effected in

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[55] [1996] 1 W.L.R. 387, affirming [1995] 1 W.L.R. 978.

[56] Staughton, LJ., *ibid.*, p405. *Cf.* Aldous, LJ., at p421, who cited, with approval, a dictum of Thorson, J. in the Canadian case of *Braun v. The Custodian* [1944] 3 D.L.R. 412, at p428, which explains the reasoning behind the rule: "*It is ... a sound rule of law that the situs of shares of a company for the purpose of determining a dispute as to their ownership is in the territory of incorporation of the company, for that is where the court has jurisdiction over the company in accordance with the law of its domicile and power to order a rectification of its register, where such rectification may be necessary, and to enforce such order by personal decree against it.*" Staughton, LJ., at p404, mentioned the "*preponderance of authority*" identifying the *lex situs* as the place of incorporation, but this reference is, in fact, to transatlantic, not United Kingdom, case law. Auld, LJ., on the other hand, remarked, at p413, that, "*For my part, I do not derive much assistance from the North American jurisprudence. However, it confirms the distinction between shares and share certificates where the latter are non-negotiable.*"

[57] *Brassard v. Smith* [1925] A.C. 371; and *R. v. Williams* [1942] A.C. 541. *Cf.* Benjamin, noting that whilst, in the case of shares, the *situs* will usually be the place of incorporation of the company to which the shares relate, "*... where securities are intermediated through global custody arrangements, and in particular,* [are] *immobilised in a central clearing system ... situs is the location of the intermediary.*" ((1996), *ibid.*, p63, and further at p79) Also Benjamin (1998), *ibid.*, at p924: "*In relation to immobilised securities, this simple [lex situs] rule presents a challenge in practice, as the location of interests in immobilised securities may not be immediately obvious. This article suggests that the legal location of such interests is the office of the clearing system where the account recording such interests is maintained.*" Consider also Auld, LJ., in *Macmillan Inc. v. Bishopsgate*, *ibid.*, at p411: in his Lordship's view, the *situs* of shares "*will normally be the country where the register is kept, usually but not always the country of incorporation.*" With reference to *Macmillan*, Collier has noted that, "*The members of the court were not altogether at one about* [the *situs* of the shares] *... Aldous LJ. plumped for the place of incorporation, as did Staughton, LJ. Auld, LJ. thought that the situs is where the share register is kept (which need not be where the company is incorporated* [at p411]*). Both Staughton and Auld LJJ. agreed that if the shares are negotiable the situs is where the instrument happens to be.*" (Collier, *ibid.*, p90) In any event, the different approaches led to the same answer since, as Staughton LJ. explained, "*Whether it be situs, place of incorporation or place of share register, the answer is the law of and prevailing in the State of New York.*" (p405) Note also that although the Court of Appeal in *Macmillan* affirmed the decision of Millet, J., the basis of his reasoning was *not* affirmed:

other countries[58]) the *situs* of the shares will largely depend upon the country in which, according to the ordinary course of business, the transfer would be registered.[59] This assumes particular importance if a share certificate is transferred in a country other than that in which the principal register of shareholders is held: the shares may be transferred in a country whose legal system permits the legal and/or the equitable title to the shares to pass from the transferor to the transferee even prior to registration of the assignation.

Based upon similar reasoning to that which underpins the rule concerning simple debts, rights of action in contract, delict or unjustified enrichment are deemed to be situate in the country in which they can, in fact, be pursued.[60] Similarly, if a beneficiary under a trust has a right to compel the trustees to implement a trust purpose, his or her interest is thought to be located at the place where that action may be brought (*e.g.* at the place of administration of the trust – generally the place of the trustees' residence[61]). If, on the other hand, a beneficiary has an absolute interest in trust or estate property, that interest is located at the actual place where the trust or estate property is situated.

As far as the goodwill of a business is concerned, it is deemed to be situate, quite naturally, in the country where the asset to which the goodwill attaches is situated.[62]

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the appellate court applied the law of the State of New York, not *qua lex loci actus* as did Millet, J., but rather *qua lex situs* of the shares.

[58] Section 362 of the Companies Act 1985.

[59] *Standard Chartered Bank Limited v. I.R.C.* [1978] 3 All E.R. 644; and Collier, *ibid.*, p90.

[60] *Danubian Sugar Factories Limited v. I.R.C.* [1901] 1 Q.B. 245; *Sutherland v. Administrator of German Property* [1934] 1 K.B. 423 (C.A.); *Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139; and Dicey & Morris, *ibid.*, p933, paragraph 22-046.

[61] *Archer-Shee v. Garland* [1931] A.C. 212; *Stirling's Trustees v. The Legal and General Assurance Society Limited* 1957 S.L.T. 73; and Dicey & Morris, *ibid.*, p934, paragraph 22-048.

[62] *I.R.C. v. Muller & Co's Margarine Limited* [1901] A.C. 217, *per* Lord Macnaghten, at p224: "*The goodwill of a business must emanate from a particular centre or source. However widely extended or*

Finally, intellectual property rights, although constituting an array of different categories of right, including copyright, patents and trademarks, are generally deemed to be situated in the country where they can effectively be transferred in accordance with the law which governs their creation.[63]

The general rule, therefore, based upon the mutual principles of control and effectiveness, would now appear to be that rights of incorporeal moveable property are deemed to be situate in the country where they can be enforced or where they are recoverable.[64] An object of incorporeal moveable property is said to be situate in the country where the debtor resides, for that is where it might be enforced.[65] Although this is the generally accepted rule, application of the 'residence' test can give rise to some difficulties, leading to criticism of the *lex situs* rule and to suggestions that it is not, in fact, entirely appropriate as regards incorporeal moveable rights. This criticism will be explored in Chapter Eleven, *infra*.

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diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates." Note, however, the dissenting judgement of Lord Chancellor Halsbury: "*I am wholly unable to see that goodwill itself is susceptible of having any local situation*." (p240) *Cf. R J Reuter Company Limited v. Mulhens* [1954] Ch. 50, 95-96.

[63] Dicey & Morris, *ibid.*, p934, paragraph 22-051. *Cf.* the assignation of company shares. Fawcett & Torremans, *ibid.*, at p490: "*The provisions of the law of the forum will ... be used to determine where the intellectual property right, as a chose in action, can be recovered properly or can be enforced ... This means, by implication, that the rule will have to be refined for each type of chose in action.*" This process of refinement pertaining to intellectual property rights is beyond the scope of this work.

[64] Although consider the dictum of Rigby, LJ. in *Smelting Company of Australia Limited v. I.R.C.* [1897] 1 Q.B. 175, at p184: "*The incorporeal right can only be made effectual where the debtor is from the nature of the right; you can only sue a man where you find him, but it does not follow that the right really can have a local situation there or anywhere.*" (Emphasis added)

[65] *Sutherland v. German Property* (1933) 50 T.L.R. 107; *F&K Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139; *In re Helbert Wagg & Co Ltd* [1956] 1 Ch. 323; and *Kwok Chi Leung Karl v. Commissioner of Estate Duty* [1988] 1 W.L.R. 1035, *per* Lord Oliver at p1041. The rule is general, but not absolute: *Power Curber International Limited v. National Bank of Kuwait* [1981] 1 W.L.R. 1035, 1041; [1981] 3 All E.R. 607.

Defining the '*lex situs*'

A further matter which should be considered in the context of the definition and interpretation of connecting factors, is the meaning of '*lex*' in the expression '*lex situs*'. Is the reference to the internal, domestic law of the *situs*, as identified by the forum, or does the expression include, in addition, the international private law rules of the *situs*?[66] In 1939, Walter Cook articulated the impact of this problem upon the conflict of law rules of property, stating that, "... *the rule that the 'law' of the situs is to be applied furnished no guide whatever to a court of the situs, unless it is first assumed that the word 'law' in the rule means in such a case the purely 'domestic' rule of the situs, and not its conflict of laws rule.*"[67] In short, the reference to the law of the *situs* is construed, if the rule is being applied by the *forum rei sitae*, as meaning the internal, domestic law of that state,[68] but if the rule is being applied by a non-*situs* forum, as including the international private law rules of the *situs*.[69] It is Morse's view that, " ... *in referring to the lex situs, it is likely, though the matter is not conclusively*

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[66] Consider Sauveplanne, J G, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 6 – Renvoi*' (1990), at p4: "*The phenomenon of rules of conflict of laws which are in conflict with each other is a specimen of a conflict of systems. The conflict rule of the forum's legal system differs from the conflict rule of the system designated by the forum's rules of conflict of laws.*" One may note Cheshire's (optimistic?) view that, "[The doctrine of *renvoi*] *has caused distress to the practitioner ...* [it] *has unloosed a prodigious volume of literature, but, after a short though stormy career it has, so far as English law is concerned, received its quietus ... Happily the controversy is dead. Whether the doctrine of the renvoi is part of English law is no longer a relevant question.*" (Cheshire, G C, '*Private International Law*' (1935) 51 L.Q.R. 76, at p76/7)

[67] Cook (1942), *ibid.*, p264. (*Cf.* Cook's 1939 article, *ibid.*, p1258) Cook is envisaging, in this context, the forum *qua situs*. In a footnote, he explained that, "*Obviously to tell the court of the situs to apply its own 'conflict of laws' rule to a case which is for it a problem in the conflict of laws is to tell it precisely nothing. On the other hand, to tell it to decide a problem in the conflict of laws in the same way it would decide an otherwise similar but for it purely domestic case does furnish the court at the situs with a basis for reaching a decision.*" (*ibid.*)

[68] *Sed contra* Cheshire, who advocated an interest-analysis approach, stating, "*It may be that a court at the situs, if required to give a decision, would apply the relevant rule of its own law applicable to a purely domestic situation. This, however, is not necessarily so. The relevant rule should be examined in the light of its reason, the purpose which it is designed to effect, and the policy upon which it is based, in order to ascertain whether it is properly applicable to a case containing a foreign element. It does not follow that a rule of the land law designed to promote the welfare of persons domiciled in one country or to regulate local transactions should necessarily be extended to transactions completed abroad between domiciled foreigners.*" (Cheshire, G C, '*Private International Law*' (1947) 3rd edn., p713/4)

[69] Cook (1939), *ibid.*, p1258/9, and (1942), *ibid.*, p264.

settled by authority, that the reference will be construed as a reference to the whole law of the situs, including its rules of private international law: in other words renvoi is applicable in this field. The policy justification for this is that a judgement which conflicts with the view which the authorities of the situs would take as to the destination of title to a moveable is likely to be ineffective."[70] This argument applies, *a fortiori*, in the case of immoveables.

Sauveplanne has explained that there are two types of argument commonly propounded in connection with *renvoi*,[71] namely, the (antagonistic) dogmatic type (including arguments based upon sovereignty and state interests,[72] and illogicality[73]), and the (proponent) purposive type, including, in particular, harmony of solution.[74] As regards the latter type, it is interesting to note that this argument has been advanced in support of '*in rem*' jurisdiction being exercised, on occasion, by a non-*situs* forum;

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[70] Morse, C G J, '*Retention of Title in English Private International Law*' 1993 J.B.L. 168, p172/3. *Cf.* Dicey & Morris, *ibid.*, p966, paragraph 24-007; and Carter, "*The lex situs must denote the whole of the lex situs – not just the law of the situs as it would be applied in a purely internal or domestic context. The effectiveness strand in the rationale of the rule dictates this.*"(In Lalive, P, ed., '*International Sales of Works of Art*' (1988), p329) This view is longstanding. In 1947, Falconbridge expressed the same opinion, namely, "*It is ... assumed that for a court of a country other than that of the situs the lex rei sitae means whatever law, whether conflict rules or domestic rules, has been or would be applied by a court of the situs.*" ((1947), *ibid.*, p520)

[71] Bear in mind Sauveplanne's remark that, "*... as many arguments can be raised in favour of renvoi as there are against it. Often the same argument is advanced by both supporters and adversaries of renvoi.*" (*ibid.*, p7)

[72] Opposed to renvoi, insofar as "[*renvoi*] *would amount to an unwarranted abandonment of sovereignty to give way to the decision made by another state.*" But *in favorem renvoi*, on the basis that, "*... when declaring a foreign law to be applicable, a state manifests its lack of interest in the application of its own law; it 'desists' from having it applied. Now why should a state be 'plus royaliste que le roi' and apply the law of another state against the latter's will.*" (Sauveplanne, *ibid.*, p7)

[73] *Renvoi* is considered by some to offend logic: "*Adversaries of renvoi have argued that its acceptance disturbs the symmetry of the legal systems involved. From a logical point of view a reference to foreign law can only be a reference to substantive law.*" (Sauveplanne, *ibid.*, p7) On the contrary, logic may be said to demand the operation of *renvoi* inasmuch as interrupting the choice of law process prematurely would be to act in a random, arbitrary fashion. "*In another scheme, renvoi is not the result of the application of a foreign conflicts rule, but of the application of an alternative rule forming part of the conflict-of-laws system of the forum which replaces the principal rule.*" (Sauveplanne, *ibid.*, p8)

[74] It is considered that *renvoi* is a tool to aid uniformity of result, regardless of the forum in which proceedings are raised (Cheatham, E E, '*Problems and Methods in Conflict of Laws*' (1960) 99 *Receuil des Cours* I 237, 339). In view, however, of the varying attitudes which countries adopt in respect of

Anderson has observed that, "*The raison d'être for the existence of double renvoi is precisely to ensure that the foreign court reaches the same conclusion as the forum regarding particular areas of decision making of which title to and rights in and over land are the primary example.*"[75] But it must be borne in mind that application of *renvoi* in any particular case depends upon the doctrine being averred and proved by one of the litigants; not many litigants have time, inclination or resources to accept the challenge of proving, not only the choice of law rule of the *lex situs*, but also the *lex situs'* rule regarding *renvoi.*[76]

Further, on account of the differing attitudes which states take to the doctrine of *renvoi*, even a *prima facie* simple rule such as that of the '*lex situs*' cannot, in fact, guarantee uniformity of decision.[77] According to Kaye "... *the problems of possibly differing concepts of situs ... might be compounded through the operation of the doctrine of renvoi: where, for example, courts of France and Italy each refer to the law of contracting state X as the situs of property, in order to determine whether the property is moveable or immoveable for the purposes of their duty to decline jurisdiction under Article 19,*[78] *but the law of contracting state X itself would consider the property to be situated in a fourth contracting state Y (or in France or Italy itself),*

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the doctrine of *renvoi*, and of the various theories of *renvoi* (*e.g.* the internal law theory, the partial *renvoi* theory and the double *renvoi* theory), uniformity of result seems to be something of a vain hope.

[75] Anderson, W, '*Foreign Orders and Local Land*' (1999) 48 I.C.L.Q. 167, 173. "*To ensure identity of results, the English court resorts to rather drastic measures including 'impersonation' of the foreign judge in whose jurisdiction the land is situated.*" (Anderson, W, '*Double Renvoi and the Circulus Inextricabilis*' (1992) Commonwealth Caribbean Legal Studies 313 - *per* Anderson (1999), *ibid.*, p173) See Chapter Six, *infra* – 'Cracks in the Monolith – '*in personam*' jurisdiction'.

[76] *Cf. Re Duke of Wellington* [1947] Ch. 506, *per* Wynn-Parry J., at p515.

[77] *Cf.* Reese, W L M, '*Restatement of the Law Second, Conflict of Laws*' (1971), regarding paragraph 244: "*Values of certainty of result and ease of application dictate that the forum should apply the local law of the selected state and not concern itself with the complexities that might arise if the forum were to apply that state's choice of law rules. There is no basis for supposing that fairness requires the forum to apply the choice of law rules of the selected state.*"

[78] Brussels Convention. See now Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Italian courts applying the doctrine of no-renvoi,[79] *would regard the domestic law of State X as lex situs governing the nature of property as moveable or immoveable, whereas French courts, applying partial renvoi,*[80] *would decide the matter according to the law of State Y as lex situs.*"[81]

In the case of *Winkworth v. Christie, Manson & Woods*,[82] Slade, J. sustained the possibility of *renvoi* operating in this field, *viz.*: "*I must therefore accept ... that the relevant question of title falls to be determined in accordance with Italian law ... it is theoretically possible that the evidence as to Italian law would show that the Italian court would itself apply English law, on the particular facts of the present case, for the purpose of determining the rights of the second defendant vis-à-vis the plaintiff and vice versa. In the event I suppose it would be open to the plaintiff to argue that English law should, in the final result, be applied by the English court by virtue of the doctrine of renvoi. By this judgement I do not intend to deprive the plaintiff of the right to argue either of these two points* [the other point being the possibility that the content of the Italian *lex causae* could offend English public policy] *at the trial.*"[83]

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[79] *E.g. Re Ross* [1930] 1 Ch. 377.

[80] *E.g. Re Annesley* [1926] 1 Ch. 692. Consider Crawford, "*NOTE that the essential difference between Annesley and Ross lies simply in the fact that French law accepts the doctrine of renvoi whereas Italian law does not do so.*" (*ibid.*, p66, paragraph 5.08)

[81] Kaye, P, '*Civil Jurisdiction and Enforcement of Foreign Judgments*' (1987), p898. *Cf.* Dicey & Morris, *ibid.*, p74, paragraph 4-022.

[82] [1980] 1 Ch. 496.

[83] At p514, *per* Slade, J. This dictum is ambiguous insofar as it is unclear whether the plaintiff's right of argument refers to his entitlement to argue that the doctrine of *renvoi* applies, in general, to cases concerning the transfer of corporeal moveable property (meaning that it is uncertain whether or not *renvoi* currently pertains to this field), or merely to his entitlement to argue that the doctrine is applicable in the instant case (meaning that it is accepted, in principle, that *renvoi* applies in this context). While Slade, J. confirms the possibility of a *renvoi* remission, he is silent on the matter of a *renvoi* transmission (in respect of which, see Crawford, *ibid.*, p58, paragraph 5.01, and Sauveplanne, *ibid.*, p3). There would seem to be no reason, however, for accepting a reference to English law, but denying a reference to the law of a third country. Dicey & Morris state the view that when an English court is applying the *lex situs* rule in this context, "... *it should interpret the lex situs broadly so as to include whatever the courts of the situs have decided or would decide.*" (*ibid.*, p74, paragraph 4-023) *Cf.* Nott, S M, '*Title to Movables Acquired Abroad*' (1981) 45 Conveyancer and Property Lawyer 279, at p284: "... *in the past the few English cases involving the transfer of moveables abroad have*

This dictum, however, should be contrasted with the more recent dictum of Staughton, LJ., in *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)*,[84] when his Lordship remarked that, "*The reference* [to the *lex situs* of the shares, namely, the law of the State of New York] *is to the domestic law of the place in question; at one time there was an argument for renvoi, but mercifully (or sadly, as the case may be) that has been abandoned.*" Significantly, his Lordship cites no authority in support of this declaration.

From the perspective at least of sovereignty and state interests, the argument that reference should be to the whole law of the *situs* is less convincing in the context of dealings with moveable property (*a fortiori* dealings with incorporeal moveable property), than in that of dealings with immoveable property.[85] The reason for this is that, by the time of litigation, the moveable property in question may no longer be situated within the territory of the *situs* deemed relevant by the forum; in such a case, given the loss of physical control over the property by the applicable '*lex situs*', there is no obvious reason why the forum should prefer the conflict rules of the *lex situs* to those of its own system.

It has been the pattern of recent Hague (and other) Conventions to exclude the operation of *renvoi*.[86] The Giuliano and Lagarde Report states that "*More generally,*

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apparently applied the domestic law of the lex situs, without recourse to the renvoi doctrine. Whether or not this represents the correct approach is perhaps open to conjecture."

[84] [1996] 1 W.L.R. 387, at p405.

[85] Dicey & Morris, *ibid.*, p74, paragraph 4-023.

[86] *E.g.* 1980 Rome Convention on the Law Applicable to Contractual Obligations, Article 15; 1985 Convention on the Law Applicable to Trusts and on their Recognition, Article 17; 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, Article 21; 2000 Convention on the International Protection of Adults, Article 19. Unusually, *renvoi* was *not* excluded from the 1980 Convention on the Civil Aspects of International Child Abduction; the reference in Article 3 thereof is

the exclusion of renvoi is justified in international conventions regarding conflict of laws. If the convention attempts as far as possible to localize the legal situation and to determine the country with which it is most closely connected, the law specified by the conflicts rule in the Convention should not be allowed to question this determination of place."[87] This approach may be related, at least in part, to the style of choice of law rule typically formulated within the new Conventions, and to the more common reliance upon flexible, 'soft' connecting factors. Sauveplanne has expressed the opinion that, "*The objective of renvoi can only be attained in those areas where choice-of-law rules are precise, which means that they determine the applicable law by a fixed connecting factor ... Traditional techniques of renvoi are difficult to apply where these new approaches* [open-ended rules] *prevail.*"[88] In contrast with this view, however, it is significant that the First Restatement (which adopted a series of fixed connecting factors), was generally hostile to *renvoi*,[89] whereas the Second Restatement (which adopts a 'softer' approach to choice of law rules), narrates a general preference for application of the 'local law' of the state addressed, subject, however, to significant exceptions.[90] Von Mehren and Trautman note that the interest

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to the whole of the law of the State in which the child was habitually resident before his/her removal or retention.

[87] Giuliano, M, and Lagarde, P, '*Report on the Convention on the Law Applicable to Contractual Obligations*' 1980 OJ C282, p37. *Cf.* Leslie, R D, '*Building Blocks for Choice of Law Structures*' (1998) 19 Statute Law Review 202, at p204: "*Where a choice of law rule is the product of a unifying international convention, it is often provided that reference to a foreign governing system made by a connecting factor is a reference to the domestic or internal rules of that system only, renvoi is excluded. If this was not so, the convention's aims of unification could, on occasion, be frustrated.*" *Sed contra* the view expressed by Cheatham at note 74, *supra*.

[88] Sauveplanne, *ibid.*, p31/32.

[89] *E.g.* First Restatement, paragraph 7(b), although an exception did pertain as regards application of the *lex situs* to questions of title to land (paragraph 8). Consider Weintraub, R J, '*The Conflict of Laws Rejoins the Mainstream of Legal Reasoning*' (1986) 65 Texas L. R. 215, at p227: "*This rejection* [of *renvoi*] *was ironic because the theoretical basis for the rigid territorial rules of that Restatement was the 'vested rights' theory. Under this theory, on the occurrence of a specific event, a right 'vested' under the law of the geographical location of that event. It was this right that was enforced in another jurisdiction ...*"

[90] Second Restatement, paragraph 8, subject to exceptions in paragraphs 223 (validity and effect of conveyance of an interest in land), 245 (effect of conveyance of an interest in a chattel) and 260 (intestate succession to moveables): Von Mehren & Trautman conclude that the Second Restatement, "*... represents a wholesale adoption of a renvoi theory for property.*" (Von Mehren, A T, and

in uniformity "*that all questions regarding property should be decided in the same way regardless of the forum – emerges triumphant over the interests in simplicity and predictability that seem to pervade the old Restatement.*"[91]

Significantly, "... *implicit ... in the Second Restatement's broad adoption of renvoi is awareness that reason and policy may lead the situs to prefer some other rule.*"[92] It is interesting to ponder Sauveplanne's verdict that, "*Courts have travelled half way around the world before ending up applying their own law ... A short cut might have spared the court much trouble.*"[93] This response will be borne in mind in Chapter Fourteen, *infra*, where consideration will be given to the *lex causae* generally applicable to choice of law disputes concerning property.

A homogeneous concept of *situs*?

To summarise, Scottish rules of international private law utilise three primary classifications of property, *viz.*: immoveable property, corporeal moveable property and incorporeal moveable property. As will be demonstrated in the following chapters, dealings with all three types of property rely heavily on the connecting factor of *lex situs/lex loci rei sitae*. This connecting factor, however, is subject to

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Trautman, D T, '*The Law of Multistate Problems – Cases and Materials on Conflict of Laws*' (1965), p193) As regards immoveables, "*the reference ... is to the totality of the law, including the choice-of-law rules, of the state where the immoveable is.*" (Second Restatement, paragraph 222, comment(e)) *Cf.* Von Mehren & Trautman, "... *although many of the provisions of Restatement Second read almost exactly like those of the First Restatement, the word 'law' must be read to mean not the domestic law but the whole law, including the conflict-of-laws rules of the situs.*" ((1965), *ibid.*, p195/6) In reviewing the Second Restatement, Morris referred to its '*double-barrelled*' rules, being those rules where the forum is directed to "*apply the law that would be applied by the courts of the situs*". (Morris, J H C, '*Law and Reason Triumphant – or – How Not To Review a Restatement*' (1973) 21 Am. Jo. of Comp. Law 322, 329)

[91] Von Mehren & Trautman, *ibid.*, p193.

[92] Von Mehren & Trautman, *ibid.*, p197.

[93] Sauveplanne, *ibid.*, p34. The author continues, "*The acceptance of renvoi often compels a court to meander along circuitous and tortuous roads to goals that could just as well be reached by straight and direct paths. Despite lip-service paid to doctrinal arguments, renvoi appears primarily to be used as a technique for reaching a certain result.*" (*ibid.*, p35)

subtle nuances of interpretation (spatial and temporal), depending upon the precise context in which it arises. In certain cases, it has been shown that the factor is manipulated or entirely fictitious – in particular, in its application to cases involving contiguous heritable/immoveable estates, aggregate units of moveable property, fixtures, goods in transit, and, more generally, incorporeal moveable property. The '*lex situs*' in such (admittedly exceptional, or 'fringe') instances indicates, not a physical connection as such, but rather a legal connection; it demonstrates, not a strict territorial connection, but an abstract, yet purposive, juridical connection. In truth, the factor, in its evolved form, is akin to the "centre of gravity" of a right of property, as propounded by Wolff.[94] It would appear that the term '*lex situs*' (which, on occasion, is clearly inappropriate in strict, semantic terms), ultimately, is a shorthand means of expressing what is, sometimes, the overriding, pivotal connection between an asset or right and a state in which it is not physically stationed. This more "*homogeneous concept of situs*"[95] applies to all types of property and indicates the place where the property in question is principally, and most effectively, possessed, enjoyed or exercised, "*the place of exercise of the fundamental use or enjoyment of the property rights, which* [in the case of corporeal property] *nearly always coincides with the physical locus*."[96]

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[94] Wolff (1950), *ibid.*, p520. For example, as regards goods in transit, Wolff stated that, "... *a mere place of transit is not the centre of gravity of rights in rem ... It seems impossible to set up a simple and comprehensive formula indicating the appropriate law. The answer must differ according to ... various relationships.*" (*ibid.*)

[95] Baxter, I F G, '*Conflicts of Law and Property*' (1964) 10 McGill Law Journal 1, 25.

[96] Baxter, *ibid.*, p25.

Chapter Five

Jurisdiction and Choice of Law – Fusion of the Rules?

A traditional exposition or application of our rules of international private law would identify three types of conflict rule: rules of choice of law, of jurisdiction, and of recognition and enforcement of foreign judgments. Although the emphasis to be placed, respectively, on each of these facets of the subject has varied over the years, with the weight of interest, scrutiny and perceived significance falling sometimes on rules of choice of law, and sometimes on rules of jurisdiction[1], it has consistently been accepted that the three categories serve different purposes and, accordingly, that they constitute separate bodies of rules (which, however, interact). In short, the factors which determine (*i.e.* confer) jurisdiction are not presumed automatically to determine (*a fortiori* to constitute) the *lex causae*.[2] In the UK at least, the reluctance to apply the *lex fori qua lex causae* (save in respect of matters of procedure), reinforces this notion.[3]

It is surprising, therefore, to read, in the context of our conflict rules of property, that "*Scholars and justices have long recognised the close relationship between*

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[1]*E.g.* Fawcett, J '*The Interrelationship of Jurisdiction and Choice of Law in Private International Law*' (1991) 44 C.L.P. 39.

[2]Though consider, historically, the link between jurisdiction and choice of law in annulment of marriage before the Domicile and Matrimonial Proceedings Act 1973 (*e.g. Prawdziclazarska v. Prawdziclazarski* 1954 S.C. 98).

[3]*E.g.* As regards choice of law in delict, the Law Commission and Scottish Law Commission remarked that, "*We think that it is correct in principle that the introduction of a foreign element may make it just to apply a foreign law to determine a dispute, even though the substantive provisions of that foreign law might be different from our own. Apart from matters of procedure, and subject to overriding public policy, there is no reason why the lex fori should be applied in all cases involving a tort or delict regardless of the foreign complexion of the factual situation.*" (Law Com. No. 193 and Scot. Law. Com. No. 129, '*Private International Law Choice of Law in Tort and Delict*', paragraph 2.7) *Contra*

jurisdiction and choice of law. To a great extent, resolution of the jurisdictional issue often resolves the choice of law."[4] Such surprise, however, is quite possibly misplaced: although analytically, the concepts of jurisdiction and choice of law are easily (indeed, logically) distinguished, in practice, the differentiation may lose something of its importance. Sedler has identified both a theoretical and a practical link between the two types of rule: "*In the doctrinal sense, the same considerations that make it constitutional for a court to exercise judicial jurisdiction in a particular case may also make it constitutional for that court to apply its own substantive law to resolve the issues presented in that case. In the pragmatic sense, courts that are committed to a policy-centred approach to choice of law ... tend to apply their own law wherever they have a real interest in doing so, and sometimes even when they do not have such an interest.*"[5] It is submitted that Sedler does not provide sufficient justification for his 'constitutional argument' and that his suggestion suffers from the same homing tendencies as forum-oriented rules which have been widely eschewed elsewhere. Although persuasive perhaps in the United States, where notions of forum

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choice of law in divorce: *Zanelli v. Zanelli* (1948) 64 T.L.R. 556. (See Crawford, E B, '*International Private Law in Scotland*' (1998), p162, paragraph 10.08)

[4] Alden, R, '*Modernizing the Situs Rule for Real Property Conflicts*' 1987 (65) Texas L.R. 585, 620. Also in the U.S.A. - Hay, P, '*Property Law and Legal Education; the Situs Rule in European and American Conflicts Law – Comparative Notes*' (1988), at p109: "*In fact, the jurisdictional rule historically swallowed the choice-of-law reference: a decision rendered by a non-situs court on a claim involving immoveable property was not traditionally recognized by the situs for want of subject-matter jurisdiction on the part of the rendering court, no matter what substantive law the latter had applied.*" Further, Trautman, D, '*The Revolution in Choice of Law: Another Insight*' (1986) 99 Harv. L. Rev. 1101, at pp1108/9: "*Choice of law in early England was essentially a choice of courts; common law courts exercised exclusive jurisdiction over titles to real property ... our* [American] *reception and adoption of the English rule* [of scission in succession], *with a boost from Justice Story, unnecessarily perpetuated its great inconvenience and awkwardness.*" Curiously, on the matter of applying the *situs* rule to immoveable property, Westlake has remarked that, "*What doubt there is turns more on the question of jurisdiction than of law.*" ('*A Treatise on Private International Law*' (1925), p215)

[5] Sedler, R A, '*Judicial Jurisdiction and Choice of Law: the Consequences of Shaffer v. Heitner*' (1978) 63 Iowa L.R. 1031. While remarking that the same factors which make it reasonable for a state to exercise jurisdiction also make it reasonable for that state to apply its own substantive law to the issue in dispute, Sedler recognises that '*The converse of this proposition has not been assumed to follow.*" (p1032) So, too, at English common law in contract, while choice of jurisdiction might indicate choice of law, choice of law could not be taken to confer jurisdiction. (Crawford, *ibid.*, p249, paragraph 12.28)

preference have traditionally been held in higher regard,[6] Sedler's argument should be discounted in our own jurisdiction, as displaying unwelcome parochial characteristics. Similarly, his policy-centred methodology cannot easily be transposed into our own jurisdiction-selecting régime. So, it is submitted that Sedler's arguments justifying the coalescence of rules of jurisdiction and of choice of law cannot here be accepted.

Some connection between the two types of conflict rule (that is, rules of jurisdiction, and of choice of law) has, however, been evident. Writing in 1964, Baxter remarked that *"There has not been much attention given either by the courts or in the literature to clear and logical policy reasons for the lex situs in choice of law. The influence of jurisdictional considerations has been great."*[7] This echoes earlier remarks made by Colwyn Williams who explained that, historically, the *situs* was significant first and foremost as a rule of jurisdiction, it being one of the bases of competency of the medieval Italian judge. According to Colwyn Williams, the *lex situs* became a rule of choice of law only in the feudal era "... *when respect for the Lord required the judges, both of the forum and the foreign allodium, to apply the law prevailing at the place where land was situated ... a limitation demanded by the ideology of a feudal law according to which even the lex fori was inferior to the power over land.*"[8]

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[6] *Cf.* Weintraub's remarks, '*An Inquiry into the Utility of Situs as a Concept in Conflicts Analysis*' 52 (1966) Cornell L.Q. 1, at p15: "*If the situs court is the only court competent to hear such matters, this will support the argument that it is most expedient to apply situs law – the law of the forum.*" In reading this passage (which is uncharacteristic of Weintraub's general antipathy towards an exclusive *situs* rule), it should be borne in mind that, at the time of writing, there was much wider support generally for application of the *lex fori*.

[7] Baxter, I F G, '*Conflicts of Law and Property*' (1964) 10 McGill L.J. 1, 17.

[8] Colwyn Williams, D, '*Land Contracts in the Conflict of Laws – Lex Situs: Rule or Exception*' (1959) 11 Hastings L.J. 159, 162/3. Also Gardner, J C, '*The Decreasing Influence of the Lex Situs*' (1934) 46 J.R. 244, 245.

Fawcett has remarked upon the amalgamation, in recent years, between the first, jurisdictional stage[9] and the second, distinct, choice of law stage in a conflicts case, largely blaming the coalition on the ascendancy of the discretionary element in jurisdiction.[10] In this regard, it is interesting to consider the influence both of rules of jurisdiction upon rules of choice of law, and *vice versa*, of rules of choice of law upon rules of jurisdiction (for it can probably no longer be assumed that jurisdiction and choice of law will necessarily be determined in that order).[11]

Fawcett has stated that "*Even if the jurisdiction rule itself does not require the ascertainment of the applicable law, it may be that the underlying basis of the jurisdiction is a choice of law rule. This is the situation under Article 16(1) ..., which gives exclusive jurisdiction 'in proceedings which have as their object rights in rem, or tenancies of, immoveable property,* [to] *the courts of the contracting state in which the property is situated. The European Court has justified giving exclusive jurisdiction to the state in which the land is situated on the basis that that state's law is applicable, and with complicated legislation on, for example, tenancies, the state in which the legislation is in force is the one that should apply that law.*"[12] The present author's contention, however, is not that the *choice of law* rule concerning property (in this context, immoveable property) has influenced the rule now enshrined in

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[9] Which, in itself, in modern (United Kingdom) legislation, sometimes can be found broken into two steps; a good example is provided by section 28 of the Matrimonial and Family Proceedings Act 1984 (concerning jurisdictional requirements *and* conditions), the aim of which is to ensure forum humility or self-effacement. The English approach, by different means to the same end, is contained in Part 3 of the Act.

[10] Fawcett, *ibid.*, p40: "... *increasingly there is a finding as to the applicable law being reached at the jurisdictional stage*." Further, at p45: "... *now that it is accepted that a wider range of considerations should be taken into account when determining the place of trial it is understandable that the question of the applicable law should come to the surface*."

[11] *Cf.* the symbiotic relationship in Post-Rome Convention contract cases of jurisdictional (Brussels) and choice of law (Rome) rules (*e.g. William Grant & Sons Ltd v. Marie-Brizard España S.A.* 1998 S.C. 537; and *Definitely Maybe (Touring) Ltd v. Marek Lieberberg Konzertagentur GmbH* [2001] 4 All

Article 16(1),[13] but, conversely, that our traditional rule of jurisdiction over immoveable property, deriving from entrenched notions of sovereignty and territoriality, has exerted considerable influence upon our rules of choice of law in property. The particular menace of this phenomenon is the fact that rules of jurisdiction are conceived with protection of the defender in mind (albeit that there exist the stabilizing factors of *forum non conveniens* and *lis pendens*), whereas rules of choice of law are developed taking into account the interests and expectations of both parties, pursuer and defender. By extracting rules of choice of law from principles of jurisdiction, there is a possibility that the interests of the pursuer in any action may rank subordinate to those of the defender.

Whilst Fawcett does briefly consider the influence of jurisdiction upon choice of law, he largely restricts his inquiry to the general question of whether it is possible to identify an increased tendency towards applying the *lex fori.*[14] When courts apply their own domestic law in property disputes, it might generally be assumed that they are applying that law *qua lex situs*. While this may be a reasonable assumption in disputes concerning immoveable property, it is not so in the case of disputes concerning moveable property, whether corporeal or incorporeal. In such a case, whilst it would likely be presumed that the forum were applying its domestic law *qua*

E.R. 283, *per* Morison, J., at p285 - *i.e.* the place of performance of the obligation [a jurisdictional test] is identified by using the law found to be the applicable law under Rome.)

[12] Fawcett, *ibid.*, p48.

[13] Brussels Convention. See now Council Regulation (EC) No 44/2001 (22 December 2001) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (which, in terms of Article 76, entered into force on 1 March 2002). Article 22 of the Regulation is identical to Article 16(1), save as regards paragraph (b), where in terms of the Regulation only the tenant, but not the landlord, need be a natural person (*i.e.* Brussels is more restrictive). Hereinafter, reference to Article 16 shall be deemed to include reference to Article 22 of the Regulation. For the equivalent provision in the Hague Conference Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (amended version of text adopted by the Special Commission on 30 October 1999) (hereafter 'the preliminary draft Hague Convention') [Article 12] - see note 39 *infra*.

lex situs, this may, in fact, disguise the truth that the forum has seized an opportunity to apply its own law *qua lex fori*, even where another law is arguably more appropriate (*e.g.* in cases where the property in dispute was abroad at the time of the relevant transaction, but has been returned to, and remains within, the jurisdiction of the forum at the time of litigation).

The present author does, however, agree with Fawcett when he writes that "*The considerations when determining the applicable law are not, and should not be, the same as those when determining the place of trial ... the court may still have a strong interest in upholding a foreign law.*"[15] In particular, this author would strongly support Fawcett's caution that the relationship between jurisdiction and choice of law should not become too close: "*Whilst it is right and proper that one are should take into account developments in the other, there is no justification ... for a fully integrated approach either in the form of taking jurisdiction whenever we apply our law or applying our law whenever we take jurisdiction.*"[16]

In light of this warning, it is interesting to note, at least in relation to immoveable property, the complete cohesion which has developed between our rules of jurisdiction and of choice of law. Is this a justifiable acknowledgement that only one state has an interest in the property and the power to control it,[17] or is it an attempt to fuse the rules of jurisdiction and of choice of law, a covert coalition between what should be two independent processes, separately to determine, on the one hand, the

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[14] Fawcett, *ibid.*, p53.
[15] *Ibid.*, p55.
[16] *Ibid.*, p58.
[17] *Cf.* Carswell; R D, '*The Doctrine of Vested Rights in Private International Law*' (1959) 8 I.C.L.Q. 268, at p278: "*The doctrine of territorial sovereignty is developed into a specialised concept of*

appropriate forum and, on the other, the applicable law? It is submitted that the *situs* has become more deeply entrenched as a choice of law connecting factor, and the *lex situs* as a choice of law rule, by reason of the fact that the *situs* is routinely also the forum. It may be that our rules of choice of law concerning property (in particular, the widespread reluctance to look beyond the territorial *lex situs* rule), in fact camouflage, conveniently, an old-fashioned preference for application of the *lex fori*. Considering the clear propensity for basing rules governing the transfer of corporeal and, *a fortiori* incorporeal, moveable property, upon the rules applicable to the transfer of immoveable property, this allegation carries with it significant repercussions for the rules governing the *inter vivos* transfer of all types of property.

The *situs* rule stands apart from all other '*lex loci*' choice of law rules on the basis that it controls both choice of law and jurisdiction.[18] This peculiar characteristic was recognised, in 1948, by Briggs who explained that, "... *there were really merged in this rule the elements of two basically different conflict rules, one recognizing an exclusive power in the situs, and the other referring to the situs' internal law.*"[19] Some years ago, Schott and Rembar described what they termed the 'confusion' between the notions of jurisdiction and choice of law, outlining why this confusion was then, and is now, misplaced: "*Essentially, it arises out of a misapprehension of jurisdiction. Courts, impressed by the immoveable nature of land, conceive that only the situs has physical power over the land itself, and are led to believe that therefore lex situs must be used in all cases concerning land. But, obviously, most cases can be disposed of without having actually to deal with the land. Money judgments are the more usual*

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jurisdiction. The State which has jurisdiction is the one which has the power to create legal rights, and these rights will be enforced in the courts of other states."

[18] Alden, *ibid.*, p589.

remedy, and, even in those cases where foreign courts order a conveyance, the courts of the situs will usually give effect to such a decree.[20] *Clearly, then, there is little a court cannot accomplish through in personam jurisdiction, so that there is no 'jurisdictional' necessity to use lex situs.*"[21] Developing this line of argument, Schott and Rembar openly criticized the (American) courts' indulgence of recognising only the jurisdiction of the *situs* court and the non-sequitur that the *lex situs* alone should be applied to determine the resolution of property disputes.[22] More recently Alden has pointed to "*The jealous manner in which the common-law courts guarded their jurisdiction over real property* [which] *made them unwilling to apply any law but their own on questions involving land.*"[23]

Recognising this correlation between jurisdiction and choice of law,[24] Weintraub remarked in 1966 that "... *if the situs had exclusive jurisdiction of the subject-matter ... such a state of things would seriously weaken any campaign to change from the situs rule. If nothing else, the simple convenience and economy in judicial administration flowing from the only competent forum's applying its own law would raise a presumption in favour of situs law that only the most compelling circumstances should rebut.*"[25] Notably, instead of advancing this as an argument in favour of an exclusive rule of jurisdiction, Weintraub pursued the contrary argument, asking why *in personam* jurisdiction over all persons whose interests in real property

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[19] Briggs, E W, '*The Jurisdictional – Choice-of-Law Relation in Conflicts Rules*' (1948) 61 Harv. L. Rev. 1165, 1177.

[20] The authors cite only American authority in support of this proposition. *Cf.* the unattributed Note on *Re Duke of Wellington*, (1948) 61 Harv. L. Rev. 1055, at p1057; and *Chiwell v. Carlyon* (1897) 14 S.C. 61 (Supreme Court of the Cape of Good Hope). *Sed contra, McKie v. McKie* [1933] I.R. 464.

[21] Schott & Rembar, '*Choice of Law for Land Transactions*' (1938) 38 Col. L. Rev. 1049, 1051.

[22] *Ibid.*, p1053.

[23] Alden, *ibid.*, p588.

[24] Weintraub (1966), *ibid.*, at p16: "*Once false dogmas about jurisdiction of the subject matter are consigned to the bonfire, it becomes apparent that proper solution of the choice-of-law problem will rarely, if ever, result in the application of the law of the situs qua situs.*"

are to be affected, should not be sufficient.[26] This converse argument has subsequently mustered minority support, at least in America, if not in the United Kingdom, principally, from Moffatt Hancock.[27] But still it seems that the "*ancient jurisdictional dogmas*" of territorial sovereignty continue to "*rule us from the graves in which they have been logically buried.*"[28] For present purposes, Weintraub's inquiry and the cynicism of Hancock and Yntema raise two further, related issues, namely, the significance of exclusive jurisdiction under Article 16(1) and the relevance of *in personam* jurisdiction.

Exclusive jurisdiction under Article 16(1)

Article 16 of the Brussels Convention, which carves out exclusive jurisdiction as a matter of legislative policy, lays down the rule of exclusive jurisdiction relative to immoveable property: "*The following courts shall have exclusive jurisdiction, regardless of domicile: (1) (a) in proceedings which have as their object rights in rem in immoveable property or tenancies of immoveable property, the courts of the Contracting State in which the property is situated; (b) however, in proceedings which have as their object tenancies of immoveable property, concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have jurisdiction, provided that the landlord and the tenant are natural persons and are domiciled in the same Contracting State*;" [29] Exclusive jurisdiction exists by reason of a pre-

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[25] *Ibid.*, p4.
[26] *Ibid.*, p5.
[27] In a review of Professor Hancock's collected essays, Professor Weintraub advised that, "[Prof Hancock] ... *attacked the jurisdictional nonsense that went hand in hand with choice-of-law nonsense – that only the courts of the situs had subject-matter jurisdiction to determine interests in realty.*" ('*The Conflict of Laws Rejoins the Mainstream of Legal Reasoning*' (1986) 65 Texas L. R. 215, 231)
[28] Yntema, H, '*The Objectives of Private International Law*' (1957) 35 Can. Bar Rev. 721, at p726.
[29] Note that Article 16(1)(b) of the Lugano Convention contains a differently framed proviso, *viz.*: "... *provided that the tenant is a natural person and neither party is domiciled in the Contracting State in*

existing, paramount connection between the substance of the proceedings and the forum, and applies notwithstanding the parties' preference that the matter be determined in another forum, or the defender's submission to the jurisdiction of another Contracting or Member State's courts.[30] Discussing these paramount connections, Kaye has explained that, "*The exclusive jurisdiction connections prescribed under Article 16 (facteurs de localisation) are based upon what was considered by its drafters to be the very close link between the subject matter of the litigation and a particular Contracting State territory such as to justify jurisdictional exclusivity of the latter's fora in the interests of certainty and judicial security, proper administration of justice, convenience of the parties and homogeneity of the Community legal order.*"[31] But, of course, modifications in the light of experience and common sense, have made a misnomer of the heading, for now in the prescribed circumstances the defendant's domicile *also* has exclusive jurisdiction (*i.e.* additional, not alternative).[32]

The Jenard Report, anticipating the question of why exclusive jurisdiction over immoveable property was considered necessary, advises: "*In the Federal Republic of Germany and in Italy,* [there exists] *exclusive jurisdiction, this being considered a matter of public policy. It follows that, in the absence of a rule of exclusive jurisdiction, judgments given in other States whose jurisdiction might have been*

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which the property is situated." Schedules 4 and 8 of the Civil Jurisdiction and Judgments Act 1982 contain wording more akin to that of the Brussels Convention.

[30] Kessedjian, C, '*Report on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*' (Hague Conference, Preliminary Document No.7, April 1997) (hereinafter 'the Kessedjian Report') at paragraph 83: "*Such forms of jurisdiction are called 'exclusive' because they automatically invalidate any contractual or tacit choice of court; they do not allow for any lis pendens since they cannot admit any 'competition' with other jurisdictions, and they prevent any joinder through related causes of action.*"

[31] Kaye, P, '*Civil Jurisdiction and Enforcement of Foreign Judgements*' (1987), p872.

derived from other provisions of the Convention (the court of the defendant's domicile, or an agreed forum) could have been neither recognised nor enforced in Germany or Italy ... Such a system would have been contrary to the principle of 'free movement of judgments'."[33] It seems that we have surrendered to a rule of exclusive jurisdiction, not simply through belief on our own part that such a rule is compelled by logic and/or principle, but also out of deference to the mutual policy of two sister European states. Exclusive jurisdictions *per se* are conceived to be matters of public policy since they cannot be departed from by the free choice of the parties. The pre-1982 policy of Scots law in respect of jurisdiction over immoveable property[34] has effectively now been buttressed by the equivalent German and Italian policies. As if to pre-empt this realisation, the Jenard Report proffers additional, subsidiary arguments in support of the exclusive rule: "[Exclusive jurisdiction] *was in the interests of justice. This type of dispute often entails checks, enquiries, and expert examinations which have to be made on the spot. Moreover, the matter is often governed in part by customary practices which are not generally known except in the courts of the place, or possibly of the country, where the immoveable property is situated. Finally, the system adopted also takes into account the need to make entries in land registers located where the property is situated.*"[35] Clearly, this last remark overlooks the independent scope of the sister rule of exclusive jurisdiction contained in Article 16(3)[36] which, for proceedings which have as their object the validity of entries in public registers, in any event confers jurisdiction upon the courts of the

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[32] Article 16(1)(b). Consider in this regard Article 23, which states that "*Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.*"

[33] Jenard, P, '*Report on the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*' (hereinafter 'the Jenard Report') OJ 1979 C59/1, p35.

[34] In respect of which, see Crawford, *ibid.*, p388, note 12, which refers to the 'exorbitant jurisdiction' affirmed by Baron Hume.

[35] *Ibid.*, p35.

[36] See now Article 22(3) of Council Regulation 44/2001.

Contracting State in which the register is kept. Article 16(3), by itself, would have been capable of safeguarding the interests of the *situs* as regards the accuracy of its land, land charges and commercial registers. In addition, in the context of the preliminary draft Hague Convention, the Kassedjian Report notes that "*All such* [property/lease] *disputes call for site reports, and these can best be made at the place where the property is situated.*"[37], but it later concedes that "... *this advantage ... loses much of its attraction since it is probable that the States Parties to the future Convention will also be Parties to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.*"[38]

Interestingly, the possibility of a non-exclusive *situs* jurisdiction was not anathema to the negotiators of the preliminary draft Hague Convention. Although Article 12 of the preliminary draft favours exclusive jurisdiction,[39] paragraph 86 of the Kassedjian Report tendered, as a possible alternative, an (optional) *special* jurisdiction at the court of the *situs* of immoveable property. The reporter advised that "*If the experts were to decide that jurisdiction in real estate matters in* [sic] *not exclusive, it should appear at least as an optional special jurisdiction. In such a case, we could imagine to empower the judge of the defendant's habitual residence to decline jurisdiction and direct the parties to the court of the place where the real estate is situated.*"[40] It is interesting to compare this late twentieth century proposal with Savigny's mid-nineteenth century description of the 'Law of Things'. Savigny explained that, "*In the*

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[37] Kessedjian Report, paragraph 84.
[38] *Ibid.*
[39] Save in respect of tenancies: Article 12(1) states that '*In proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.*' Note should, of course, be taken of Article 12(6) which states that, '*The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.*'
[40] *Ibid.*, paragraph 86.

older Roman law ... the forum rei sitae was quite unknown [Vatic. Fragm. Para 326]; but it was early introduced in the rei vindicatio [L.3, C.ubi in rem 3, 19], and was afterwards extended to other actions in rem. It is not, however, held as the exclusive forum, but the plaintiff has an election between the (special) forum rei sitae, and the (general) forum domicilii."[41]

Given that in modern Europe we have forsaken the early ideal of concurrent jurisdiction in favour of a rule of exclusive jurisdiction, care must be taken to restrict such jurisdiction to those cases for which it was genuinely intended. This requires careful and restrained interpretation of phrases such as '*proceedings which have as their object*'.[42] Criticism has already been levelled at the European Court of Justice's failure to exercise due restraint in this regard.[43] According to the Jenard Report, the matters referred to in Article 16 will normally be the subject of exclusive jurisdiction, "*only if they constitute the principal subject matter of the proceedings of which the court is to be seised.*"[44] Article 16 must be read in conjunction with Article 19 which stipulates that, "*Where a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16, it shall declare of its own motion that it has no jurisdiction.*"[45] The words '*principally concerned with*' imply

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[41] Savigny, F C, '*A Treatise on the Conflict of Laws*' (1869), p130, paragraph 366.

[42] *Cf. Ashurst v. Pollard* [2001] 2 All E.R. 75, *per* Jonathan Parker, LJ., p81, at paragraph 33: "*The concept of proceedings which have as their 'object' a particular category of right is not a concept which I find entirely easy to grasp.*"

[43] Hay (1988), *ibid.*, at p121: "*The European Court's decisions missed this opportunity; they broadened the reach of the rule inappropriately to include non-title-related damage claims.*"

[44] Jenard Report, p34. *Cf. Ashurst v. Pollard, ibid.*, p83, paragraph 41, where Jonathan Parker, LJ. cites Advocate-General Darmon's remarks in *Webb v. Webb* [1994] 3 All E.R. 911, to the effect that proceedings which have as their object rights *in rem* are equated with proceedings where the '*principal subject matter*' of the claim relates to rights *in rem.*

[45] *Cf.* Article 25, Council Regulation 44/2001. Kaye suggests that Article 19 is security against breach of Article 16 by reason of "*apathy, ignorance or convenience by agreement or submission to jurisdiction.*" (*ibid.*, p873) *Cf.* the Kassedjian Report, paragraph 83: "*Were the new Convention to*

that a court is not required to declare of its own motion that it has no jurisdiction, where the matter which falls within the exclusive jurisdiction of the courts of another Contracting State is raised purely as a preliminary or incidental issue.[46] The rationale for this provision can be questioned. As Briggs has stated, " ... *if the jurisdiction of the court depends upon the ability of the plaintiff (or the defendant, though in this respect acting contrary to his interests) to make the legal issues look complicated, this is curiously unsatisfactory.*"[47] Likewise, it should be noted that the requirement to decline jurisdiction is restricted to proceedings principally within the exclusive jurisdiction of another *Contracting State*. This geographical restriction prompts one to query the strength of the public policy which supposedly demands exclusive jurisdiction.

Apparently, therefore, there is scope for evasion of Article 16(1), by formulation of a claim in such a way that the property issue appears to be ancillary or incidental to the principal claim. Kaye offers the example of a case in which a pursuer, who is seeking to uphold his own title to immoveable property situated in a Contracting State, as against the defender, who is in occupation thereof, sues the defender for damages in respect of trespass to the property, in the courts of the (Contracting State) domicile of the defender rather than in those of the *situs* of the property, "*with the expectation that the defender will challenge the pursuer's ownership of the property by way of defence, thereby occasioning a Contracting State's court, other than that of the situs,*

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include this concept of 'exclusive jurisdiction', the courts of States Parties to the Convention would have to comply faithfully with these rules, declaring themselves proprio motu without jurisdiction if seised in breach of these rules."

[46] Jenard Report, p39. Consider also Jenard, P and Möller, G, '*Report on the Convention on Jurisdiction and Enforcement of Judgments* [Re Lugano]' (OJ 1990 C189/57), which states that, "*Article16(1) applies only if the property is situated in the territory of a Contracting State ... If the property is situated in the territory of a third state, the other provisions of the Convention apply.*" (p76)

[47] Briggs, A, '*Recent Property Decisions*' (1998) LXIX B.Y.I.L. 352, 358.

to adjudicate – albeit incidentally – upon title."[48] While suggesting (theoretically) that the court of the defender's domicile should, if faced with such a scenario, sist its proceedings, pending a determination by the *forum rei sitae* upon the 'incidental' property issue, Kaye admits that there is no justification, within the four corners of the Convention, for such a response.

The second way in which the exclusive jurisdiction provision countenances the forum *rei sitae*'s all too ready use of its predominant jurisdiction, is by ensuring that Article 16 also gives the forum jurisdiction over matters related to, but not, in fact, falling within the ambit of the principal proceedings (*e.g.* issues arising as incidental questions), even where that forum could not otherwise exercise jurisdiction over the incidental issue. Kaye criticizes this over-inclusion, remarking that, "... *it is one thing to decide to make provision for exclusive jurisdiction under the Convention, but it is another to confine its effect to the subject matter principally intended to be governed by it.*"[49]

Curiously, neither the Convention nor the Council Regulation seeks to define either of the terms '*rights in rem*' or '*immoveable property*', and accordingly, the interesting question of definition of connecting factors for the purposes of rules of jurisdiction draws into focus. The identification and interpretation of connecting factors is primarily a matter for determination by the forum; to adopt the interpretation of the *lex situs* would be to assume the very point in issue. Although referring this issue to the *lex situs* may be to beg the question, according to the Schlosser Report, the answer to the second question, whether the dispute concerns 'rights *in rem*', "*can hardly be*

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[48] Kaye, *ibid.*, p875.

derived from any law other than that of the situs."[50] Clearly, it would be unsatisfactory for Forum X to decline jurisdiction, under Article 19, on the basis that it considers the immoveable property to be situated in State Y, if, in fact, Forum Y did not consider State Y to be the *situs* of the property; or, equally, where Forum Y did not consider the proceedings '*principally to concern*'[51] or to '*have as their object*' '*rights in rem*'[52] in '*immoveable property*' or '*tenancies of immoveable property*'. The scope for conflicting interpretations between Contracting States is as wide here as it is in the search for, and application, of the apposite choice of law rule itself. As regards 'tenancies', for example, as the European Court itself has observed,[53] these are regulated by complex social legislation in each Contracting State; what State X considers to be a tenancy, may not constitute a tenancy in the eyes of State Y.[54] In view of this, and solely for the purpose of designating the territory of a particular

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[49] *Ibid.*, p877. *Cf. Ashurst v. Pollard* [2001] 2 All E.R., *per* Jonathan Parker, LJ., p85, paragraph 53.

[50] Schlosser, P, '*Report on the Convention on the Association of Denmark, Ireland and UK to the Brussels Convention*' (OJ 1979 C59/71), p121, paragraph 168.

[51] *Re Polly Peck International plc (No.2)* [1998] 3 All ER 812, 828 – 'principally' means 'chiefly' or 'for the most part' – Rattee J.'s methodology was to list the legal issues which the court would have to decide and to note that the issue of title was only one among many difficult points. According to Briggs, "*As such, it could not be said that the issue of title was the principal concern of the case.*" (1998), p357. In *Coin Controls Ltd v. Suzo International (UK) Ltd* [1999] Ch. 33, 50-1, Laddie J. gave a wide interpretation to the phrase 'principally concerned': something which is a major feature of the litigation is not incidental.

[52] *Re Hayward* [1997] 1 All E.R. 32; *Barratt International Resorts Ltd v. Martin* 1994 S.L.T. 434; and *Webb v. Webb* [1994] 3 All E.R. 911. In *Webb*, Mr Webb senior provided the funds to purchase a flat in the South of France. Title to the flat was transferred into the sole name of his son. Mr Webb senior brought proceedings in England for a declaration that Mr Webb junior held the flat as trustee, and for an order that the son execute such documentation as was necessary to vest title in the father. The son challenged the jurisdiction of the English court on the ground that, by virtue of Article 16(1), the French courts had exclusive jurisdiction. Following a preliminary reference to the European Court of Justice, it was held that for Article 16 to apply, the action must be based on a right *in rem* and not on a right *in personam*. Since Mr Webb senior was only seeking to assert rights against his son (*i.e.* a right *in personam*), the action did *not* fall within Article 16(1). *Cf. Gaillard v. Chekili* [2001] I.L.Pr. 33, in which the European Court of Justice held that an action for rescission of a contract of sale of land (in France) was *not* an action *in rem*, but rather an action *in personam*. Accordingly, the Belgian court was not required to decline jurisdiction.

[53] *Sanders v. Van der Putte* [1977] E.C.R. 2383; and *Rösler v. Rottwinkel* [1985] E.C.R. 99. Kaye suggests that courts of a Contracting State will refer to the *lex situs* in order to determine whether the proceedings have a tenancy as their object, regardless of whether the relationship involved would constitute a tenancy under the *lex fori*. (*ibid.*, pp912/3)

[54] *Jarrett v. Barclays Bank* [1997] 2 All E.R. 484 – Timeshare agreements in respect of Spanish and Portuguese properties were deemed to fall within Article 16(1)(a) since they related to the exclusive occupation of immoveable property for a specified duration, in return for payment of money.

foreign Contracting State as the *situs* of the property, Kaye has enquired whether each Contracting State's own determination of *situs* "*... ought to be replaced by uniform Community-inspired criteria of moveability and immoveability ... for purposes of Article 16(1) at the instigation of the European court?*"[55] Such an approach to interpretation would at least avoid any incongruity or inconsistency among the approaches of the various Contracting States.[56]

Admittedly, some measures have been taken in England and Wales to restrict the over-exclusivity of Article 16(1).[57] Section 30(1) of the Civil Jurisdiction and Judgments Act 1982 provides that, "*The jurisdiction of any court in England and Wales or Northern Ireland to entertain proceedings for trespass to, or any other tort affecting, immoveable property shall extend to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of title to, or the right to possession of, that property.*" Section 30 does not extend to Scotland, and, interestingly, the approach of the Scottish courts has been somewhat different. In the 1980s, when considering the Scots international private law of delict, the Scottish Law Commission explained that the Scottish courts "*... have not excluded, in principle, the entertaining of actions, including actions of damages, in relation to immoveables abroad but, particularly in the context of actions to determine proprietary or possessory rights in immoveables,*

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[55] Kaye, *ibid.*, p897. Fawcett & Torremans have also called for the concept of 'immoveable property' in Article 16(1) to be given an independent Community meaning. (Fawcett, J J and Torremans, P, '*Intellectual Property and Private International Law*' (1998), p34)

[56] Kaye points, for example, to tenancies of immoveable property which, in his view, would require to be specifically mentioned, since, in the eyes of French law, the right of the tenant is merely one *in personam*. (*ibid.*, p912) Guidance as to what does, or does not, constitute a right *in rem* could be found, for example, in paragraphs 223-253 of the *Second Restatement of the Conflict of Laws*.

[57] Calls for restraint have also, on occasion, emanated from the European Court of Justice (*e.g. Hacher v. Euro Relais Gmbh* [1992] 3 I.L.Pr. 515, where the Court reiterated the need not to give Article 16 a wider interpretation than is required by its objectives).

they have liberally admitted the plea of forum non conveniens."[58] This is a reasonable and more tempered approach to jurisdiction, marking a narrow in-road into the apparently inviolable *situs* jurisdiction. Collier has noted that the House of Lords considered the *Moçambique* rule[59] to be a "... *self-denying rule*" with "... *little or no justification (since if the English court were to take jurisdiction it would usually apply the lex situs to the substantive issue).*"[60] Collier's remarks convey the notion that an English forum should be sufficiently objective to distinguish between rules of jurisdiction and rules of choice-of-law; the mere fact that the non-*situs* forum has assumed jurisdiction in such an action should not automatically result in its applying its own domestic law to the substantive point in issue. In short, it should not be presupposed that a non-*situs* forum will always lack choice-of-law objectivity.

The authors of Cheshire & North advise that the *situs* court is "*uniquely well placed to deal with the subject-matter listed in* [Article 16(1)]."[61] This may be true, but the present author would agree with Alden, who has suggested that assertions such as this "... *only endorse the situs state's assertion of jurisdiction and do not imply that the nonsitus cannot exert its judicial power over the property.*"[62] It is submitted that absence of the property from a court's jurisdiction should not, *per se*, suffice to preclude a non-*situs* court's assumption of jurisdiction, where circumstances would otherwise denote a close(r) connection between the non-*situs* state and the parties, their transacting and/or the consequences of their so doing. The assumption and

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[58] Scottish Law Commission, CM No 62 (and Law Commission WP No 87), '*Private International Law Choice of Law in Tort and Delict*' (1984), paragraph 2.81.
[59] *British South Africa Co v. Companhia de Moçambique* [1893] A.C. 602 – a court has no jurisdiction to determine title to foreign land, or to decide claims for damages for trespass to such property. Also, *Hesperides Hotels Ltd v. Muftizade* [1979] A.C. 508; *Hewit's Trs v. Lawson* (1891) 18 R. 793; and *Cathcart v. Cathcart* (1904) 12 S.L.T. 12.
[60] Collier, J G, *Conflict of laws*' (2001), p262.
[61] Cheshire & North, '*Private International Law*' (13th ed.) (1999), p229.
[62] Alden, *ibid.*, p622. (Emphasis added)

exercise of jurisdiction should not, it is submitted, be equated with the recognition and enforcement of decrees; to do this would be to demean the third category of conflict rule, namely, rules of recognition and enforcement of foreign decrees. For many years, however, there has been a tendency to equate jurisdiction over property with the matter of enforcement.[63] In the same way that it has been argued that rules of choice of law should not be fused (or confused) with rules of jurisdiction,[64] so too, it is here argued, that rules of recognition and enforcement of foreign decrees must not be usurped by, or subsumed within, rules of jurisdiction. Kaye has identified what the present author judges to be an infelicitous objective of Article 16, namely, "... *the basis of Article 16 exclusive jurisdiction is not merely one of unifying and rationalising Contracting States' jurisdiction in such proceedings, but also to further the Community public policy objective of ensuring that courts of States with a particular interest in controlling the types of transaction and activities dealt with under Article 16, by reason of their close territorial connection therewith, are accorded exclusive jurisdiction in relation to such proceedings.*"[65] This sentiment is echoed in the Kassedjian Report which states that the court of exclusive jurisdiction "*is the only one able to adjudicate the case effectively, this being a pledge that justice*

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[63] For example, in the unattributed Note in (1910-11) 24 Harv. L. Rev. 567: "*Undoubtedly the basis for the rule is found in the complete power of the state throughout its own territory, so that any sound exception made to it must rest on an examination of that principle.*" (p567) Consider also Westlake's view: "*The principle of the forum situs, in its application to land itself, is incontrovertible. Since only the authorities that exist on the spot can employ force to give possession or take it away, it would be idle for any foreign jurisdiction to make a direct attempt to determine the possession of land, or even the property in it ...*" (Westlake, J, '*A Treatise on Private International Law*' (1925), p215) This view was mirrored in the writing of Briggs, E, '*The Jurisdictional - Choice-of-Law Relation in Conflicts Rules*' (1948) 61 Harv. L. Rev. 1165, 1201: discussing the question of enforcement the author declared that, "*The answer ... is found in the basic fact of the situs' exclusive power over the land; other states have little choice.*"

[64] The desire to ensure the proper administration of justice may require "... *various checks, enquiries, on the spot examinations by experts and entries in local land registers.*" (Kaye, *ibid.*, p892) These are all relevant *choice of law* issues, but should not be concerns at the stage of conferring *jurisdiction*, save, where relevant, for purposes of *forum non conveniens*.

[65] Kaye, *ibid.*, p881.

will be properly dispensed."[66] This statement implies that 'conflicts justice'[67] is only done when the *lex fori* is applied *qua lex causae*, and again fails to acknowledge that such justice is also achieved through the application of conflict rules of recognition and enforcement of foreign decrees.[68] This is redolent of the now vilified notion of forum preference in choice of law, and is barely consonant with the internationalist approach expected, first, of the European Union, and secondly, of modern-day conflict rules.

As Alden has remarked, albeit with reference to America, "*If the situs retains any exclusive power it may be in enforcing a final judgment, although it must carefully follow the mandate of full faith and credit such a final judgment requires.*"[69] It is quite true that the power to *enforce* a decree rests with the *forum rei sitae* alone;[70] the power and control argument, however, could apply with equal force to moveable property, but in this regard, as Hay has highlighted, "*it has not been doubted that personal jurisdiction over the parties has been sufficient to bind their interests.*"[71] It is entirely legitimate to argue that the *situs* alone has jurisdiction to make effective (*i.e.* to enforce) the title of a particular party, but it is submitted that it is not equally

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[66] Paragraph 83.
[67] Kegel, G, '*International Encyclopaedia of Comparative Law – Volume III, Chapter 3: Fundamental Approaches*' (1986), p15.
[68] This is particularly true in the (European or Hague) context of an economic, political or legal community, sharing a common identity or loose sense of association. *Cf.* Von Mehren, A, '*Recognition and Enforcement of Sister-State Judgements: Reflections on General Theory and Current Practice in the EEC and the US.*' (1981) 81 Col. L. Rev. 1044, at p1046: "*... common membership in a political, economic, and legal system that is in some meaningful sense federal presumably increases each member's awareness and understanding of the quality of justice provided by other members.*"
[69] Alden, *ibid.*, p624.
[70] Falconbridge, J D, '*Essays in the Conflict of Laws*' (1947), at p534: "*It is only a court of the country in which the land is situated that can effectively grant any remedy enforceable in rem or give a judgement or make an order directly affecting the title to land or the possession of the land.*"
[71] Hay, *ibid.*, p116.

persuasive to argue that only the *forum rei sitae* can *determine* title.[72] Significantly, Hay has observed that in both jurisdiction and choice of law, American practice displays a trend away from an exclusive jurisdiction rule, and concludes that "*It is curious ... that the EEC Convention takes a step back and accords the situs exclusive jurisdiction.*"[73]

Since Article 16(1) is expressly restricted to proceedings which have as their object rights *in rem* in *immoveable* property, it may be assumed that any concerns regarding the alleged excessive reach of that rule would be confined to its effect upon immoveable property. As previously noted, however, in view of the general tendency to base choice of law rules relating to the transfer of corporeal and incorporeal moveable property, upon rules which govern the transfer of immoveable property, it is feared that an all-embracing resort to the jurisdiction and rules of the *lex situs* for the purposes of dealing with immoveable property, will, in fact, engender a similar jurisdictional and choice of law monopoly in the determination of moveable property disputes.

In concluding this chapter, it is submitted that if conflict rules of recognition and enforcement of foreign decrees are operating effectively, then limited exercise of non-*situs* jurisdiction over immoveable (and, *a fortiori*, moveable) property could be permitted. The Hague negotiators' discussion of an alternative (optional) special jurisdiction supports this conclusion. The concept of exclusive jurisdiction under Article 16(1) has abetted the dominion of the *lex situs* choice of law rule, intensifying

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[72] Consider Hay, *ibid.*, at p118: "*Jurisdiction to determine the right to title, the entitlement as distinguished from title itself, depends on the exercise of personal jurisdiction; it affects rights and obligations as between the parties.*"
[73] Hay, *ibid.*, p120.

the 'land taboo'. Fusion of the jurisdictional and choice of law connecting factors has helped to buttress the *situs* monolith, but, nevertheless, another crack is surfacing, namely, abuse of '*in personam*' jurisdiction.

Chapter Six

Cracks in the Monolith – '*in personam*' jurisdiction

The importance of the distinction between the determination of title, and the subsequent enforcement thereof, draws sharply into focus in the context of *in personam* jurisdiction.[1]

Undeniably, the *situs* state has ultimate control of, and responsibility for, immoveable property situated within its borders. The question whether this power justifies *exclusive* jurisdiction has already been considered and answered in the negative. The potential interest of a non-*situs* state in questions of title to foreign land has been admitted for some time, to the extent that the *situs* rule permits the exercise of *in personam* jurisdiction by a non-*situs* court even where that *in personam* jurisdiction affects foreign land. Joseph Beale outlined the position at the beginning of the twentieth century, *viz.*: "... *though the creation of equitable interests in land is a matter for the law of the situs alone, it does not follow that the courts of equity of another country may not in a sense exercise power over the foreign land ... It is clear that in certain cases a court of equity will decree a conveyance of foreign land in specific performance of a contract to convey, or require mutual deeds to rectify the*

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[1] '[*An action in rem] differs from an action in personam in that the decree of the court is not confined in its effects to the actual parties to the suit but embraces the disposition of the thing itself and purports to bind everybody in the world who might deny the validity of the interest sought to be established.*' (Cheshire, G C, '*Private International Law*' (1947), 3rd edition, p145) '*A right in personam can only be claimed against a particular person ... A right in rem, on the other hand, is available against the whole world ... its owner is entitled to demand that the thing in which it exists be given up by anyone not enjoying a prior right.*' (Schlosser, P, '*Report on the Convention on the Association of Denmark, Ireland and the UK to the Brussels Convention*' OJ 1979 C/59/71, p120/1) Note, however, the following remark, that, '*Equitable interests* [in English law] *are not ... merely the equivalent of personal rights on the Continent. Some can be registered and they, like legal rights, have universal effect even against purchasers in good faith.*" (*ibid.*, p121)

boundaries of foreign land, or decree a reconveyance for fraud ... the foreign court may decree a conveyance as a remedy for a tort or breach of contract of the defendant, although no right to a conveyance is recognised in the courts of the situs."[2] *In personam* jurisdiction exists wherever a court has jurisdiction over the *person* of the defender; if the defender is shown to be in breach of his obligations under a non-*situs* law, (or at least in the eyes of a non-*situs* court), that non-*situs* court may, in certain circumstances, order a conveyance of foreign land, even although such a decree, if it is to be effective, must be acted upon, or implemented, by the defender.[3] It is generally accepted that a court having jurisdiction over the defender can oblige him/her to execute a disposition or other deed affecting foreign land.[4] But the power of the non-*situs* forum extends only to the *person* of the defender, not to the land itself. Litigation between parties may involve, *inter alia*, contractual, delictual, or alimentary obligations. If the pursuer is successful in obtaining a decree from a non-*situs* court in respect of these obligations, and that same court orders the defender to convey foreign land to the pursuer in implementation thereof, the question arises as to how far the pursuer's rights extend should the defender refuse to implement the decree.[5] Armed with the decree of the non-*situs* forum, does the pursuer have sufficient munitions to enforce his or her rights within (and in respect of) the territory of the *situs*, or at least to request 'rubber-stamping' by the forum *rei sitae* of the non-

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[2] Beale, J H, '*Equitable Interests in Foreign Property*' (1906/7) 20 Harv. L. Rev. 382, 384.

[3] Beale, *ibid.*, p387.

[4] Briggs, E W, '*The Jurisdictional – Choice-of-Law Relation in Conflicts Rules*' (1948) 61 Harv. L. Rev. 1165, 1182. See Barbour, '*The Extra-Territorial Effect of the Equitable Decree*' (1919) 17 Mich. L Rev. 527, at p532-3: "... [if] *the defendant is personally before a court of equity, the court has power to order him to convey foreign land. Such a decree is an effective judgement and determines conclusively his obligation to convey and this obligation remains binding upon the person of the defendant wherever found. Such a decree ought to be entitled to full faith and credit at the situs of the land.*" Also Currie, B, '*Full Faith and Credit to Foreign Land Decrees*' (1954) 21 Uni. of Chi. L. Rev. 620 at p620. See *Ashurst v. Pollard* [2000] 2 All E.R. 772, [2001] 2 All E.R. 75 (note 15, *infra*).

[5] Or, in Goodrich's words, if the defender '... *has succeeded in evading the clutches of the court which made the order.*' (Goodrich, H F, '*Two States and Real Estate*' (1941) 89 Uni. of Pen. L. R. 417, 426)

situs decree?[6] The enquiry can be reduced to the simple question whether, "... *our plaintiff is helped by the foreign decree or must he begin de novo*?"[7] It is submitted that if the pursuer must begin his or her crusade entirely afresh, our system of community of judgments is flawed.

The distinction between *in rem* and *in personam* jurisdiction is deceptively simple. In some cases it may even appear that the basis of the distinction has been altogether overlooked. Consider, for example, *Re Duke of Wellington:*[8] Morris has highlighted the curious point that, in this case, the issue of jurisdiction appears to have been glossed over. Although the dispute centred around immoveable assets in England and Spain, Morris has explained that "*it was ultimately arranged that the* [English] *court would deal with the matter on the footing that the law of England applied, the parties expressing their willingness to be bound by the decision.*"[9] Surely, however, the issue was not what the parties might have desired, but rather the soundness or otherwise of the forum's exercise of jurisdiction. Interestingly, Morris makes the point that "*If the statements in the textbooks are to be taken at their face value, it looks as though the Wellington case could have been disposed of quite shortly on the ground that the court had no jurisdiction, since the better opinion is that the jurisdictional objection cannot be waived.*"[10]

Alden has highlighted some of the difficulties with *in personam* jurisdiction. In particular, it is not always easy for a court to frame or to classify its decree as one *in personam*, rather than *in rem*: "*The interests of the parties cannot be separated wholly*

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[6] Consider Goodrich, *ibid.*
[7] Goodrich, *ibid.*, p426.
[8] [1948] Ch. 118, affirming [1947] Ch. 506.
[9] Morris, '*Renvoi*' (1948) 64 L.Q.R. 264, 268.

from the land itself. Regardless of the label affixed to a decree, it affects both the interests of the state in the land and the personal interests of the parties. Not only does this ambiguous distinction create conflicting results, but more importantly, it demonstrates that there is no inherent reason why a non-situs court is an inappropriate forum."[11] Although the *situs* court will generally tolerate a non-*situs* forum's exercise of *in personam* jurisdiction, it will take umbrage if the foreign court purports *directly* to affect the land: no reliance is placed either upon the non-*situs* forum's ability discerningly to apply the apposite choice of law rule (many of which, at least in European or Hague countries, are now harmonised), or in the safeguards inherent in the *lex situs'* own rules of recognition and enforcement of foreign decrees (*i.e.* its finite grounds for non-recognition or non-enforcement).

It can be perceived that the *in rem/in personam* jurisdiction distinction is somewhat obscure, possibly giving rise to manipulation of the more permissive *in personam* jurisdiction. As Alden has stated, "*Courts may thereby* [*i.e.* through reliance upon *in personam* jurisdiction] *accomplish what the law prohibits them from doing directly.*"[12] In Alden's words, "*In recharacterizing the nature of the relief, the foreign court simply professes to assert its equitable powers in personam and orders the conveyance of the extrastate land, while at the same time disavowing any intent to act directly on the property. When the proper language and form are used, this in personam loophole allows a nonsitus court to accomplish the needed division.*"[13] It is intellectually naïve to entertain the notion that a non-*situs* forum can order a

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[10] *Ibid.*, p268. Consider, however, Morris' rationalisation of the decision at p268.
[11] Alden, R, '*Modernizing the Situs Rule for Real Property Conflicts*' (1987) 65 Texas L. Rev. 585, 595.
[12] Alden, *ibid.*, p595.

conveyance of title to foreign land without directly affecting that title: "*It is difficult to conceive of an action that more directly affects land than a determination of who holds what interests in that land.*"[14] It is instructive to consider the English case of *Ashurst v. Pollard.*[15] The case concerned proceedings raised by an English trustee in bankruptcy. Mr Pollard and his wife owned land in Portugal. On 26 October 1993, a bankruptcy order was made against Mr Pollard. On 4 October 1999, District Judge Lay[16] granted an order for sale of the Portuguese property with vacant possession. The question arose whether the proceedings, in fact, fell within the exclusive jurisdiction of the Portuguese courts, as proceedings concerning rights *in rem* in immoveable property.[17] The Pollards appealed the judgment of the District Court,[18] to Jacob, J., sitting in the Bankruptcy Court of the Chancery Division. Jacob, J. dismissed the appeal, holding that although *prima facie* an order which purported to be effective against the world fell within Article 16(1), the article did not prevent the forum from enforcing an English trust in respect of land abroad, since such an action was one *in personam* and not *in rem.* Although the effect of an English order might be to compel the Pollards to complete the trustee in bankruptcy's title (which presumably would require action in Portugal), or indeed to do any other act in relation to the land, such an order was permissible if achieved through the medium of a decree *in personam.* It followed that the granting of an order requiring the bankrupt and his wife to do all things necessary to procure the sale of the jointly-owned property was correct in principle since it was an order *in personam.* The Pollards appealed against the

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[13] Alden, *ibid.*, p599/600 (*e.g. District Attorney v. McAuliffe* 493 N.Y.S. 2d 406, 412 [US Supreme Court, 1985] where a forfeiture action was characterised as *in personam* and a restraining order supported).

[14] Alden, *ibid.*, p607.

[15] [2000] 2 All E.R. Ch.D. 772, [2001] 2 All E.R. 75.

[16] At Brighton County Court.

[17] In terms of Article 16(1) of the Brussels Convention.

[18] To the effect that Article 16(1) did *not* prevent the English forum from enforcing an English trust in respect of land abroad.

decision of Jacob, J., still contending that the court had no jurisdiction to make such an order in relation to the Portuguese property. The appeal was dismissed.[19] The appellate court held that in determining whether Article 16(1) applied to any particular case, it was necessary, first, to give a restrictive interpretation to Article 16, since its effect was to override the parties' choice of forum. Secondly, it was necessary to consider whether the proceedings involved a factual investigation that was best performed by the courts of the state in which the property was situated, and/or whether questions of local law and practice were raised. In the instant case, no issue was deemed to be raised as to the factual situation in Portugal, nor, it was held, did the matter involve any question of Portuguese law or practice. In the circumstances, the court held that the proceedings affected only the *in personam* right of the appellants, and accordingly, that it was appropriate for the English court to exercise jurisdiction.

It would appear that the court's assessment of the factual situation was somewhat impressionistic, and the decision that no question of Portuguese law or practice was involved rather premature. In line with the sentiment of Alden's remarks, it is difficult to identify an issue that more directly affects the Portuguese land than the question of whether or not it is to be sold or transferred with vacant possession by one party to another. Rather than deny the nature of the order in question, and engage in classificatory gymnastics so as to characterise the decree as one *in personam*, would it not be more honest to recognise that, in these circumstances, the English forum had a greater interest in hearing the action, in determining which of two English parties, in fact, owned the foreign land in question, and in dealing with the resultant transfer of

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[19] *Ashurst v. Pollard* [2001] 2 All E.R. 75. The case called before a bench of three judges, Kennedy,

the property (save for questions of formal validity and accuracy of records, in which the *situs* has a greater interest)?[20] It seems neither honest nor logical to state that, "*The fact that the trustee's ultimate aim or purpose in prosecuting the proceedings is to effect a change in the ownership of the property by achieving its sale is not material*";[21] on the contrary, ownership of the Portuguese property was *central* to the point in issue. Nonetheless, the Court of Appeal dismissed[22] the argument put forward by Counsel for Mr Pollard, namely that, "... *in deciding whether art. 16 applies to these proceedings the court must look at the substance of the dispute, rather than the form of relief sought or of the order made.*"[23]

If it is accepted that the non-*situs* court may have sufficient interest to grant an *in personam* decree, then, in appropriate circumstances, it could perhaps be demonstrated that such a court might have an interest in the land itself. Bearing in mind the distinction between determination of title and the subsequent enforcement thereof, it should be accepted that the *situs'* refusal to recognise another legitimately

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LJ., Potter, LJ., and Jonathan Parker, LJ.

[20] The appellate court distinguished the case of *Re Hayward (deceased)* [1997] 1 All E.R. 32. It is submitted, however, that Rattee J.'s conclusion in *Hayward* was less strained than the decision in *Ashurst*. In *Hayward*, Rattee, J. concluded that: "*The trustee's claim ... was of the very essence of a claim of a right in rem, in that it was a claim to ownership itself of one half of the villa.*" (*ibid., per* Rattee, J., p43) The trustee's claim was that the deceased's one half share in a Minorcan villa formed part of his estate and, accordingly, that it vested in the trustee, and that any purported transfer of the interest, to or by the deceased's widow, was void. Although *Hayward* differs from *Ashurst* to the extent that, in the former case, the trustee expressly craved the court to order the widow and X, a third party purchaser, to take steps to rectify the Minorcan register so as to demonstrate that the villa was held in the joint names of X and the trustee, it can be inferred that Mr Ashurst would also have required such steps to be taken, *mutatis mutandis*, so as to satisfy the conditions of clear title and vacant possession. It is submitted that the absence in *Ashurst* of an express crave in these terms is not *per se* sufficient grounds on which to distinguish the two cases. Jonathan Parker, LJ. distinguishes the two cases on the basis that the '*principal subject matter*' of the proceedings in *Hayward*, but not in *Ashurst*, was the *ownership* of the foreign property. His Lordship opined that, "*The trustee in the instant case* [*Ashurst*] *is not seeking to establish or protect, let alone perfect, his title to Mr Pollard's interest in the Portuguese property.*" (*ibid.*, p87, paragraph 60)

[21] *Ashurst v. Pollard* [2001] 2 All E.R. 75, *per* Jonathan Parker, LJ., p86, paragraph 56.

[22] *Ibid.*, p86, paragraph 56.

[23] *Ibid.*, p80, paragraph 21, *per* Mr Prentis, Counsel for Mr Pollard.

interested[24] court's determination of title, is not appropriate, save for customary[25] reasons. The exclusive jurisdiction rule may even be criticised precisely because it encourages parties against whom an *in personam* decree has been awarded in a non-*situs* forum, to disregard that order, pending further enforcement proceedings at the *situs* (or, more likely perhaps, contempt of court proceedings at the non-*situs* forum).[26]

It is inconsistent and illogical to refuse to recognise the decree of the non-*situs* forum merely on the basis that it infringes upon the sovereignty of the *forum rei sitae.* As Anderson has explained, "*Whenever foreign judgements are enforced there is an 'invasion' of sorts of local sovereign rights. Why should judgements affecting land be treated differently*?"[27] A 'different' treatment has been justified, historically, by virtue of land being the principal source of wealth (as well as for political reasons whereby a *situs* may wish to exercise control over the identity of those persons who are permitted to live within its borders). It is suggested, however, that it is now misguided to presume (irrebuttably) that the interests of the *situs* will always be protected or furthered by automatic refusal to recognise the decree of a non-*situs* forum, or

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[24] The difficulty, of course, is in ascertaining which legal system/court *is* legitimately interested, for in all matters where a forum's authority extends, it may persuade itself and others that it is legitimately interested. See Chapter Seven, *infra* – 'Cracks in the Monolith – Particular Instances'.

[25] *i.e.* Typical Convention grounds for refusal of recognition, such as fraud or public policy (*e.g.* section 51(3) of the Family Law Act 1986). Currie, B, '*Full Faith and Credit to Foreign Land Decrees*' (1954) 21 Uni. of Chi. L. Rev. 620, indicates, at p642, that, '*... there is no reason to fear the application of full faith and credit to foreign decrees will place the land policy of the state at the mercy of venal and hostile tribunals. Our systems of conflict-of-laws are sufficiently homogeneous to ensure that the law of the situs will be given due consideration.*' The author later counsels his readers to '*... replace the traditional attitude of suspicious and jealous provincialism.*' (p677)

[26] *Cf.* Alden, *ibid.*, p601/2. See also *Gammon v. Gammon*. 684 P 2d. 1081 (1984). If it is within the authority of the non-*situs* forum to find the non-compliant defender to be acting in contempt of court, then it is academic to say that the non-*situs* forum cannot affect title to land abroad. Weintraub has also remarked upon this point, stating that a non-*situs* decree *in rem* cannot be deemed outrageously inappropriate since '*situs states have consistently given effect to a deed actually executed by a party under compulsion of such a* [*non*-situs] *decree.*' (Weintraub, R J, '*An Inquiry into the Utility of Situs as a Concept in Conflicts Analysis*' (1966) 52 Cornell L.Q. 1, 14)

conversely, to presume that the interests of the *situs* will, without exception, be offended by recognition of a non-*situs* decree.

The third category of conflict rule, those of recognition and enforcement of foreign decrees, should be able to operate independently of the first category of rule, that is, rules of jurisdiction. Unlike rules of exclusive jurisdiction, which, it has been argued, already enjoy too wide a reach, rules of (non-)recognition or (non-)enforcement of foreign decrees typically are more restrained in their operation (*i.e.* whilst a rule of exclusive jurisdiction automatically results in all decrees of a non-*situs* forum being denied recognition, rules which merely specify grounds for refusing recognition are less sweeping in their effect and would likely result in at least *some* non-*situs* decrees being recognised in the *forum rei sitae*).[28]

So long as *situs* recording or registration requirements are satisfied (this being guaranteed, in some cases at least, by Article 16(3), or by Article 22(3) of Council Regulation 44/2001), and deeds are appropriately framed and executed so as to satisfy the *lex situs* on matters of formal validity (this being, in any event, a *choice of law* issue), it has been boldly suggested that "... *the exercise of jurisdiction by a nonsitus court poses no unique dangers.*"[29] There is little justification for a *universal* ban on foreign orders which purport to affect local land; the question of conformity with the formal or procedural requirements of the *lex situs* can be determined on a *case by case*

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[27] Anderson, W, '*Foreign Orders and Local Land: the Caribbean gets its own Version of Duke v. Andler*' 1999 I.C.L.Q. 167, 172.

[28] This holds particular significance in the U.S.A. where, according to Currie, under the doctrine of Full Faith and Credit, the substantiality of a state's policy objections to the recognition of a sister state's judgment is to be finally determined by the United States Supreme Court: "*The inference is strong that the reason for withholding recognition lies not in the nature of the decree but in some conception of policy relating to local land.*" ((1954), *ibid.*, p623/4)

[29] Alden, *ibid.*, p593.

basis. It is submitted that Anderson is correct in his view that, "*The risk of non-conformity cannot be a principle that forecloses recognition of all foreign judgements.*"[30]

Even if rules of jurisdiction and of recognition and enforcement have always been linked by invisible threads, it is suggested that those threads, in the context, at least, of property, are now stronger than ever. Brainerd Currie, writing in 1954, stated that, "... *the question of jurisdiction in a particular instance becomes one of the effectiveness of the judgement. Effectiveness means de facto power to produce the desired result – not merely in terms of power to compel the defendant to perform an act, but also in terms of the consequences which the appropriate foreign sovereign will attach to the act when performed.*"[31] Rules of recognition and enforcement, however, must not be emasculated. In the American arena, Hay has suggested that "*To ask about the effect of non-situs land decrees at the situs mis-states the issue, or complicates it unnecessarily ... state court judgements do not directly affect any property outside the forum state. But they establish obligations which the full faith and credit clause requires the situs to recognise.*"[32] It is not suggested that non-*situs* decrees relating to land should affect title to foreign land *ex proprio vigore*, rather, in the words of Barbour, "... *all that is contended is that the courts of the situs should recognise such a decree as a final determination of a personal obligation to convey, an obligation analogous to that arising from a valid contract.*"[33] The *forum rei sitae*, when called

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[30] Anderson, *ibid.*, p172/3. He also makes the interesting point that objections to non-*situs* jurisdiction do not take into account the principle of double *renvoi*: "*The raison d'être for the existence of double renvoi is precisely to ensure that the foreign court reaches the same conclusion as the forum regarding particular areas of decision making of which title to and rights in and over land are the primary example.*"

[31] Currie (1954), *ibid.*, p622.

[32] Hay, P and Hoeflich, M H, (ed. Hay, P) '*Property Law and Legal Education; the Situs Rule in European and American Conflicts Law - Comparative Notes*' (1988), p120.

[33] Barbour, *ibid.*, p548; and Currie (1954), *ibid.*, p628.

upon to recognise and to enforce the non-*situs* decree, should effectively engage only in a process of rubber-stamping; the grounds for non-recognition or non-enforcement should be strictly curtailed.[34] In appropriate cases (*e.g.* where the parties and the circumstances of their transacting demonstrate a closer connection with the non-*situs* forum than with the *forum rei sitae*), the non-*situs* forum should be permitted to regulate the personal obligations and proprietary rights of the parties, leaving to the *forum rei sitae* only the actual enforcement of the prior determination.[35] As Hay has indicated, *"Rarely, if ever, will the situs have so great an interest in denying full recognition to non-situs decrees that it should be permitted to disregard them.*[36] *Full recognition in the sense ... of issuing its decree to mirror that of the non-situs court ..."*[37] It is submitted that grounds for non-recognition or non-enforcement should protect only such provisions of the *lex situs* as concern alienability or marketability of immoveable property, accuracy of its title records, and restrictions on land use.[38]

Adopting an interest analysis approach, Weintraub has advised that, "*The situs may,*

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[34] *Cf.* sections 46(1) and 51(3)(a) of the Family Law Act 1986, and Article 10 of the 1980 European Convention on Recognition and enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children. For example, it might be suggested that recognition of the validity of an overseas transfer of rights *in rem* in immoveable property may be refused if: -

(a) It was obtained without such steps having been taken for giving notice of the proceedings to parties having an interest in the property as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or
(b) It was obtained without a party declaring an interest in the property having been given such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given; or
(c) Recognition of the transfer of rights *in rem* in the property would be manifestly incompatible with the fundamental principles of the law relating to the ownership and use of immoveable property in the State addressed [*i.e.* the *lex situs*].

[35] In such instances, the non-*situs* forum need not necessarily determine the rights of the parties *inter se,* or as regards the foreign property, in accordance with the *lex situs*. *Cf.* Hay (1988), *ibid.*, p119.

[36] *E.g. Ashurst v. Pollard, ibid.*; and *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733.

[37] Hay (1988), *ibid.*, p120.

[38] *Cf.* Alden, *ibid.*, p626. This could be achieved by the means suggested by Currie, so as to ensure formal validity of the transfer of immoveable property: '*A procedure which would be strictly in conformity with the theory on which conclusive effect is claimed for the foreign decrees would be to bring, at the situs, an action to effectuate the foreign decree, or to carry it into effect.*' (Currie, 1954, *ibid.*, p675) This should comprise no more than a declarator of the rights conferred or approved by the non-*situs* forum, or at most, an order mandating compliance with the recording or registration requirements of the *lex situs*. Weintraub, for example, suggests that '... *the proper notation will have to be made in the land records at the situs to protect persons who might rely on record title.*'

under a proper full, faith and credit standard, refuse to recognize a sister-state judgement affecting the interests of persons in realty ... only when recognizing a particular interest as validly created will conflict with its own interests as situs and when this conflict with its interests is so gross as to outweigh the need for full faith and credit."[39] It is submitted, however, that the tenor of this statement may run against the reality of the situation; it may be argued that the onus should lie, not on the forum *rei sitae* to show gross conflict with the interests of the *lex situs*, but rather, that it should lie on the party seeking to rely upon the judgment of the non-*situs* forum to show that the decree does not conflict with the fundamental principles of the *lex situs*. *Ex comitate*, the *situs may*[40] acquiesce in the non-*situs* decree.

One case in which an English court was invited to make an order in respect of land in Scotland was *Richard West & Partners (Inverness) Ltd v. Dick*.[41] Megarry J. held that, equity acting *in personam*, the English court had jurisdiction to grant a decree of specific performance of a contract for the sale or purchase of foreign land, provided that the defendant was domiciled within the English jurisdiction.[42]

Counsel for the defendant had contended that "*where ... the land was subject to an entirely different system, ... it* [was] *inappropriate to grant a remedy which might involve grave difficulties in working out the decree. Scots land law is probably no less*

(Weintraub, R J, '*The Conflict of Laws Rejoins the Mainstream of Legal Reasoning*' (1986) 65 Texas Law Review 215, 232)

[39] Weintraub (1966), *ibid.*, p11. Otherwise, the non-*situs* decree should '*bind the conscience*' of the *forum rei sitae*. *Fall v. Eastin* 113 N.W. 132, 180. *Cf.* Cheshire & North, '*Private International Law*' (1999), p378.

[40] Or may not: *McKie v. McKie* 1933 I.R. 464.

[41] [1969] 2 Ch. 424.

[42] Harman, LJ. remarked that – "*I say nothing about a case where the defendant is domiciled outside* [the jurisdiction of the English forum]." (p436)

obscure to the English lawyer than English land law is to the Scots."[43] This argument, however, was dismissed somewhat flippantly by Russell, LJ. (affirming Megarry J.), *viz.: "I trust that I shall not be thought lacking in a due sense of awe at the prospect of a Chancery Master being enveloped in the coils of Scottish conveyancing. I certainly do not say that in some cases there may not be very real difficulties. But I hope that practical difficulties in applying sound principles will never too easily be permitted to distort those principles ... I refuse to assume that the Scottish courts will stand aghast at the spectacle of a purchaser living within the English jurisdiction being ordered by an English court to carry out his agreement to purchase land in Scotland*"[44]

Their Lordships found justification[45] for their decision in an earlier dictum of the Lord Chancellor, Lord Selbourne, in the case of *Ewing v. Orr Ewing*:[46] "*The courts of equity in England are, and always have been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trust as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries.*" Interestingly, it has been doubted whether an English forum would accord the same degree of respect to the decree of a foreign tribunal purporting to deal with title to land in England.[47] It is submitted that to deny recognition to a foreign decree,

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[43] *Ibid.*, p429.
[44] *Ibid.*, and p430.
[45] *Ibid.*, p430.
[46] (1883) 9 App. Cas. 34, 40.
[47] Anderson, *ibid.*, p168, has remarked that, "... *English law still leaves open the question whether an English court would recognise the decree of a foreign court purporting to operate in personam on the parties affecting land in England.*" He asserts, however, that there are Canadian and American cases directly in point.

where, *mutatis mutandis*, an English non-*situs* forum would expect the foreign *forum rei sitae* to recognise an English decree *in personam*, would be to offend principles of reciprocity and comity.[48]

Significantly, in *Richard West*, Russell, LJ. alluded to the fundamental distinction between rules of jurisdiction and rules of recognition and enforcement, *viz*: "*Any inability of the court to enforce the decree in rem is no reason for refusing the plaintiff such rights and means of enforcement as equity can afford him.*"[49] One senses in these words an exercise, by the English forum, of jurisdiction carefully labelled *ex post facto* as jurisdiction *in personam*, in order to achieve the end result desired by the forum, but without causing offence to the *lex situs*.

As regards the Scots courts, in the case of *Ruthven v. Ruthven*,[50] the court was willing to exercise personal jurisdiction over the defender, Lord Ruthven, to order him to execute and deliver a conveyance of land in Ireland. The court refused, however, to have the conveyance executed by the Clerk of Court, opining that this would intrude upon the jurisdiction of the Irish court. It must be admitted, nevertheless, that the court's decree *ad factum praestandum* did, to some extent at least, trespass upon the territorial sovereignty of the *lex situs*, for it cannot be denied that the result of the litigation in Scotland was to affect the land in Ireland.

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[48] *Cf. Travers v. Holley* reasoning ([1953] P. 246).
[49] *Ibid.*, p431.
[50] 1905 (43) S.L.R. 1.

The line between acting *in rem* and acting *in personam* is a fine one, and one which is difficult to tread.[51] Professor Currie has laid down some basic pointers: "*To provide that the* [non-*situs*] *decree shall operate of its own force as a conveyance is bad enough; to provide for actual registration at the situs is waving a red flag. If the decree is to be accepted as conclusive for any purpose at the situs, the foreign court must mind its manners; a plaintiff's lawyers drafting the decree must not put into the mouth of that court language which serves no purpose except to arouse the elemental instincts of the court at the situs in defense of its legitimate prerogatives ... the plaintiff must scrupulously avoid any prayer for relief predicated on the assumption that he has acquired legal title by virtue of the foreign decree.*"[52] In other words, the pursuer, and in turn, the non-*situs* forum, must not force the hand of the *forum rei sitae*, or suggest that the *lex situs* is doing anything other than acting of its own accord, and as master in its own court.

Various American cases have confronted the *in rem/in personam* dichotomy, and have revealed, in certain instances, the superficiality of the distinction. In 1810, the U.S. Supreme Court decided the case of *Massie v. Watts.*[53] Watts, Virginian, sued Massie, Kentuckian, in a Kentucky Federal Court, asking the Court to compel Massie to convey to Watts land in Ohio, to which Massie held legal title. Watts claimed that Massie had acquired legal title with notice of Watt's equitable title. In ordering Massie to convey the land to Watts, Marshall, CJ. explained that, "*Was this cause ... to be considered as involving a naked question of title ... the jurisdiction of the ... Court of Kentucky would not be sustained. But where the question changes its*

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[51] *Cf.* Gardner, J C, '*The Decreasing Influence of the Lex Situs*' (1934) 46 J.R. 244, at p249: "*... I submit that in many cases the distinction is much less clear than is generally contended. At any rate it is often so fine that it is bound to exercise an undermining influence on the principle of the lex situs.*"
[52] Currie (1954), *ibid.*, p673.

character, where the defendant in the original action is liable to the plaintiff ... as the holder of a legal title acquired by any species of mala fides practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."[54] The shallowness of the *in rem/in personam* distinction is manifest in Marshall, CJ.'s conclusion that, "... *in a case of fraud, or trust, or of contract, the jurisdiction of a court ... is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree. The inquiry, therefore, will be whether this be an unmixed question of title, or a case of fraud, trust or contract.*"[55]

In the later case of *Cheever v. Wilson*,[56] Swayne, J. remarked that, "*The decree rendered in Indiana, so far as it related to real property in question* [in Washington] *could have no extraterritorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in the situs rei, by the proper proceedings conducted there for that purpose.*"[57] In other words, the non-*situs* decree could have been enforced at the *situs*, or a declarator as to the parties' rights (pursuant to the non-*situs* decree) obtained in the *forum rei sitae*, and certainly, the non-*situs*

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[53] 10 U.S. 148 (1810).
[54] *Ibid.*, p156.
[55] *Ibid.*
[56] 76 U.S. 108 (1869).
[57] Paragraph 121. Consider also *Muller v. Dows* [1876] 94 U.S. 444, *per* Strong, J., at p449: "*It is here undoubtedly a recognised doctrine that a Court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title.*" (Gardner, *ibid.*, p250)

decree would have been recognised at the *situs* for the purpose of a plea of *res judicata*.[58]

The 1810 dictum of Marshall, CJ. was refined in 1890, by Fuller, CJ. in the case of *Carpenter v. Strange*.[59] The rubric states that "*The jurisdiction of a court ... may be sustained over a person, notwithstanding lands not within the jurisdiction may be affected by the decree ...*" Fuller, CJ. expanded upon this, saying that, "*The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or on behalf of the party.*" It was apparent, therefore, that while the non-*situs* forum did not assert that its decree had automatic extra-territorial effect, inherent in the court's coercion of the defendant (albeit coercion *in personam*), was an intention directly to affect the foreign land.

Reliance was placed upon *in personam* jurisdiction in two further important American cases, *Clarke v. Clarke*[60] and *Fall v. Eastin*.[61] In *Clarke*, Counsel for the plaintiff successfully contended that, "*...what cannot be done directly*[62] *can be accomplished by indirection*[63] *and ... the fundamental principle which gives to a sovereignty an*

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[58] *Cf.* An unattributed note on *Re Duke of Wellington* [1948] Ch 118; (1948) 61 Harv. L. Rev. 1055, 1057: "*There seems to be no valid reason why a decision of a foreign court on a matter affecting title to land should not be considered res judicata at the situs.*"
[59] 141 U.S. 87 (1890).
[60] 178 U.S.186 (1900).
[61] 215 U.S.1 (1909).
[62] *i.e.* By decree *in rem* of the non-*situs* state.
[63] *i.e.* By decree *in personam* of the non-*situs* state.

exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its existence may be thus[64] *frustrated at any time.*"[65] It is ironic that the misnomer of 'exclusive' jurisdiction used in early twentieth century America is mirrored even now in the ostensible 'exclusive' jurisdiction rule of Article 16 of the Brussels Convention.

Fall v. Eastin concerned a deed in respect of land in Nebraska. The deed was granted by a commissioner under a Washington divorce decree. In determining the equities of the parties, the Washington divorce forum set apart the land in Nebraska to the wife as her own separate property. The wife contended that the "*Washington court, having had jurisdiction of the parties and the subject matter, in determination of the equities between the parties to the lands in controversy, decreed a conveyance to be made to her* ... [and] *was evidence of* [the wife's] *right to the legal title.*"[66] Her husband, on the other hand, argued that "... *the Washington court had neither power nor jurisdiction to affect in the least, either legally or equitably, lands situated in Nebraska.*"[67] The Nebraska Supreme Court held that it was not necessary, in terms of the Full Faith and Credit clause of the Federal Constitution, that the Washington deed be recognised in Nebraska: "*The rule is well settled that when a case ... is presented, a court of equity having personal jurisdiction of the parties may, in the exercise of its discretion, assume jurisdiction, although land in another state may be affected, if it can grant effective relief by a decree acting solely upon the person whose title or interest in the*

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[64] *i.e.* By the *in personam* judgment of a non-*situs* state asserting jurisdiction by its own rights.
[65] Paragraphs 191/192.
[66] Page 67.
[67] Page 68.

land is to be affected, as distinguished from a decree acting directly upon the land ... But the decree is ineffectual without a conveyance by the holder of the title pursuant to the requisition of the decree."[68]

The Supreme Court of Nebraska explained the strength of the *in personam* decree, *viz:*, "*We think there can be no doubt, where a court of chancery has, by its decree, ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings and that any action taken by reason of such compliance is valid and effectual wherever it may be assailed.*" But, in spite of the *in personam* effect, the decree was not effective *in rem*: "*The* [Washington] *decree is inoperative to affect the title to the Nebraska land, and is given no binding force or effect so far as the courts of this state are concerned, by the provisions of the Constitution of the United States with reference to full faith and credit.*"[69] In fact, the wife in this case did not utilise the remedy which lay open to her in terms of provision for recognition and enforcement of foreign decrees. As Weintraub has indicated, "*Instead of suing the husband's grantees directly, she should first have sued upon the Washington decree in Nebraska asking a Nebraska court to establish and enforce it as a decree from a Nebraska court.*"[70] Apparently, the *forum rei sitae* becomes somewhat piqued in the face of a presumptuous and ill-mannered non-*situs* forum.[71]

The superficiality of the *in rem/in personam* distinction, and the ease with which it can be manipulated by the non-*situs* forum, is evident in the following statement: "*A*

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[68] Page 67.
[69] Page 69.
[70] Weintraub (1966), *ibid.*, p9.

court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person. Whatever it may do through the party, it may do to give effect to its decree respecting property, whether it goes to the entire disposition of it or only to affect it with liens or burdens."[72] Ultimately, if the husband in *Fall v. Eastin* had been compelled, by virtue of contempt of court proceedings raised in the Washington forum, to transfer to his wife title to the land in Nebraska, then the Nebraska *forum rei sitae* would have recognised his wife's title, regardless of the fact that, effectively, the transferor would have been acting under compulsion. As Goodrich has remarked, "... *if the defendant makes a conveyance in pursuance of such an order* [*i.e.* an order of the non-*situs* forum delivered at the conclusion of contempt proceedings] *he may not deny, even in the state of the situs, that the conveyance is his own free act and deed even though he made it to get out of jail.*"[73]

This incongruity was underlined in *Fall v. Eastin*, where the Supreme Court, citing the earlier case of *Carpenter v. Strange*,[74] opined that "... *a court of equity may, in a proper case, compel* [a party] *to act in relation to property not within its jurisdiction; its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or cancelled by or on behalf of that party.*"[75]

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[71] Weintraub suggests that the wife in *Fall v. Eastin* breached '*procedural etiquette*'. (*ibid.*, p10) *Cf.* note 52, *supra.*
[72] *Ibid.*
[73] Goodrich (1941), *ibid.*, p426.
[74] 141 U.S. 87, 105.
[75] *Fall v. Eastin*, p70.

The casuistry of the *in rem/in personam* distinction was apparent even to the Supreme Court itself, which admitted the "*... embarrassment which sometimes results from* [the application of the distinction]": "*Whether the doctrine that a decree of a court rendered in consummation of equities ... will not convey title, and that the deed of a party coerced by the decree will have such effect, is illogical or inconsequent, we need not inquire, nor consider whether the other view would not more completely fulfil the constitution of the U.S.*"[76] Although only the *forum rei sitae* has subject-matter jurisdiction over land, a non-*situs* forum is fully able to exercise personal jurisdiction so as indirectly to affect the foreign land.[77] In granting an order *in personam* against the defender, the non-*situs* forum fully anticipates that, ultimately, its decree will have extra-territorial effect.[78] The converse proposition would be absurd, to say nothing of vexatious. In 1966, Weintraub instructed scholars to, "*...dismiss at once the argument that by refusing to recognize the sister-state decree as between the original parties ... the situs is simply protecting the hypothetical bona fide purchaser who might rely on a record title which does not note the sister-state decree. When bona fide purchasers exist, the situs is free to protect them on the same basis as it would in wholly domestic transactions which are improperly recorded. It may not ... create imaginary bogies to mask what is simply hostility to a sister-state decree.*"[79]

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[76] *Ibid.*, p70.
[77] *Cf.* Cheshire & North, *ibid.*, at p377: '*A decree may be issued, which though personal in form, will indirectly affect land abroad.*'
[78] To argue otherwise would be tantamount to saying that "*equity is willing to act in vain*" (Anderson, *ibid.*, p174). Consider also Westlake, J, '*A Treatise on Private International Law*' (1925), at p215: '*... an indirect attempt may be made by a foreign jurisdiction to determine the possession or the property in land by compelling one who is personally subject to its authority to employ those possessory or proprietary rights which he possesses in the forum situs in such a manner as to give effect to a determination which in itself would be nugatory.*'
[79] Weintraub (1966), *ibid.*, p11.

Despite Colwyn Williams' prediction in 1959 that "... *in general the situs rule is weakening all through the conflict of laws ... It may well be that it is in this area* [that is, the recognition of foreign land decrees] *that the land taboo will first disappear* ...",[80] the taboo still exists, at least in name. In practice, however, the *in rem/in personam* distinction permits, to some extent, circumvention of the *situs* rule. What a non-*situs* forum cannot achieve directly, it is able to achieve using the device of decree *in personam*. As Gardner concluded in 1934, by requiring a party to implement a contractual, delictual or trust obligation in respect of foreign land, "... *a Court of personal jurisdiction can issue what practically amounts to a decree in rem.*"[81]

The apparent difficulty (both in theory and in practice) in making a demarcation between jurisdiction *in rem* and jurisdiction *in personam*, is indicative of further weakness in the monolith.[82] In this chapter, however, the authorities relied upon to demonstrate the weakness derive principally from the United States, and rely heavily upon American conflicts thinking, and upon notions of equitable jurisdiction. In the following chapter, it is intended to measure the extent of the 'weakness' in the Scottish and English jurisdictions.

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[80] Colwyn Williams, D, '*Land Contracts in the Conflict of Laws – Lex Situs: Rule or Exception*' (1959) 11 Hastings Law Journal 159, 160.
[81] Gardner, *ibid.*, p249/250.
[82] Gardner, *ibid.*, refers to it as, "*a factor in the decreasing influence of the lex situs.*" (p251)

Chapter Seven

Cracks in the Monolith – Particular Instances

Property and Divorce

The *in rem/in personam* distinction has been used to outflank the exclusive jurisdiction rule in the context of division of property in the event of divorce.[1] In considering financial provision in the event of divorce, including, in particular, transfer of property orders, one must explore two aspects of the problem: first, the approach of a Scottish or English consistorial forum asked to deal not only with the separating spouses' Scottish or English property, but also with such foreign assets as constitute matrimonial property (in the view, at least, of the Scottish or English forum), and secondly, the response of a Scottish or English *forum rei sitae* to the decree of a foreign consistorial forum which purports to deal not only with the separating spouses' property situated within that foreign jurisdiction, but also with matrimonial property in Scotland or England.

In *Hamlin v. Hamlin*,[2] for example, Mrs Hamlin petitioned the court for divorce, and applied aditionally for various heads of ancillary relief, including an order that Mr Hamlin be restrained from disposing of a Spanish villa, valued at approximately £60,000. Title to the villa (which was the main item of matrimonial property) was in the name of the defendant. Mr Hamlin objected to the order sought on the basis that he might face bankruptcy proceedings were he to be precluded from selling the

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[1] Consider Scoles, E F, '*Choice of Law in Family Property Transactions*' (1988) *Receuil des Cours* II 13, at p56, where the author suggests that, "*On divorce, the courts regularly undertake to make this allocation of property without regard to the location of the assets.*"
[2] [1985] 2 All E.R. 1037.

property. At first instance, the county court rejected Mrs Hamlin's application, on the ground of no jurisdiction. On appeal, however, it was held that when dealing with a claim for financial provision on divorce, the English court did have jurisdiction to make an order restraining the defendant from disposing of property (real or personal[3]) situated abroad. The appellate court paid heed to the theoretical distinction between the first and third categories of conflict rule,[4] noting that even if the litigants are present within the forum's jurisdiction, the forum will *not* generally make an order, the effectiveness of which depends upon its being recognised or enforced by the *forum rei sitae*, *if* evidence suggests that the order will not, in fact, be recognised or enforced there.[5] It is critical, however, to note the rider which Kerr, LJ. places on the court's pronouncement, namely, "... *such cases go to discretion and not to jurisdiction.*"[6] In the case of *Tallack v. Tallack and Broekema*,[7] for example, an English forum refused to grant an order in respect of property situated in the Netherlands, on the ground that there was evidence to suggest the order would not be effective there. But importantly, as Kerr, LJ. emphasised, "... *the fact that the property in question was abroad was not treated as ousting the court's jurisdiction in principle.*"[8] Rather, the distinction between jurisdictional competence and the actual exercise of jurisdiction is a matter to be determined by principles of *forum non*

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[3] *Ibid., per* Kerr, LJ., at p1042: "... *it is convenient to pause to consider to what extent, if any, the application of the foregoing principles and authorities requires any distinction to be drawn according to whether or not the property abroad is real or personal property. In my view there is no such distinction in regard to the existence of the jurisdiction. Admittedly, the exercise of the discretion to use the jurisdiction is in practice circumscribed by the fact that under the law of the foreign locus the court's order may not be effective. In such cases the jurisdiction will not be exercised, but it exists.*"

[4] Respectively, rules of jurisdiction, and rules of recognition and enforcement of foreign decrees.

[5] *Ibid., per* Kerr, LJ., at p1041: "... *it is a fundamental principle that, in the exercise of their discretion, our courts will not make orders which they cannot enforce.*"

[6] *Ibid.*, p1041.

[7] [1927] P. 211.

[8] *Hamlin v. Hamlin, ibid.*, p1042.

conveniens or *lis pendens*.[9] In certain cases, as will later be demonstrated, the scales of appropriateness may tip in favour of the non-*situs* forum,[10] but as Weintraub has indicated, "... *if a non-situs forum in a particular place proves to be an inconvenient place to litigate title to land*[11] ... *the doctrine of forum non conveniens is available to prevent a miscarriage of justice.*"[12]

In *Hamlin*, Kerr, LJ. made reference to section 37(2) of the Matrimonial Causes Act 1973 ('the 1973 Act'), which states that, "*Where proceedings are brought by one person against another, the court may, on the application of the first-mentioned person – (a) if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such an order as it thinks fit for restraining the other party from so doing or otherwise protecting the claim.*" It was the view of the court that this enabling provision was not restricted in its application to property situated within the jurisdiction of the English court, but that it extended also to property situated abroad.[13] Although the 1973 Act does not apply in Scotland, it is submitted that equivalent powers are conferred upon the Scottish courts by virtue of section 14 of the Family Law (Scotland) Act 1985 ('the 1985 Act'). Section 14 authorises the Scottish courts to

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[9] *Cf.* Kerr, LJ., *ibid.*, at p1044: "... *the existence of jurisdiction ... must be distinguished from the decision whether or not it will be exercised in any given case.*" *Cf.* also unattributed note on *Re Duke of Wellington* [1948] Ch. 118, (1948) 61 Harv. L. Rev. 1055, at p1057: "*It would be desirable if jurisdiction to try title to foreign land were exercised generally (subject to the limitations of the doctrine of forum non conveniens).*"

[10] *E.g. Razelos v. Razelos* [1960] 3 All E.R. 929; and *Sandford v. Sandford* [1985] 15 Fam. Law 230. *Contra* Kerr, LJ., *ibid.*, at p1045: "... *in the present case the respective merits* [of the *situs* and non-*situs fori*] *have not yet been investigated. But that issue goes to the discretionary exercise of the court's jurisdiction, not to its existence.*"

[11] For example, because physical inspection of the land is necessary, or crucial witnesses are competent or compellable only at the *situs*.

[12] Weintraub, R J, '*An Inquiry into the Utility of Situs as a Concept in Conflicts Analysis*' (1966) 52 Cornell L.Q. 1, at p15.

grant incidental orders, including an order, *inter alia*, that property shall be transferred to any curator bonis or trustee or other person for the benefit of the applicant spouse,[14] and any ancillary order which is expedient to give effect to the section 9 principles.[15]

Kerr, LJ. explained in *Hamlin* that, "*The jurisdiction of the courts in this field is exercised in personam against persons who are amenable, as a last resort, to the courts' coercive powers to enforce orders made against them. The orders do not operate directly on the property, let alone in rem.*"[16] But the coercive effect upon foreign property of a decree *in personam* ultimately may be the same as that of a decree *in rem* pronounced by the *forum rei sitae*.[17] In the case of *Razelos v. Razelos*,[18] for example, a consistorial case concerning the division of immoveable property in Greece, Baker, J., in observing the choice of law/recognition of foreign decree distinction, concluded that, "*I* ... [shall] *make an order in respect of the* [Greek immoveable property] *for what it may be worth in respect of the property now. If the Greek courts will enforce such an order, so much the better. If not, there is still the probability that* [the husband] *will return to England and the chance of enforcement in personam.*"[19]

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[13] *Ibid.*, p1040.
[14] Section 14(2)(g) of the 1985 Act.
[15] Section 14(2)(k), *ibid.*. Consider Thomson, J M, '*Family Law in Scotland*', at p126: "*Armed with this plethora of powers, the court can make orders for financial provision which can be tailormade for the particular couple concerned.*"
[16] *Hamlin*, *ibid.*, p1041.
[17] Consider Hay, P, '*Property Law and Legal Education; the Situs Rule in European and American Conflicts Law – Comparative Notes*' (1988), at p120: "... *while the* [non-*situs*] *court may not affect title to real property situated outside the state, it may make an equitable distribution thereof, and order one of the parties to convey such property.*"
[18] [1969] 3 All E.R. 929.
[19] Page 1044. The merits of Mrs Razelos' claim were particularly strong since, in the words of Baker, J., "*The wife dare not go to Greece to establish her case there ... In the absence of such an order the wife would be left without any means of recovering property which I find was obtained from her fraudulently, being dishonestly bought in* [Mr Razelos'] *name with her money.*" (p1044) *Cf. Lightning v. Lightning Electrical Contractors* [1998] N.P.C. (Q.B.D.) (71 1998 C.L.Y. 768), in which the receivers of LEC appealed against the dismissal of their application for a declaration that the English court had no jurisdiction over property in Scotland. The appeal, however, was dismissed. Peter Gibson,

In cases of distribution of matrimonial property in the event of divorce, it is especially true that the interests of the *situs* will not necessarily outweigh those of a non-*situs* forum which is responsible for determining the outcome of the consistorial proceedings. In many cases, the non-*situs* forum (which typically will be the domicile[20] or habitual residence of at least one of the parties and often will be the shared matrimonial domicile[21]) will represent the state which is most interested in (*i.e.* affected by) the parties, their marital relationship (including legal termination thereof), and their financial affairs (including, in particular, the post-divorce financial status of the spouses). The *forum rei sitae*, in contrast, will usually have legitimate interest only in matters of alienability of the asset in question, the accuracy of its own records, and any restrictions on land use.[22]

In relation to orders for financial provision on divorce, the question of title to property and any transfer thereof is secondary to the central issue, which is making a fair

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LJ., opined that as both the company and its managing director were 'resident' in England, an equitable remedy *in personam* which was not recognised by a foreign (*i.e.* Scottish) court was still available in respect of the foreign (*i.e.* Scottish) land.

[20] Or in cases where the spouses are non-UK domiciliaries, the nationality.

[21] Consider sections 7 and 8 of the Domicile and Matrimonial Proceedings Act 1973. For actions raised after 1 March 2001, see Article 2 of Council Regulation No. 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses ('Brussels II' - 2000 OJ 1160/19).

[22] *Cf.* Scoles (1988), at p23: "*This is not to say that in the U.S. or the British Commonwealth reference to the law of the situs is not significant on occasion, such as to issues of use or title registration...*" Consider too Alden, R, '*Modernizing the Siuts Rule for Real Property Conflicts*' (1987) 65 Texas L. R. 585, at p625: "*The situs rule places an inordinate importance on the land itself; ignoring the more important interests of persons in the property ... many actions concern the land and its title only collaterally.*" Even as to questions of alienability, however, the non-*situs* court may sometimes have a stronger interest than that of the *situs* (*e.g.* in the case of sale of matrimonial property, outwith the state of the matrimonial domicile, and without the consent of a jointly-entitled spouse/joint owner, where the law of the matrimonial domicile, but not the law of the state where the sale took place, considered the property to be unmarketable unless the consent of both spouses has been obtained. This may be the case where assets are removed from a state, the law of which incorporates a community of property régime, and taken to one which maintains a system of separation of property. In Scoles' opinion, "... *the marital property régime is not destroyed by reason of assets being moved physically.*" (*ibid.*, p36) Hence, if an interest analysis approach were applied to the issue of alienability, a different result may

distribution of matrimonial property between the spouses.[23] Family property transactions are essentially a matter of personal law, and cases involving the transfer of property in the event of divorce essentially concern the incidental property aspects of what is not generally, or principally, a proprietary relationship.[24] Weintraub has remarked that, "... *when the forum is granting a divorce and dividing the property of the warring spouses, it is highly desirable that such division be made with a view of the full picture and include property of the couple wherever situated.*"[25] On account of the clear benefit of the forum having in view the complete financial picture of the spouses, it is appropriate not only for the non-*situs* forum to exercise jurisdiction over the spouses' property in such a situation (or at least upon them personally in relation to that property[26]), but also for that forum to apply whatever law it considers to be most appropriate to the transfer of the foreign property (not necessarily the *lex situs*).[27] This approach can be seen also in the venerable matrimonial property conflict cases of *De Nicols (No.2)*[28] and *Chiwell v. Carlyon.*[29]

In a divorce action raised in Scotland, the Scottish forum has authority to make an order obliging one spouse to transfer property which he/she owns to the other

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apply than would apply under the general rule of *Duc de Frias v. Pichon* [1886] 13 *Journal du Droit International* 593.

[23] Fair sharing of the property being the dominant principle in Scotland at least, in terms of section 9(1)(a) of the 1985 Act. An overseas divorce forum would apply whatever principles of division it deemed appropriate in terms of the relevant *lex causae*. For disposal of an application for financial provision in a Scottish forum following an overseas divorce *etc.*, section 29(1), Matrimonial and Family Proceedings Act 1984 states that Scots law will apply as it would were the application being made in an action for divorce in Scotland.

[24] Consider Scoles' view that: "... *a single law should be applicable and ... the nature of the asset as moveable or immoveable is generally insignificant.*" (*ibid.*, p22) See also Venturini, G C, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 21 – Property*' (1976), p9. *Cf.* Scottish Executive Consultation Paper on Hague Convention on Children 1996, paragraph 79: "...*matters of personal welfare and property are often inter-related.*" (14 December 2000)

[25] Weintraub (1966), *ibid.*, p15.

[26] *Cf. Razelos v. Razelos* [1969] 3 All E.R. 929.

[27] *Cf.* Hay (1988), *ibid.*, p119.

[28] [1900] 2 Ch. 410.

[29] (1897) 14 S.C. 61 (S.A.).

spouse.[30] Such an order, however, must be justified by the principles set out in section 9 of the 1985 Act. In terms of Article 1 of the Brussels Convention,[31] the Convention (and hence the exclusive jurisdiction provisions set out in Article 16 thereof) shall not apply to '*rights in property arising out of a matrimonial relationship*.' The interpretation provisions[32] of the 1985 Act make no special mention of property situated furth of Scotland (nor, incidentally, does section 22 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, whose definition of 'matrimonial home', being without geographical limitation, may be presumed to be inclusive of property situated abroad).[33] The inference may be that it is competent for a Scottish court to make a transfer of property order in respect of property situated abroad. It is submitted that sections 11(3)(h), (4)(e) and (5)(e) of the 1985 Act (which enable a Scottish court charged with applying the section 9 principles to have regard to '*all the other circumstances of the case*'), would empower a Scottish court to weigh the interests of the *lex situs* and to consider the appropriateness of applying that law to any transfer of the foreign property in question.[34] This, in turn, may justify the Scottish forum sisting the action on the basis of *forum non conveniens*, and bowing to the jurisdiction of the *forum rei sitae* as regards the distribution or transfer of the foreign property.[35]

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[30] Sections 8(1)(aa) and 12 of the 1985 Act.

[31] Schedule 1, Civil Jurisdiction and Judgments Act 1982. *Cf.* Article 1(2)(a), Council Regulation No.44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[32] Sections 10(4), 25(3) and 27.

[33] Section 22 defines 'matrimonial home' as "*any house ... which has been provided or has been made available by one or both spouses as, or has become, a family residence.*" (Emphasis added) Professor Meston's Annotations to the 1981 Act do not counter the suggested presumption.

[34] It should be noted, however, that this power only applies to orders made under section 9(1)(c), (d) or (e), and *not* to the more commonly relied on principles contained in section 9(1)(a) or (b).

[35] *i.e.* A (common law) sisting within the substantive conduct of the case, to be distinguished from a (statutory) sisting of jurisdiction to settle, at the outset, a question of conflicting jurisdictions (Domicile and Matrimonial Proceedings Act 1973, Schedule 3).

As regards the 'active' functions of the Scottish or English consistorial *fori*, therefore, one might infer that these courts are able, in terms of the relevant statutory provisions, to exercise jurisdiction over 'foreign' matrimonial property. The issue of whether or not that jurisdiction will, in fact, be exercised, is best resolved by application of general rules of *forum non conveniens*, and in the light of likelihood of effectiveness. If, as an integral part of the weighing process involved in that doctrine, attention were paid to principles of interest analysis, then, in many cases, it would be apparent that the interest of the consistorial forum in the transfer of the foreign property is stronger than that of the foreign *situs*.

One might also consider in this context the divorce forum's approach to private marriage contract provisions made by the parties, and intended to apply (principally, one supposes) to property matters upon divorce. The divorce forum may give its approval to these, or not; in this it may – or may not – be influenced by the parties' own 'current' attitudes thereto.[36] But in any event, it is quite possible that the drafting and implementation of the marriage contract may (have) take(n) little heed of the traditional '*situs*' concerns of conflict of laws theory.

Turning now to the converse 'passive' scenario: what is the attitude of a Scottish or English *forum rei sitae* to a foreign consistorial decree which incorporates a transfer of property order, or other ancillary measure, which purports to affect property in Scotland or England? Some insight can be gleaned from cases decided prior to the passing of the Matrimonial and Family Proceedings Act 1984 ('the 1984 Act').

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[36] Crawford, E B, '*International Private Law in Scotland*' (1998), p332, paragraph 15.09.

Galbraith v. Galbraith,[37] for example, concerned a domiciled Scotsman who married, in Scotland, a woman of Finnish nationality. Following the marriage, the parties lived together in a house in Prestwick, Scotland, which, according to Lord Wheatley, was the only matrimonial home.[38] In 1966, three years after the marriage, Mrs Galbraith returned to Finland, and, in 1968, obtained a divorce decree from the court in Helsinki. The action was served on Mr Galbraith, but he did not enter appearance, and subsequently he raised an action for divorce in Scotland, on the basis of his wife's desertion, or alternatively, for declarator that the marriage had been validly dissolved by decree of the Finnish court. The Scottish action was undefended.[39] Free to depart from the *ratio* of *Le Mesurier v. Le Mesurier*,[40] but declaring the decision in *Indyka v. Indyka*[41] to be highly persuasive, the Scottish court held that the jurisdiction of the Finnish court to entertain Mrs Galbraith's action should be recognised, and decree of declarator was granted in the terms craved. Significantly, Lord Wheatley stated that, "*The* [Finnish] *decree granting divorce and custody and aliment to the defender is now final and not open to appeal.*"[42] This extended even to dealings with the Scottish matrimonial home: "*It seems to me therefore that while the wife must be regarded as a domiciled Scotswoman, and the matrimonial home which she left was in Scotland, she appears to have satisfied the various tests which their Lordships severally envisaged as taking the law beyond the confines of the Travers v. Holley rule.*"[43]

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[37] 1971 S.L.T. 139
[38] *Ibid.*, p139.
[39] Mr Galbraith had served as defender not only his wife, but also, in the public interest, the Lord Advocate and the Registrar General for Scotland.
[40] 1895 A.C. 517. When the rule in *Le Mesurier* was extant, it is not clear whether the *lex domicilii* also governed questions regarding property belonging to the divorcing spouses and situated abroad.
[41] 1969 1 A.C. 33. Lord Wheatley explained that although, technically, he was not bound by *Indyka*, he found it to be "... *of the highest standing and persuasion.*" (*Galbraith v. Galbraith, ibid.*, p140)
[42] *Galbraith v. Galbraith, ibid.*, p139. (Emphasis added)
[43] *Ibid.*, p141.

A similar situation arose in the case of *Bain v. Bain*,[44] save for the fact that in the latter case there was no matrimonial property situated in Scotland.[45] Even so, a dictum of Lord Robertson is significant: "*It was argued on behalf of the pursuer that, once it is accepted that the foreign court is a court of competent jurisdiction and allegedly applied Scots law, it did not matter that Scots law had been applied wrongly. The decree was a judgment in rem and could not be so scrutinised* [citing in support of this argument *Castrique v. Imrie*[46]] ... *In my opinion this argument is sound.*"[47]

Historically, even where the litigants were domiciled in Scotland (as was the case both in *Galbraith* and in *Bain*[48]), a Scottish forum was bound to recognise the consequences of the foreign divorce decree. In theory, this obligation extended not only to the personal consequences of such a decree (*i.e.* to status), but also to the proprietary consequences thereof, the sole safeguard open to the *forum rei sitae* being the standard one of public policy. This position was highlighted by the case of *Torok v. Torok.*[49] Even if the proprietary consequences of the foreign decree offended the *forum rei sitae*, at most those consequences could be ignored; it was not possible for a Scottish or English forum to supplement the provision of the foreign court, or to substitute the foreign relief with the forum's preferred financial provision.[50] Ormrod,

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[44] 1971 S.L.T. 141.

[45] Lord Robertson explained that, "*At the time of the marriage the defender apparently made it clear to the pursuer that she had no intention of living with him anywhere but in Japan, and in particular had no intention of setting up house in Scotland ... It was understood that the defender would cohabit with the pursuer when his ship went to Japan during voyages. After 20th May 1962, however, the pursuer's ship ceased to call at Japanese ports.*" (*ibid.*, p142)

[46] 1870 L.R. 4 (H.L.) 414. *Cf.* (in reverse) *Merker v. Merker* [1963] P. 283, concerning error by a foreign court as to its *own* law.

[47] *Bain v. Bain, ibid.*, p145.

[48] Both cases being litigated prior to 1 January 1974, at a time when the unity of domicile rule prevailed, clothing married women with the domicile of their husbands, *ex lege*. See now Domicile and Matrimonial Proceedings Act 1973.

[49] [1973] 1 W.L.R. 1066.

[50] The reason, at least in England, was partly (or largely) technical: since by virtue of the foreign divorce the parties were no longer married in the eyes of English law, the English courts had no *locus* to grant financial relief. (Cheshire & North (1999), *ibid.*, p844)

J. verbalised the widespread frustration at this result, "... *there is no doubt that under the* [Recognition of Divorces and Legal Separations] *Act of 1971 this court is bound, or would be bound to recognise any decree of the Hungarian court made in this case on these facts, which would have the effect, if that decree were made before a decree in this court, of shutting out this court's jurisdiction to deal with the property belonging to the spouses in this country – which of course is to produce a ridiculous situation, where two people have been living in England since 1956, married in England, with children who have been brought up in England and who have English Christian names, whose matrimonial home – and whose only matrimonial home – was in this country, and whose future is obviously here, or in Canada, or some other place, but certainly not Hungary.*"[51]

The 1984 Act was passed, *inter alia*, to make provision for financial relief to be available in Scotland or England, where a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, in an overseas country.[52] The annotations to the statute indicate that prior to the passing of the 1984 Act "*Financial provision may be sought in the jurisdiction where the* [divorce *etc.*] *decree was granted, but this may be difficult, unsatisfactory or even impossible. Moreover, there may be no court able to adjust property rights in a matrimonial home in England or Wales* [or Scotland]. *Any statutory rights of occupation conferred by the Matrimonial Homes Act* [or the Matrimonial Homes (Family Protection) (Scotland) Act 1981] *will*

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[51] *Ibid.*, p1069/70.

[52] Part III concerns financial relief in England and Wales following an overseas divorce *etc*, and Part IV financial relief in Scotland in equivalent circumstances (following the Scottish Law Commission Report on Financial Provision after Foreign Divorce, SLC. No. 72 (1982)). The approaches of Part III and Part IV are different, the SLC preferring "*a more restricted approach to the problem than the Law Commission ... The Scottish Law Commission preferred legislation which identifies certain cases as inappropriate in advance.*" (Miller, J G, *Annotations to the Scottish Current Law Statutes* 1984, Volume 3, c.42, p42/27-28)

have been terminated as a result of the decree."[53] Admitting that, prior to 1984, the Scottish court could not supplement the financial provision made in the foreign decree, the question whether the Scottish court would nevertheless recognise the proprietary consequences of the foreign order (insofar as it professed to affect property in Scotland) was left largely unanswered (indeed unasked).[54]

The 1984 Act introduced the option of supplementing the financial provision embodied in the foreign consistorial decree. Now, a Scottish court may entertain an application by one of the ex-spouses for an order for financial provision, subject to satisfaction of the section 28(2) jurisdictional requirements and purification of the section 28(3) conditions. In disposing of such an application, however, section 29(3)(b) obliges the Scottish forum to have regard, *inter alia*, to "*any order made by a foreign court in or in connection with the divorce proceedings for ... the transfer of property, by one of the parties to the other*." If, therefore, a foreign consistorial forum should purport to order the transfer of property in Scotland from one spouse to another, the obligation upon the Scottish court to recognise and enforce the order is not mandatory, rather section 29(3)(b) is permissive in its terms, expressly enabling the Scottish *forum rei sitae* to acquiesce in the order of the non-*situs* forum. Section 29(5) also provides that where the Scottish court has jurisdiction to grant financial provision after the overseas divorce *etc. only* because the defender owned (or was the tenant of, or had a beneficial interest in) property in Scotland which had at some time

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[53] Miller, *ibid.*, p42/11.

[54] Consider *Chebaro v. Chebaro* [1987] 1 All E.R. 999, *per* Balcombe, LJ., at p1000: "*Until Pt III of the Matrimonial and Family Proceedings Act 1984 was brought into force, our courts had no power to grant ancillary financial relief after divorce unless the decree had been granted in this country, notwithstanding that both the property and the parties were within the jurisdiction.*" *Chebaro* concerned the recognition of a Lebanese divorce, and subsequent proceedings in England under the 1984 Act, regarding property in Greater Manchester.

been the matrimonial home of the parties,[55] the court may make an order relating to the former matrimonial home or its furniture and plenishings (*i.e.* it cannot make any wider order for financial provision). It may be inferred, however, from the discretionary (rather than mandatory) power conferred by section 29(5) that merely because Scotland is the *forum rei sitae* of the former matrimonial home does not mean that an order of the foreign consistorial forum concerning the matrimonial home or other matrimonial property in Scotland, will not be recognised or enforced in Scotland.

The question whether an English court would recognise the long-arm jurisdiction of a foreign consistorial forum arose specifically in the post-1984 case of *Holmes v. Holmes*.[56] The parties in this case had married, in England, in 1968. In 1978, they moved, with their son Rowland, to New York, and, in 1979, resolved to stay there indefinitely. At that point, they purchased an apartment in New York, title being taken in the sole name of Mr Holmes, and Vine Cottage in England, title being taken in the spouses' joint names. In 1986, the Supreme Court of the State of New York granted a divorce, ordering that the flat *and* the cottage be sold, and that the proceeds be divided equally between Mr and Mrs Holmes. In December 1986, Mrs Holmes returned to England, to reside in Vine Cottage, where she wished perpetually to remain. In March 1988, however, when Mrs Holmes failed to raise a mortgage which would allow her to purchase her husband's share of the cottage, the New York court confirmed its 1986 order for the sale of Vine Cottage. Two months later, Mrs Holmes applied in England for financial relief under the 1984 Act. At first instance, Heilbron, J., held that the proper forum for determining the issue of financial provision was the New

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[55] Section 28(2)(b)(iii), 1984 Act.

York court, but, dissatisfied with this result, Mrs Holmes applied to the Court of Appeal for leave to appeal. Leave was refused on the ground that the New York court had been properly seised of the matter and was the natural forum for resolving the dispute between the parties.

It appears that Purchas, LJ. accepted that the New York forum had authority to deal with the property in England, remarking that, "*The New York apartment and Vine Cottage were to be sold, the proceeds of sale in each case to be divided between the parties. The* [New York] *order contained detailed provisions as to how the sales were to be carried out, and so forth. It is not necessary to say more than that the directions were extremely detailed and provided for the proper distribution of the assets.*"[57] The English court also appeared to concede that the New York court's power to enforce its decree *in personam* was sufficient to affect the English land, for in Purchas, LJ.'s opinion, "... *the* [English] *court must always be slow to interfere with a competent court seised of the matter, as was the Supreme Court of the State of New York, which has made orders which are clearly enforceable, which is capable of enforcing them, and has dealt with the matter on a reasonably careful assessment of all the features.*"[58] It is arguable that by the time of the English proceedings Mrs Holmes had acquired a domicile of choice in England,[59] but even as regards the immoveable property in England, of an English domiciliary, the stronger interest of the non-*situs* court was acknowledged by the *forum rei sitae*, and the decree of the foreign court recognised in England.

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[56] [1989] 3 All E.R. 786.
[57] *Ibid.*, p788.
[58] Purchas, LJ., p794.

In considering the issue of *forum non conveniens*, Purchas, LJ. relied upon a dictum of Lord Templeman in *The Spiliada*,[60] *viz.*: "*The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion. The authorities do not, perhaps cannot, give any clear guidance as to how these factors are to be weighed in any particular case ... the solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge*." Although the facts and nature of *The Spiliada* were quite different from those in *Holmes*, Purchas, LJ. concluded that, "*The problem here is whether or not, on the application of one of the parties, the courts in this country should interfere with the resolution of matrimonial difficulties and disputes, particularly in the field of financial relief, where there is in place a competent forum in a foreign jurisdiction seised of the matter, where the parties at the material time were domiciled or otherwise within the jurisdiction of that court, have submitted to the jurisdiction of that court, and apart from one aspect, have been content to abide by the judgement of that court.*"[61] It is neither the purpose nor objective of the 1984 Act to open up to the financially disadvantaged spouse a further avenue of appeal, nor is it to confer upon the Scottish or English forum authority to consider *de novo* the financial position of the parties: "... *I do not believe that the intention of Parliament in passing the 1984 Act was in any way to vest in the English courts any powers of review or even correction of orders made in a foreign forum by a competent court in which the whole matter has been examined in a way exactly equivalent to the examination which would have taken place if the application had been made in the first instance in the*

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[59] Purchas, LJ., remarked that, "... *for all practical purposes* [Vine Cottage] *is the home of both the wife and Rowland.*" (*ibid.*, p788)
[60] *Spiliada Maritime Corp. v. Cansulex* [1987] A.C. 460, 465.
[61] *Holmes v. Holmes, ibid.*, p792.

courts here. That is not the object of this legislation at all."[62] As the court in *Holmes* observed, the New York forum had examined carefully the parties' circumstances and, although arriving at a different solution from that at which an English forum might have arrived in equivalent circumstances, neither the solution nor the process through which it was reached breached 'natural justice', nor offended the English forum's notion of public policy.[63]

The decision in *Holmes* can be contrasted with that of *Mitchell v. Mitchell*.[64] Whilst in *Holmes* the spouses had initially agreed that New York was the proper forum in which to hear the action (despite matrimonial property being situated in England), in *Mitchell*, from the outset, the husband challenged the appropriateness of the Scottish forum's exercise of jurisdiction. *Mitchell*, in fact, concerns the application of Schedule 3.9(1) of the Domicile and Matrimonial Proceedings Act 1973, concerning discretionary sists, and not financial provision following an overseas divorce. Interestingly, although the terms of Part IV of the 1984 Act mean that the question of *forum non conveniens* is, in Scotland, quite separate from the appropriateness or

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[62]Purchas, LJ., *ibid.*, p794. *Cf.* the view of Dillon, LJ., who remarked that, "*The essential ground for seeking to apply in this country now is that the wife thinks that she may get relief in England of a kind which she will not get in New York, for instance, a property transfer order in respect of the husband's beneficial half-share in Vine Cottage or an order deferring the sale of Vine Cottage and entitling the wife to live there, at any rate until Rowland is no longer in full-time education ... I cannot think that it was intended that the English courts should be swift to assume jurisdiction wherever English legislation in respect of the making of financial provision for wives is in English eyes better than foreign legislation, or wherever better relief is available for wives here than abroad.*" (*ibid.*, p794/5) *Cf. Hewitson v. Hewitson* [1995] 1 All E.R. 472 where Butler-Sloss, LJ. opined that the purpose of the 1984 Act was to mitigate disadvantage and not to confer extra advantages on a particular group of applicants which would be unavailable under domestic matrimonial legislation, adding that, "*It would ... be wrong in principle and contrary to public policy to extend the narrow compass of an Act designed to meet limited objectives to cover a wide and unintended situation.*" (p476)

[63] Dillon, LJ. remarked, "... *there is no basis for saying that justice would not be done if she is compelled to pursue her remedies for financial provision in the courts of New York according to the law of New York. The New York court is the natural forum for the resolution of disputes arising from the breakdown of the marriage.*" (*ibid.*, p795)

[64] 1993 S.L.T. 123. Noting that if the facts of *Mitchell* were to arise today, the question of competing jurisdictions (Scottish/French) would be determined according to Article 11 ('*Lis pendens*') of Council Regulation No. 1347/2000 (2000 OJ 1160/19) on Jurisdiction and the Recognition and Enforcement of

otherwise of a Scots court appending an award of financial provision to an overseas divorce, Part III, applying only to England, approximates the two concepts insofar as it entrusts to the courts, guided by a list of factors, the responsibility for "[sifting] *out cases where an award would be inappropriate.*"[65] Section 16(1) of the 1984 Act compels the English court, before making an order for financial relief, to "*consider whether in all the circumstances of the case it would be appropriate for such an order to be made by a court in England and Wales, and if the court is not satisfied that it would be appropriate, ...* [to] *dismiss the application.*" The Scottish forum, on the other hand, is subject to Part IV "... *which identifies certain cases as inappropriate in advance.*"[66]

In *Mitchell*, the husband's motion for a sist of the Scottish proceedings was refused on the basis that his marriage was most strongly connected with Scotland and not France. Highly influential on the court's decision was the fact that the couple's ownership of property in Edinburgh was central to their dispute. The court took the view that a dispute concerning heritable property in Edinburgh would be more conveniently resolved by the Scottish, rather than the French, court. Whilst the English court in *Holmes* was not opposed to the New York forum dealing with the issue of ownership of Vine Cottage in England, the Scottish forum in *Mitchell* was troubled by the prospect of a French court overseeing the question of title to a property in Edinburgh.

What is the reason, or justification, for the more provincial approach taken by the

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Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses.

[65] Miller, *ibid.*,p42-42. Note also section 11(b) of the Domicile and Matrimonial Proceedings Act 1973, which preserves the court's power to sist an action under general rules of *forum non conveniens*. *Cf. Butler v. Butler* [1997] 2 All E.R. 822, in which the wife's application for stay of the English proceedings was granted in circumstances where all of her property, including the couple's only matrimonial residence, was in Florida, and her husband had acquired property in England only after their separation. (*per* Sir Stephen Brown, P)

[66] Miller, *ibid.*, p42-27/28.

Scottish court? It is evident from the opinion of the court in *Mitchell* that there were particular difficulties concerning ownership of 'The Whitehouse', the property in question. Initially, Mrs Mitchell had agreed that 'The Whitehouse' was *not* matrimonial property. Later, however, she adjusted her pleadings, asking the court to set aside a disposition granted by her husband on 8 February 1991, by which he had purported to sell The Whitehouse to Pageant Investments Limited for £750,000.[67] In contrast with *Holmes*, ownership of the relevant asset was central to the dispute and involved at least one third party. In these circumstances, the balance of fairness (including convenience) dictated that the Scottish proceedings should continue.

Returning to the essential feature of family property transactions such as these, it is significant to note that the Second Restatement of Conflict of Laws has observed, in this context, the collateral nature of the proprietary issues.[68] Paragraph 223 of the Second Restatement provides that, "*(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.*" Thereafter, however, the scenario is outlined where W, domiciled in state X, raises divorce proceedings against H, also domiciled in state X, in forum X. As part of the financial provision on divorce, W asks the forum to make a transfer of property order in respect of land in state Y. A true conflict arises where W is entitled to that order in terms of X law, but not in terms of the Y *lex rei sitae*. In examining the question in terms of interest analysis, Professor Reese asks whether state X or state Y has the dominant interest in the resolution of this particular issue, and whether forum X can provide W with effective relief. The commentary to Paragraph 223 concludes that X is, in fact, the state having dominant interest and that

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[67] *Mitchell v. Mitchell*, *ibid.*, p127.

the purpose of the X rule of financial provision would be furthered by its application to H and W, both domiciled in state X.[69] In contrast, the reporter suggests that "... *it is doubtful that any interest of* [Y] *would be served by application of the* [Y] *rule, which is presumably directed, at least primarily, to spouses domiciled in* [Y]."[70]

As well as engaging in interest analysis, U.S. courts and commentators have occasionally utilised a party expectations test. They have concluded, however, that in cases of divorce, parties either will be completely lacking in expectations as to which law will apply to determine their dispute, or alternatively, they will expect the law which governs their matrimonial relations to resolve any proprietary issues which flow incidentally from the termination of their marital relationship.[71]

Taking the same facts as above, if state X were to grant a transfer of property order against H, that order would not be effective in state Y as regards third parties, until such time as the transfer of property between H and W had satisfied the formal requirements (including registration or recording requirements) of state Y. But Professor Reese is of the view that "*The* [Y] *recording system would not be affected if the* [X] *court were to apply* [X] *local law and order H to transfer to W his interests in*

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[68] Reese, W L M, '*Restatement of Law Second, Conflict of Laws*' (1971) ('Second Restatement').

[69] Consider Alden, *ibid.*, at p594: "*More important considerations and interests exist in divorce ... cases than the geographical location of the land.*"

[70] Paragraph 223(1)(i). *Cf.* the probable result of using an interest analysis approach to deal with the question of capacity to transfer immoveable property, highlighted by the limited interest of Transvaal law in the case of *Bank of Africa v. Cohen* [1909] 2 Ch. 129. *Cf.* also section 28(2)(a) of the Matrimonial and Family Proceedings Act 1984, which requires that the applicant for financial provision in Scotland be domiciled or habitually resident in Scotland on the date when the application was made. This is indicative of the fact that the rule is intended only to protect the interests of Scottish domiciliaries/residents. Contrast this with a scenario where both (ex-)spouses are non-Scottish domiciliaries/residents (*i.e.* outside the scope of the 1984 Act); the interest of the Scottish *lex situs* is limited in such cases, it is submitted, to questions of alienability, accuracy of land records, and restrictions on land use.

[71] Consider Alden, *ibid.*, p596.

[Y] *land.*"[72] In the view of the reporter, the sole justification[73] for state Y refusing to recognise the decree of the X forum would only be where the marriage between H and W itself offends the public policy of state Y (a matter which would be resolved as an incidental question).[74] Observing the need for greater co-ordination between rules concerning financial provision on divorce, and those concerning the transfer of property, Venturini has asked, "*how the respective spheres of operation are to be delimited.*"[75] One might suggest that unless the public policy of the *situs* is grossly offended,[76] its interests in the matter (other than in respect of accuracy of records and restrictions on land use) should yield to those of the non-*situs* state, whose polices, according to Alden, are "*directly implicated.*"[77]

As in the previous chapter, a question arises as to the enforceability of an *in personam* order should the defender refuse to implement the decree of the non-*situs* forum. In

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[72] Second Restatement, paragraph 223(1)(i).

[73] *Sed quaere*, there may be said to be *two* types of objection which might reasonably be held by the *situs*, *viz.* (1) 'legal' (such as quoted by the reporter as the sole example, and requiring to be treated as an incidental question), as, for example, whether the parties were validly married – a larger issue than policy, involving perhaps validity of antecedent divorce or annulment – and are about to be validly divorced (giving rise to questions, perhaps, as to the jurisdiction of the divorce forum); and (2) 'policy' in the specific sphere of matrimonial property adjustment. But even the traditionalist might concede the force of the 'interest' argument here (and the absence of legitimate *situs* interest).

[74] *Cf. Weesner v. Weesner* 168 Neb. 346, 95 N.W. 2d 682 [1959], a case in which a non-*situs* divorce decree purported to alter the spouses' interests in land in Nebraska. The Nebraska Supreme Court stated that "*Where all necessary parties are before a competent court in the non-situs state, such an order will be given force and effect ... if the related public policy of the situs state is in substantial accord with that of the other state.*" Weintraub has suggested that the public policy hurdle may necessitate ensuring, for example, that the *lex situs* would itself, in a similar domestic case, have power to make a transfer of property order in the event of divorce. (Weintraub (1966), *ibid.*, p13) It is submitted that if the parties are not domiciled in the *situs*, then the policy concerns of the *situs* regarding financial provision on divorce (which must be presumed to be intended to protect only the interests of its own domiciliaries) are not relevant to non-domiciliaries.

[75] Venturini, *ibid.*, p9.

[76] *Cf. Cheni v. Cheni* [1965] P 85.

[77] Alden, *ibid.*, p592. "*Decisions regarding divorce ... involve more important considerations than the requirements of an indirectly affected recording act.*" (p593) See also Hay, *ibid.*, at p117, where it is said that, "*Marital property rights of a surviving spouse as well as division of property upon divorce similarly do not implicate situs interests qua situs but are more properly referred to the state of the matrimonial domicile.*"

the American case of *Mallette v. Carpenter*[78] a wife sought to divorce her husband in Illinois, where both parties were domiciled. The court granted the divorce and entered decree directing the payment of $4,000 alimony, '*to be satisfied by the conveyance*' of land in Wisconsin. In breach of the Illinois order, the husband conveyed the Wisconsin land to a third party. Upon learning of this, the wife raised an action in Wisconsin to have the husband's conveyance set aside and to have the land conveyed to her. The wife's application was successful, the court recognising that a decree to convey land in a foreign jurisdiction when based on prior equity in the land constitutes a binding adjudication of the facts, to which full faith and credit are due.[79] The husband's conveyance to a third party was, in effect, a fraud on his creditors, and liable to be set aside.[80]

Alden has made reference to Californian courts which have, on occasion, awarded capital sum payments equivalent to the market value of the foreign land in issue, as a means of preventing the defender from evading liability through his/her own non-compliance with the non-*situs* decree.[81] Measures such as this, however, are not infallible and are defeated where the defender himself is neither present within the jurisdiction of the forum, nor has assets there. Alden has concluded therefore, and it is submitted correctly, that, "*Simply giving effect to a nonsitus decree* [at the *situs*] *eliminates the waste and cumbersome procedural dance that a court must undertake*

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[78] 160 N.W. 182 (Wis.) (*per* (1917) 30 Harv. L. Rev.)
[79] *Cf. Burchell v. Burchell.* [1926] 2 D.L.R. 595, concerning an Ohio court's decree in respect of land in Ontario. As matters transpired, the husband was happy to accept cash, instead of his ex-wife's interest in the Ontarian land. For discussion of the case, see 40 Harv. L. Rev. 500.
[80] (1917) 30 Harv. L. Rev. 522.
[81] *E.g. In re Marriage of Fink* 25 Cal. 3d 877 [1979] (*per* Alden, *ibid.*, p603).

to enforce its order ... The manner in which [the non-*situs* court] *renders a decree should be irrelevant for jurisdictional concerns.*"[82]

It appears, therefore, that in cases where financial provision on divorce is sought (and particularly in cases where the non-*situs*, consistorial forum wishes to grant a transfer of property order), courts sometimes do (and it is submitted, correctly) exercise jurisdiction over foreign moveable and immoveable property. Certainly, the English forum has exercised jurisdiction over foreign property in *Hamlin*, *Tallack* and *Razelos*, and has deferred to (or perhaps, more accurately, has acquiesced in) the authority of a foreign consistorial court over property in England, at least in the case of *Holmes*.[83] In the U.S.A., this has been justified by principles of interest analysis which are largely unknown to, or at least have not been overtly adopted by, the Scottish or English courts. But even so, as cases such as *Hamlin*, *Tallack*, *Razelos* and *Sandford*[84] illustrate, courts in England have been content to optimise the *in rem/in personam* distinction (possibly with unarticulated reliance upon rudimentary notions of interest analysis), so as to exercise jurisdiction over immoveable assets which do not, in fact, lie within their territorial boundaries. This represents another fissure in the *situs* monolith in the area of exclusive jurisdiction, and one which, it may be argued, the United Kingdom courts appear on occasion to have accepted by acquiescence.

Property and Children

Elsewhere in the context of family law, one can identify fractures in the *situs* monolith, namely in the matter of jurisdiction over property belonging to children and

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[82] Alden, *ibid.*, p603.
[83] *Cf. De Nicols (No.2)* [1900] 2 Ch. 410 and *Chiwell v. Carlyon* (1897) 14 S.C. 61 (S.A.), distinguishing *Callwood v. Callwood* [1960] A.C. 659.
[84] (1985) 15 Fam. Law 230.

incapable adults. In terms of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Convention'), the courts of a child's habitual residence have jurisdiction to deal, not only with the *person* of the child, but also to take measures directed to the protection of the child's *property*.[85] As Dr Clive has stated, "*Property interests and personal interests are often intertwined and it will generally be convenient for them to be handled by the same country's authorities.*"[86] Measures in respect of a child's property are deemed to include the administration, conservation or disposal of such property.[87] The Justice Department of the Scottish Executive has stated in a recent consultation document[88] that "*This would not be a difference so far as Scotland is concerned*[89] *and may not be a great difference so far as England and Wales and Northern Ireland are concerned at least if the question of protection of the child's property arose in the context of the*

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[85] The Explanatory Report to the 1996 Convention (Lagarde, P) ('Lagarde Report I') explains that the Special Commission (which drew up the preliminary draft Convention) took the decision to deal also with the child's property after hearing expert (French) evidence concerning, "... *the utility of having precise rules concerning the designation and the powers of the child's legal representative to administer the child's property located in a foreign state, in particular where it is necessary to carry out the settlement of an estate which has passed to the child.*" (paragraph 10) The Eighteenth Session of the Hague Conference (meeting between 30 September and 19 October 1996) endorsed the Commission's decision, but also took into account the interests of the *lex situs*, by virtue of Article 55, *infra.*

[86] Clive, E, 'The New Hague Convention on Children' 1998 J.R. 169, 186. *Cf.* text at note 24, *supra.*

[87] Articles 1(1)(a) and (2), 3(d) and (g), and 5(1) of the 1996 Convention. The wide formulation of '*administration, conservation or disposal of the child's property*' is deemed to include "*all the operations concerned with the minor's property, including acquisitions, considered as investments or assignments disposing of the property transferred in consideration of the acquisition.*" (Lagarde Report I , paragraph 25)

[88] Consultation Paper on Hague Convention on Children 1996, 14 December 2000 (hereinafter 'S.E. Consultation Paper').

[89] Section 14(1) of the Children (Scotland) Act 1995 provides that "*(1) The Court of Session shall have jurisdiction to entertain an application for an order relating to the administration of a child's property if the child is habitually resident in, or the property is situated in, Scotland.*" Subsection (2) confers equivalent jurisdiction on the sheriff court in cases where the child is habitually resident in, or the property is situated in, the sheriffdom. The provision relates to heritable and moveable property (Crawford, *ibid.*, p228, at paragraph 11.41, note 46). Questions of interpretation may arise over the location of the property. Does the Scottish court have jurisdiction over the property of a child habitually resident in Scotland, wherever that property may be. (*i.e.* Is the condition that the property be situated in Scotland only applicable to a child who is not habitually resident in Scotland?)

inherent jurisdiction or the 'pure' guardianship jurisdiction."[90] The Justice Department has also suggested that since children do not generally own property of substantial amount or significant value, and because trusts are excluded from the scope of the Convention,[91] "... *rules on children's property may not be important in practice.*"[92] Regardless of this, however, in cases where the welfare of the child requires that property matters be taken into consideration, the Department states that, "... *it is not obviously inappropriate that the courts of the child's habitual residence are able to take a global view.*"[93]

In terms of section 11(1)(d) of the Children (Scotland) Act 1995, the court of the child's habitual residence is able to make an order in relation to the administration of a child's property, and, one can infer from section 14(1) and (2) of the same Act that this applies, even where the child's property is situated abroad. The Justice Department is swift to advise that, "*It goes without saying that any order relating to property in a foreign country would have to be implemented in accordance with the law of that country*",[94] but then adds rather ambiguously, "*A United Kingdom court would, however, be able to take account of the law of the property's situation in making its order.*"[95] Article 15 of the 1996 Convention states that, "*(1) In exercising their jurisdiction ... the authorities of the Contracting States shall apply their own law. (2) However, in so far as the protection of ... the property of the child requires,*

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[90] S.E. Consultation Paper, paragraph 78.
[91] Article 4(f). In the Lagarde Report I, it is said that "*The exclusion of trusts is understandable in view of the concern that the Convention not encroach on systems of property law and, more generally, on the categories of property rights.*" (paragraph 32) But, consider the apparent need for, and late introduction of, Article 55 (note 102, *infra*). Moreover, it was considered that, "*the creation of a trust involving a child's property is not necessarily a measure of protection of that child and that the questions of private international law concerning trusts have already been dealt with in a specific Convention.*" (paragraph 32)
[92] *Ibid.*, paragraph 79.
[93] *Ibid.*
[94] *Ibid.*

they may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection." Even if the forum chooses to apply the *lex situs* of the child's property under paragraph (1), there is scope for applying another closely connected[96] law under paragraph (2). So, the Department concludes that "*... there can probably be little objection to the courts in any part of the United Kingdom having jurisdiction to deal with all of a child's property where the child is habitually resident in that part of the United Kingdom.*"[97] This, it is submitted, constitutes an exception to the Brussels rule of (*soi-disant*) exclusive jurisdiction.[98] That this is the intended interpretation of the Convention is corroborated by paragraph 80 of the S.E. Consultation Paper, which outlines the need for United Kingdom courts to have the power to exercise an emergency jurisdiction, or an ability to take provisional measures of protection, in respect of property situated in the United Kingdom, but belonging to a child habitually resident in another Contracting State (*i.e.* in such cases, primary jurisdiction would be conferred upon the state of habitual residence, not the *forum rei sitae*).[99] Articles 11 and 12 of the 1996 Convention,[100] respectively, provide an emergency jurisdiction and jurisdiction to take provisional measures, and Articles 8 and 9 allow for jurisdiction to be transferred from the court of the state of the child's habitual residence to that of the state in which property of

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[95] *Ibid.*

[96] Not necessarily '*more* closely connected.'

[97] S.E. Consultation Paper, paragraph 79 (Emphasis added).

[98] But noting the point made by Dr Clive that "*It is implicit in the convention that it does not apply to ordinary legal remedies under, for example, the general law on obligations and property which just happen to have the incidental effect of protecting the interests of a child ... The convention is impliedly limited to matters which would be thought of as child protection or child law matters, rather than matters relating simply to ordinary laws of general application which have their own private international law rules.*" (*ibid.*, p172)

[99] *Ibid.*, paragraph 80.

[100] *Cf.* paragraph (14) of the Preamble to EC Council Regulation No 1347/2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses. Paragraph 14 states, "*The Regulation does not prevent the courts of a Member State from taking provisional, including protective, measures, in urgent cases, with regard to persons or property situated in that State.*"

the child is located, if the first state should consider that the second state would be better placed, in the particular case, to assess the best interests of the child[101]

Despite Articles 8, 9, 11 and 12, Article 55[102] of the 1996 Convention permits Contracting States expressly to reserve the jurisdiction of its authorities to take measures directed to protect property which is situated on its territory.[103] It is significant, however, to note that the Justice Department has indicated that, "*The fact that* [Article 55] *is there does not mean that it has to be used and it is arguable that the more responsible solution would be not to use it.*"[104] The view of the Justice

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[101] Article 8(1) and (2)(b) of the 1996 Convention. Under Article 8 the transfer of jurisdiction is initiated by the court of the state of the child's habitual residence, whereas under Article 9, the proactive party is the *forum rei sitae*, that court having been empowered to request that the state of habitual residence authorise the *forum rei sitae* to exercise jurisdiction to take such measures of protection as it considers necessary. The S.E. Consultation Paper suggests that, "*The transfer jurisdiction under articles 8 and 9 could also be used to transfer jurisdiction to deal with the property on a long-term basis from the courts of the habitual residence to the courts of the property's situation*", before expressing the seemingly inconsistent sentiment that, "*To give the courts of the country where the property is situated any wider jurisdiction to deal with long-term questions would run the risk of conflicts with the courts of the child's habitual residence who will also have jurisdiction.*" (paragraph 80) The Lagarde Report I suggests that Article 8(2) only permits transfer of jurisdiction to the *forum rei sitae* where that state is a Contracting State (paragraph 53). The example given under Article 8(2) was the granting of an authorisation to sell immoveable property located in a state other than that of the child's habitual residence. (*ibid.*, paragraph 55) It is significant to note, however, that "... *the language of the text does not limit the subsidiary jurisdiction of the court where the property is located to measures concerning the property.*" (*ibid.*, paragraph 55) This is echoed in the emergency jurisdiction provision of Article 11, with reference to which Paul Lagarde has said that, "*The authorities of the State on the territory of which property of the child is present have, in cases of urgency, jurisdiction which is not limited to the protection of this property.*" (*ibid.*, paragraph 69)

[102] Proposed by the United Kingdom delegation and accepted by the other delegations, "... *although the debates indicated clearly that few considered it necessary or desirable.*" (S.E. Consultation Paper, paragraph 81). Paragraph 181 of the Lagarde Report I indicates that the United Kingdom proposal was supported, in particular, by Australia and Canada. According to Professor Lagarde, "*The fear was expressed by these delegations of not being able to convince their respective States to ratify the Convention, if the jurisdiction of their authorities was not preserved in order to take the measures of protection for property, or for certain property, in particular immovables, of the child situated on their territory, as well as the possibility of not recognising a parental responsibility or a measure which might be incompatible with a measure taken by their authorities in respect to this property.*" (*ibid.*, paragraph 181) The reservation had not been included in the Preliminary Draft Hague Convention on the Protection of Children.

[103] It further permits Contracting States expressly to reserve the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property. Article 55(2) permits the reservations to be restricted to certain categories of property.

[104] S.E. Consultation Paper, paragraph 81. In spite of the sentiments of the United Kingdom delegation, the Justice Department is of the view that, "*Making the reservation disrupts the scheme of the Convention and increases the likelihood of conflicts of jurisdiction.*" *Cf.* Dr Clive who expresses the

Department is noteworthy, particularly in light of Professor Lagarde's remark that, "*Here, one is at the interface between property law and the law of protection of minors, and the needs of the law of the situs are particularly strong.*"[105] Certainly, the reservation would be ill-advised as regards *moveable* property,[106] but, at present, the results are not available of the Executive's consultation as to whether or not the reservation should be made in respect of *immoveable* property. The view of the Justice Department, however, seems to be that the reservation should *not* be made, undermining in this context the traditional dominance of the *lex situs*.

Property and Adults in Need of Protection

The position regarding children's property has largely been mirrored in the case of adults who, "... *by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.*"[107] The Explanatory Report to the 2000 Convention expressly states that "*The* [Adult] *Convention follows the general structure of the Convention of 19 October 1996 and adopts on many points the same solutions.*"[108] The objects of the 2000 Convention are to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of relevant adults, and to determine which law should be applied

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hope "... *that most Contracting States will feel able to apply the convention to property as well as personal matters.*" (*ibid.*, p187)

[105] Lagarde Report I, paragraph 181. *Cf.* Dr Clive, who dismisses the matter somewhat cursorily, stating, "*Of course the mechanics and legal technicalities of dealing with property will depend to a large extent on the law of the situation of the property but that is not a problem. It just means that a local lawyer will often have to be employed just as would be the case with an adult dealing with his or her own property in another jurisdiction.*" (*ibid.*, p187)

[106] The Department has indicated that "*In relation to* [moveable] *property there is a strong argument for allowing one court, the court of the child's habitual residence, to have jurisdiction to make long-term decisions in the light of the child's whole situation.*" (S.E. Consultation Paper, paragraph 81) *Cf.* text at note 24, *supra.*

[107] Preamble and Article 1 of the Hague Convention on the International Protection of Adults dated 13 January 2000 ('the 2000 Convention'). The 2000 Convention has been signed by the Netherlands, but it has not yet entered into force.

[108] Lagarde, P, *Explanatory Report* ('the Lagarde Report II'), p24, paragraph 4.

by the appointed *fori*.[109] As with the 1996 Convention, the measures referred to include "*the administration, conservation or disposal of the adult's property*",[110] and "*the authorisation of a specific intervention for the protection of the property of the adult.*"[111]

Primary jurisdiction is conferred upon the state of habitual residence of the adult in question.[112] A transfer jurisdiction also exists under Article 8, akin to Article 8 of the 1996 Convention.[113] The provisions of Article 9 differ from those of the 1996 Convention, giving the *lex situs* a slightly stronger footing in the case of adults: "*The authorities of a Contracting State where property of an adult is situated have jurisdiction to take measures of protection concerning that property, to the extent that such measures are compatible with those taken by the authorities having jurisdiction under Articles 5 to 8.*"[114] Professor Lagarde is of the view that "*The need to include a jurisdiction in the authorities of the State in which property of the adult is situated to take measures of protection relating to that property is explained by the fact that adults in need of protection are generally, in contrast to children, owners of property.*"[115] The limitation regarding compatibility with jurisdiction under Articles 5 to 8 is "*self-explanatory and aims to avoid any inconsistency between measures for the protection of property which may be taken by the local authorities and those taken*

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[109] Article 1(2). The Lagarde Report II explains that extension of the Convention to the property, as well as the person, of the adult is even more essential for an adult than for a child, "*since the adult's frail condition generally continues to an age at which he or she has at his or her disposal property which cannot be left unmanaged.*" (p28, paragraph 12)

[110] Article 3(f). The Lagarde Report II expresses the view that "*This sub-paragraph assumes great practical importance for adults ... This very broad formulation encompasses all operations concerning property, in particular sale of immovables, management of securities, investments, regulation and the handling of successions devolving to the adult.*" (p31, paragraph 25) *Cf.* 1996 Convention, note 87, *supra*.

[111] Article 3(g), 2000 Convention.

[112] Article 5(1). Lagarde Report II, p25, paragraph 5 and p38, paragraph 48.

[113] Consider Lagarde Report II, p43, paragraph 65.

by the authorities which have a general jurisdiction to arrange protection."[116] Significantly, and illustrative of the primacy of the habitual residence basis of jurisdiction, Professor Lagarde continues to explain that, "*It should be noted that the measures taken by the authorities with general jurisdiction may have been taken before or after those taken by the authorities of the State of the situs. If they have been taken afterwards, they will terminate the measures taken by the authorities of the situs to the extent of the incompatibility.*"[117] In short, if there is conflict between the measures taken by the authorities of the habitual residence of the *de cuius*, and the *forum rei sitae*, then the former will prevail over the latter.

Briefly, as far as applicable law is concerned, echoing the 1996 Convention, the primarily applicable law in the case of adults with incapacity is that of the habitual residence of the adult in question, and only exceptionally, insofar as the protection of the person or the property of the adult requires, may the forum apply or take into consideration the law of another State with which the situation has a substantial connection.[118] Professor Lagarde has explained that Article 13(2) "... *constitutes an exception clause based not on the principle of proximity (the closest connection) but on the best interests of the adult.*"[119] This approximates to an interest analysis approach, the aim being to consider which law better protects the proprietary interests of the *de cuius*.

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[114] Article 9. The Lagarde Report II suggests that Article 9 confers a "*concurrent subsidiary jurisdiction to the authorities of the State in which property of the adult is situated.*" (p25, paragraph 5)
[115] Lagarde Report II, p46, paragraph 75.
[116] *Ibid.*
[117] *Ibid.*, p46, paragraph 76.
[118] Article 13, and bearing in mind also Article 21 which stipulates that the application of the law designated can be refused only if this application would be manifestly contrary to public policy. Page 25, paragraph 5 of the Lagarde Report II indicates that Chapter III of the Convention "*takes up the principle of the 1996 Convention according to which each authority taking a measure of protection applies its own internal law.*" Later, Professor Lagarde remarks that, "*The Commission adopted without discussion the principle laid down by the 1996 Convention.*" (p52, paragraph 91)

Together, the 1996 and the 2000 Conventions demonstrate that, in certain circumstances, focus on the character of the property in issue and on the mechanics of acquiring, conserving or disposing of such property, should be secondary to certain wider issues deemed more important. Where this is shown to be the case, then the approach of these two recent international measures is that it is correct for the *lex situs* rules of jurisdiction and choice of law to yield to another more appropriate forum and applicable law. No longer is the *lex situs* considered to be impenetrable or completely impervious to challenge. Now, the more important issue seems to be one of appropriateness, not merely one of control.

Property and Succession

Finally, the test of appropriateness seems also to be advancing into the area of succession. In recent years abandonment of the *lex situs* rule has been mooted in the law of intestate succession.[120] Traditionally, even where the *lex domicilii* has been applied to general assignments of moveable property, whether in the event of death or bankruptcy,[121] the *lex situs* at the date of death has governed intestate succession to immoveable property.[122] It is interesting to note the commentary offered by Dicey and Morris to rule 98 of the tenth edition of their work,[123] *viz*: "... *the rule has always*

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[119] Lagarde Report II, p53, paragraph 92.
[120] *E.g.* The 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons ('the 1989 Convention').
[121] *Sill v. Worswick* (1791) 1 H.B. 1 665; *Provincial Treasurer for Alberta v. Kerr* [1933] A.C. 701, 721; and *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 Q.B. 248, 257 *per* Devlin J,: "*The maxim mobilia sequuntur personam is the exception rather than the rule and is probably confined to certain special classes of general assignments such as marriage settlements and devolutions on death and bankruptcy.*"
[122] Crawford, *ibid.*, p356, paragraph 17.10. See also Dicey & Morris, *'Conflict of Laws'*, Rule 133; *Fenton v. Livingstone* (1859) 21 D. (HL) 10; *Downie v. Downie's Trustees* (1866) 4 M. 1067; and *Train v. Train's Executrix* (1899) 2 F. 146.
[123] Rule 98 states that, "*The succession to the immoveables of an intestate is governed by the law of the country where the immoveables are situated* (*lex situs*)." This rule has appeared in identical terms in

been taken for granted rather than expressly laid down by judges ... It makes no sense today when England and all other countries in the world (except Bermuda) have adopted one system of intestate succession for all kinds of property. It has, therefore, been suggested that the lex situs rule has outlived its usefulness and should be abandoned in favour of the law of the intestate's domicile."[124] The esteemed authors even warn that, "*There is a serious risk that the retention of the lex situs rule will frustrate the intentions of Parliament.*"[125] Not until the twelfth edition of their work, however, did the authors suggest that reform could best be achieved by treating the whole estate (moveable and immoveable) as a single unit, to be governed by the *lex ultimi domicilii*.[126]

The *situs* rule in succession has been the subject of strong criticism on an international level: the *Actes et Documents* of the Sixteenth Session of the Hague Conference report that, "*Many people ... regard the connecting factor of situs in the case of immoveables to be practically inevitable, but it has been widely recognised in the scissionist jurisdictions that the rule of the situs is open to serious criticism.*"[127] On the domestic plane, meanwhile, the remarks made by Dicey and Morris in their tenth edition have received judicial consideration, and in the case of *In re Collens, deceased*, it was pronounced, *per curiam*, that there, "... *is much force in the trenchant criticism in Dicey and Morris ... as to the illogicality of requiring English immoveable assets to be regulated for the purpose of succession by the lex situs rather*

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later editions: 11th edition (1987), rule 138; 12th edition (1993), rule 135; and 13th edition (2000), Rule 133 (p1027, paragraph 27R-015).

[124] Dicey and Morris, '*Conflict of Laws*' (10th edition) (1980), p613.

[125] *Ibid.*, p614.

[126] Dicey and Morris, '*Conflict of Laws*' (12th edition), p1028.

[127] Hague Conference on Private International Law, *Actes et documents de la seizième session, Tome II* – Succession to Estates – Applicable Law, (1990), p535.

than by the law of the domicile."[128] It was with a note of resignation that Sir Nicholas Browne-Wilkinson, VC concluded that, "*However, that is the law as it stands. If the Law Commission choose to look at the matter, they may find factors which suggest that a rule which accords with the view in Dicey and Morris would be fairer and better. But my job is to administer the law as it now is.*"[129]

In fact, in 1986, the Scottish Law Commission ('the SLC') did turn its attention to matters of succession.[130] Paragraph 6.1 of the report notes that "*Although the Succession (Scotland) Act 1964 assimilated heritage and moveables for some purposes (such as succession to the free estate situated in Scotland) it did not change the private international law rules.*"[131]

The argument was advanced that if Scots law had ceased to make a distinction between heritage and moveables for the purposes of the domestic law of intestate succession, then it would be anomalous to preserve the differentiation for the purposes of choice of law.[132]

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[128] *In re Collens, deceased* [1986] Ch. 505.
[129] *Ibid.*, pp512-3. The reference to Dicey and Morris is to the 10th edition (1980), pp613-4.
[130] SLC Consultative Memorandum No. 71, '*Some Miscellaneous Topics in the Law of Succession*' (1986) ('Memo 71').
[131] The rules are articulated in paragraph 6.2 of Memo 71 which explains that, "*Intestate succession to immoveables is governed by the law of the place where they are situated ... The prior right of a surviving spouse to the deceased's interest in a dwellinghouse, being a right to immoveables, may be claimed out of residential property situated in Scotland, irrespective of the deceased's domicile, provided the other conditions are satisfied ... Prior right ... to a cash sum ... is rateably borne by moveable and heritable property. Where the deceased died domiciled furth of Scotland, the whole right is claimable out of immoveables in Scotland, without reference to the value of any foreign estate.*" Though this is admirably clearly expressed, the Scottish rules in this area admit of some difficult points of interpretation, with conflict of laws potential (*e.g.* does the surviving spouse's right to furniture and plenishings extend only to such items as are contained in the qualifying dwelling-house?) (See further, Leslie, R D, '*Prior Rights in Succession: The International Dimension*' 1988 S.L.T. (News) 105)
[132] Memo 71, paragraph 6.4.

For present purposes, it is highly significant to note the following remarks: "... *the argument that the application of foreign law to land in Scotland somehow threatens the dignity or independence of the country seems lacking in force today, even if it was a relevant consideration in the days when land was held by a comparatively small number of persons, when possession of land conferred status, and when feudal obligations running with the land required the presence of a person in Scotland to fulfil them. In fields other than succession, land in Scotland may be affected by the laws of other countries.*"[133]

Drawing the conclusion that the interest of the *lex situs* is not the paramount interest in this area, the SLC proposed that, "*The law of a deceased person's last domicile should regulate the devolution of his or her whole intestate estate (immoveables and moveables) wherever situated.*"[134] The SLC proposed a rule of mutual comity, recommending that when faced with a question of succession to immoveable property in Scotland, albeit belonging to a non-Scottish domiciliary, the same rule should be

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[133] Memo 71, paragraph 6.5. The Report proffers the example of a contract to sell a factory in Scotland, which contract may be made in Germany and subject to German law. It should be observed, however, that, "*Foreign law would ... regulate only the beneficial interests; questions of title and conveyancing in relation to Scottish land would continue to be governed by Scots law.*" The inference is that only mattes of formal validity should be governed exclusively by Scots law. *Cf.* also paragraph 6.21.

[134] Memo 71, paragraph 6.7. *Cf.* paragraph 6.6, which states that, "... *the use of the law of the deceased's last domicile to regulate the devolution of the whole intestate estate is more likely to reflect the wishes of the deceased than the present rule that succession to immoveables devolves in accordance with the law of the country in which they are situated.*" This is endorsed by Scoles who has stated that, "*An owner views his or her estate as a unit.*" (*ibid.*, p64) *Cf.* SLC *Report on Succession* (No. 124, Part X, Private International Law) ('1990 Report'), paragraph 10.5, which states that "... *it does not seem reasonable to presume that a person investing in foreign shares is aware of the law of the relevant country on survivorship rights in joint holdings or that, even if he were aware of it, that he would wish it to apply ... as a matter of policy it would seem preferable to regard the question whether property passes to someone else on the death of an owner or part owner as a question of succession to be governed by the law of the deceased's domicile.*"

applied, that is, devolution of the Scottish property should be determined, not by Scots law, but by the *lex ultimi domicilii* of the deceased.[135]

Ironically, the law reform intentions of the Scottish Law Commission have been hindered by the impasse reached on the international front. In 1990, the SLC intimated that it would make, "*No recommendation on those areas covered by the draft Hague Convention, pending the government's UK response.*"[136] Usefully, however, the SLC was prepared to "... *place on the record that our consultation revealed strong support for having one law governing the whole of the succession to a person's estate, without distinction between moveable and immoveable property.*"[137]

The SLC's reference was to the preliminary draft Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons.[138] In a commentary upon a succession questionnaire completed by the various Hague countries, Georges Droz concluded that a rule of unity of inheritance (in terms of which succession to the entire estate of a deceased person would be governed by one single law, regardless of where the assets are situated[139]) was generally provided for, even if the connecting factor chosen by the relevant states was not always uniform.[140] In 1986, Hans van Loon suggested that there was a growing tendency towards support for the unity

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[135] Memo 71, paragraph 6.20, "*Our tentative preference would be to eliminate the distinction between immoveables and moveables so that the law of the testator's domicile should be presumed to apply to the construction of deeds relating to any kind of property.*"
[136] 1990 Report, paragraph 10.1.
[137] *Ibid.*. See also Crawford, *ibid.*, p357, paragraph 17.12.
[138] The 1989 Convention was concluded on 1 August 1989, but has not yet entered into force.
[139] Droz, G, '*Commentary on the Questionnaire on Succession in PIL*' (1969), p19 (*Actes et documents, ibid.*)
[140] Droz (1969), *ibid.* The countries adopting a rule of unity included, *inter alia*, Denmark, Germany, Italy, Netherlands, Spain and Sweden. In contrast, a scissionist approach was taken by Belgium, Canada, France, Luxembourg, the United Kingdom and the Unites States of America.

principle.[141] This tendency was emerging in the context of an international society in which, "*The removal of legal barriers between many countries ... has provided an accelerating rhythm of settlement of nationals of one country in another country for a shorter or longer period of their choice.*"[142] This migration highlights the paradoxical situation which has arisen: the growing internationalisation of succession issues, stemming from an increasingly peripatetic society, is to be contrasted with the "*tradition-bound character of the law of inheritance*".[143] Although the *situs* rule was developed at a time when wealth could largely be equated with land ownership (which, in turn, could be equated with rights of suffrage[144]), the economy has since evolved and, as Scoles as advised, "... *the situs rule has continued over the years to be applied in an economy which is no longer agrarian and in which land no longer holds the unique place that it once held both in society and the economy.*"[145]

Intended to expunge this paradox, the prime feature of the 1989 Convention is the adoption of a unity principle, "... *whereby a single law will govern the succession to both moveable and immoveable property in the deceased's estate.*"[146] In terms of

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[141] Van Loon, H, '*Update on the Commentary*' (1986) (*Actes et documents, ibid.*)

[142] Van Loon, *ibid.*, p151. The author identified, in particular, "*The attraction of foreign workers, special relations with former colonies, the influx of refugees, the expansion of international companies and the mushrooming of international organizations ...*" as additional causes of increased movement of foreign nationals.

[143] Van Loon, *ibid.*, p155. In this context, in particular, it is significant to note the statistics of the Commission of European Affairs regarding the acquisition of primary or secondary residences in countries with a favourable climate: as of 22 May 1986, Van Loon advises that, "*75% of the apartments in the Canary Islands are owned by foreigners ... on the Costa del Sol there are many English and Arabian property owners, and in the Balearics English and German property owners.*" (*ibid.*, p159)

[144] Weintraub (1966), *ibid.*, p19.

[145] Scoles, *ibid.*, p63. It is evident that the land taboo permeates also the field of succession, the author remarking that, "*Notwithstanding these changes, the sentimental attachment that the ... Anglo-American legal mind has to land seems to blind lawyers and judges in their analysis of conflict of laws issues related to land, including its succession.*"

[146] Waters, D W M, '*Report of the Special Commission*' (*Actes et documents, ibid.*), p241. The Convention also endeavours to provide "... a *formula for the determination of the applicable law to govern the succession (the objective connecting factor), a formula which represents a compromise between the connecting factors of habitual residence and nationality.*" (*ibid.*) It is reported that adoption of a unity principle was acceptable to all delegations no later than the end of the November

Article 1(2), the Convention does not apply to (a) the form of dispositions of property upon death; (b) capacity to dispose of property upon death; (c) issues pertaining to matrimonial property; or (d) property rights, interests or assets created or transferred otherwise than by succession.[147] Although Article 3 of the 1989 Convention gives primacy to the law of the State in which the deceased was habitually resident at the time of his death, and to the *lex patriae*, there is nevertheless provision for application of the law of the State with which the deceased was '*manifestly more closely connected*'.[148]

Although a rule of unity is imposed, Article 15 tackles the residual concerns of the *lex situs* by providing that, "*The law applicable under the Convention does not affect the application of any rules of the law of the State where certain immoveables, enterprises or other special categories of assets are situated, which rules institute a particular inheritance regime in respect of such assets because of economic, family or social considerations.*" This is not intended to amount to a general reservation in favour of the *lex situs*, rather it applies only in narrowly-defined circumstances, where the *lex situs* has imposed a particular form of distribution for specific assets.[149]

1986 session. (*ibid.*, p243) The commentary to the final Convention reports that, "... *it is interesting that the proposed move to the unitarist position by the Convention was welcomed in the early sessions of the Special Commission, and never questioned again.*" (*Actes et documents*, *ibid.*, Final Convention, p535)

[147] Paragraph (d) was not contained in the preliminary draft Convention, and was added only at the stage of the final draft. (*Actes et documents, ibid., Conclusions, Preliminary Draft Convention* (1986), p515)

[148] Articles 3(1) and (2). Article 3(3) also incorporates a displacement rule, but in that instance the test is not '*manifestly more closely connected*', but simply '*more closely connected*'. The difference between these benchmark standards is not immediately obvious. In a commentary upon Article 3(2) '*closer connection*', Waters has remarked that, "*The difficulty with this term ... is that it appears almost as a non-rule ... it has no touchstone. However, this would be to misunderstand it, because this connecting factor is the focussing of elements (or factors). The elements are observable personal data, and when focussed, as one would focus binoculars, they reveal the central place of the de cujus' life.*" (*Actes et documents, ibid.*, p253)

[149] *E.g.* There may be specific provision in the *lex situs* whereby family-owned farms, at or under a given size, are to devolve as one unit through the male line of the proprietor. (Waters, *ibid.*, p273) *Cf.* Weintraub's remark that, "... [the *situs*] *might have a rule designed to prevent land from being broken*

What is generally being advocated in the international arena, however, is a movement away from the absolute control of the *lex situs* in respect of intestate succession to immoveable property. The aptness of the *lex situs* rule, while for many years uncontested, has recently been challenged, nationally and internationally, and has been found to be lacking in legitimate interest.[150] In contrast, "*Persons domiciled in a nonsitus state seeking a divorce or declaration of interests in a decedent's estate give that state very significant contacts and create state interests. Certainly the nonsitus state will most likely experience the social consequences of the failure to apply its law.*"[151]

If a *forum rei sitae* were to prohibit a certain form of distribution which, nevertheless, would be permitted or tolerated by a non-*situs* forum which happens also to be the domicile or habitual residence of the testator and/or the beneficiaries, then it could be argued, adopting a functional analysis of the problem, that the non-*situs* forum has a greater interest in the resolution of the matter, and in the consequences, than does the *forum rei sitae*, and that the matter would more appropriately be determined by the *lex domicilii* (or other personal law equivalent), for as Hancock has submitted, "... *local statutes* ... [are] *designed to embody the supposed desires of persons domiciled at the*

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up into parcels too small to be utilized economically." ((1966), *ibid.*, p18); and Dr Crawford's comment that, "*Sometimes it is found that a foreign lex situs may not permit immoveable property owned by 'an incomer', defined by that law, to devolve according to his/her heirs but may require it to be sold; and of course the lex situs has the last word.*" (*ibid.*, p358, paragraph 17.12) One can anticipate difficulties in interpreting (according to which law?) this key issue of whether or not a particular inheritance régime is imposed because of economic, family or social considerations (*e.g.* rules concerning entails, perpetuities and accumulations).

[150] Consider Alden, "*The situs rule is especially nefarious when the situs chooses to apply its own law to problems of intestacy. Unless the resolution affects the use of land or the economy, the situs qua situs has no interest ...*" (*ibid.*, p617)

[151] Alden, *ibid.*, p630/1.

forum ... Real property of a foreign decedent should be distributed according to a scheme embodying the customs and mores of his home community."[152]

One might consider the scenario where H and W and their two children are domiciled in Utopia, and H dies intestate, owning land in Arcadia. In terms of Utopian law, the surviving spouse may be entitled to one half of H's estate, and the two children to one quarter each. Arcadian law, on the other hand, may provide that W is entitled to one third of the estate, and likewise, that each child is entitled to one third thereof. The question arises whether Utopian or Arcadian law should apply to determine succession to the land in Arcadia. Taking an interest analysis approach, it is submitted that Utopian law, as the settled residence of the deceased and the three claimants has the greater interest in determining the proportions due to each beneficiary. Weintraub would argue that, "... *if the distribution does not comport with* [Utopia's] *idea of fairness, and the* [Utopian] *claimants quarrel, it is* [Utopia's] *peace that is disturbed.*"[153] In contrast, the interest of Arcadia is, in most cases, marginal. Weintraub has even gone so far as to state that, "*The conflict is a false one only* [Utopian] *law being rationally applicable.*"[154] Weintraub does, however, concede, that the interest of the *situs* could, theoretically, be stronger than that of the non-*situs* court where the rules of intestate succession applied at the *lex situs* are intended specifically to protect "*the economy and vital interests of the situs.*" This is subject to the same interpretational difficulties identified at note 149 *supra*, in the context of '*particular inheritance regime due to economic, family or social considerations*'.

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[152] Hancock, M, '*Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenousness*' (1967) 20 Stanford L. Rev. 1, 11.
[153] Weintraub (1966), *ibid.*, p17.
[154] Weintraub (1966), *ibid.*, p17: "... [A]*pplying the situs law is likely to be ... inimical to the interest of the home state of the claimants in treating them according to its own notions of fairness.*" (p18) *Cf. In re Berchtold, Berchtold v Capron* [1923] 1 Ch. 193.

In the same manner that an interest analysis approach may advocate the application of non-*situs* law in the event of distribution of matrimonial property upon divorce *etc*, Alden has even argued that "... *protection of nonsitus interests may mandate the use of nonsitus law e.g. well-being of its citizens affected by distribution of property under a will.*"[155] While this is a more radical proposition than applying the non-*situs* law in instances of intestate succession to land, Alden makes the valid point that, "*When land use or free circulation are ... threatened, scenarios that never arise in the average divorce or estate distribution case, an interest analysis would yield the same results as the situs rule.*"[156] But the interest analysis approach is preferred because the *lex situs*, if applied, is arrived at, "... *through a disciplined, jurisprudentially sound approach of interest analysis and not through the rote recitation of an inflexible 'rule'.*"[157]

Finally, an interesting doctrine which should be mentioned in this context is that of equitable conversion, for it has been suggested that "... *the mysterious doctrine of equitable conversion also has been used to erode the situs formula in cases of intestate succession.*"[158] The operation of this doctrine results in property which is normally regarded as heritable being treated as if it were moveable, and *vice versa.*[159]

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[155] Alden, *ibid.*, p596. This comparison has also been drawn by Scoles, whose opinion is that "*Clearly, the law should not offer less protection to the spouse who persists until dissolution of the marriage by death.*" (*ibid.*, p59)

[156] Alden, *ibid.*

[157] Alden, *ibid.*

[158] Hancock (1967), *ibid.*, p18. The author has accused courts of using the doctrine, "*to avoid an unpalatable decision without appearing to disturb or disregard an ancient and oft-repeated formula of law.*" (*ibid.*, p19)

[159] Anton, A E, '*Private International Law*' (1990), p597. Consider *In re Cutliffe's Will Trusts, Brewer v. Cutliffe* [1940] 1 Ch. 565 (realty treated as personalty); *sed contra In re Berchtold, Berchtold v. Capron* [1923] 1 Ch. 193 (money treated as realty). Examples can also be found in Scots domestic law of chameleon-type property (that is, property which is moveable for one purpose, and heritable for

The doctrine is a fiction to the extent that "*real estate is treated as personal estate and personal estate is treated as real estate; not that immoveables are turned into moveables or moveables into immoveables.*"[160] It is said, in Scotland at least, that the "*... conversion from moveable to heritable is effective only for the purposes of the law of succession ...*"[161] and that it operates under the maxim '*quod fiere debet infectum valet*' ('what ought to be done avails although not done').[162] Clearly, a fiction such as this, by which immoveable property is to be treated as moveable property, could be perceived to be a form of subterfuge, another way by which to evade the operation of the *lex situs* rule in intestate succession, favouring instead operation of the *lex ultimi domicilii*.[163] Simply by ordering that immoveable property situated abroad be sold and the proceeds distributed to beneficiaries, the non-*situs* forum can effectively convert the foreign immoveable property into moveable property and thereafter apply its own (arguably more relevant) rules of succession. Whilst theoretically possible (since the question whether or not property has been converted is determined, in Scots law, by the *lex ultimi domicilii*, and not by the *lex situs*[164]), this "*re-labelling device*"[165] is not

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another) – sometimes with conflict implications as, for example, in *Train v. Train's Exr.* (1899) 2 F. 146.

[160] *Actes et documents*, *ibid.*, p21.

[161] Stair Memorial Encyclopaedia, Volume 18, paragraph 15.

[162] Walker, D M, '*Principles of Scottish Private Law*', Volume III, p16; and Trautman, D T, '*The Revolution in Choice of Law: Another Insight*' (1986) 99 Harv. L. Rev. 1101, 1107. Lowenfeld has explained that "*The mysterious doctrine of equitable conversion, for those who have forgotten or never knew, permits a court of equity to treat 'as done what ought to be done', so that land subject to a direction to sell may in certain circumstances pass to the next of kin as personalty, rather than to the heirs as realty. By analogy, in intestate cases an interest in land subject to sale (or lease) may be treated like personalty, so that the law of the testator's domicile, rather than the law of the situs, is applied.*" (Lowenfeld, A F, '*Book Review: Revolt Against Intellectual Tyranny*' (1985-86) 38 Stanford L. Rev. 1411, 1418)

[163] Weintraub has even referred to the doctrine as an "*... advocate's trick ... to be remembered and stored away for possible use in undermining the situs monolith when all else fails.*" ((1966), *ibid.*, p20) Consider also Hancock who, in an attack upon several arcane favourites, expressed consternation at how "*... learned lawyers of the past, supposedly clear-thinking, practical men, could allow their thought processes to become entangled in such bewildering conceptions as the building which is part of the land, the weird alchemy of equity which converts real property into personal property or the ceaseless oscillation of the renvoi.*" (Hancock, M, '*Fallacy of the Transplanted Category*' (1959) 37 Can. Bar Rev. 535, at p535/6)

[164] Crawford, *ibid.*, p375, at paragraph 17.39, citing *Hall's Trs v. Hall* (1854) 16 D. 1057. *Hall's Trs.* concerned the proceeds of a heritable bond belonging to an English domiciled woman, and deposited

an attractive solution.[166] Until such time, however, as the scissionist rule is abandoned, the doctrine constitutes a useful device to be employed in appropriate cases where it is apparent to the (non-*situs*) forum that the interest of the *lex situs* in the case in hand is, in fact, secondary to that of the deceased's or beneficiaries' personal law.[167]

One must bear in mind, however, that the artifice of equitable conversion does not extend to all cases. Where the forum lacks discretion to order sale of the foreign immoveable property, the device cannot be employed. Similarly, it may be that the competition to determine the 'most interested law' is played out, not just between the *lex situs* and the forum (*e.g.* the *lex ultimi domicilii* of the deceased), but also with a

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with a Scottish bank. The English husband claimed the sum under the *ius mariti*, but the wife's trustees claimed that the money was a *surrogatum* for the bond and therefore determined by the Scottish *situs*. The court held that the question of right to the property had to be regulated by English law, England being the parties' domicile at the date of dissolution of the marriage. Lord Justice Clerk Hope opined, "*That the money is in Scotland is wholly immaterial.*" (p1060) This may be less a matter of conversion, however, than one of matrimonial property, for Lord Cowan articulated the, "... *general principle ... that the rights of the spouses inter se fall to be determined by the law of the domicile at the dissolution of the marriage.*" (p1060) *Sed quaere*, *Murray v. Champernowne* [1901] 2 Ir.R. 232, in which it was argued that Irish lands were equitably converted into money, and therefore, to be determined by the Scots personal law. Andrews, J., however, held that succession should be governed by the *lex situs*: "*The lands of Rathsheagh notwithstanding the doctrine of equitable conversion are still lands in fact* ..." (paragraph 236) *Contra* the rule in America (paragraph 209, First Restatement (1934) and paragraph 225, Second Restatement (1971)), in terms of which whether interests in land are converted into personal property by dealings with the land depends upon the law of the state where the land is." *Cf.* Von Mehren, A T, & Trautman, D T, '*The Law of Multistate Problems – Cases and Materials on Conflict of Laws*' (1965), p194. Consider *Clarke v. Clarke* 178 U.S. 186 (1900): "*A decision by a testatrix's domicilaitary court that her will worked a conversion into personalty of all her real property, wherever situated is not conclusive upon the courts of a sister state in respect to the effect of the will upon the title to real property in that state.*" (*per* White, J. paragraph 191)

[165] Weintraub, R J, '*The Conflict of Laws Rejoins the Mainstream of Legal Reasoning*' (1986) 65 Texas L. R. 215, 230/1.

[166] Consider Hancock, who suggested that "*Instead of employing this clumsy fiction ...* [replace] *the law-of-the-situs with a policy analysis ... to escape the rigors of the law of the situs.*" (Trautman, D T, '*The Revolution in Choice of Law: Another Insight*' (1986) 99 Harv. L. Rev. 1101, at p1107) Hancock explained that although treating interests in realty as interests in personal property "... *occasionally leads to a correct result ...* [equitable conversion is a] ... *flawed and poor substitute for proper interest analysis.*" (*per* Weintraub (1986), *ibid.*, p231) This view has also been advanced by Professor Reese. (Reese, W L M, '*Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles*' (1984) 9 Dalhousie Law Journal 181, p184)

[167] Consider Weintraub (1966), *ibid.*, at p20: "*It is true that on average, more just and rational decisions will be reached by accepting this argument of equitable conversion than by rejecting it. This is because the domicile of the decedent at death will usually have the predominant interest, often the sole interest, in regulating the intestate distribution of his property.*"

third state which appears to be interested (*e.g.* the common domicile of the beneficiaries, where that law differs from the deceased's *lex ultimi domicilii*). The doctrine of equitable conversion can only be employed to supplant the *lex situs* with the *lex ultimi domicilii*; what is required is a choice of law rule which aims to identify, without restriction, the most appropriate law. As Weintraub has asserted, "... *the substitution of one rigid, territorially-oriented choice-of-law rule, 'domicile at death', for another, is not why we storm the Bastille.*"[168]

Analysing the role of interest analysis

Reference has been made in this, and preceding, Chapters to the strength or weakness of a particular state's interest in the application of its law to the matter in dispute. As was indicated in Chapter One, *supra*, in the USA especially, selection of the *lex causae* has sometimes been determined by means of an analysis of the interests of individual states in the facts in hand.[169] In contrast, in the United Kingdom, reference is seldom made to these, *prima facie*, nebulous concepts. In particular, Morris has openly criticised the use of interest analysis in matters of property law: "... *it seems to me that in property law you must make some concessions to conceptualism, whether you like it or not, and that free-wheeling talk about 'interests' and 'policies' is out of*

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[168] In a later work Weintraub indicated that, in any event, "*Acceptance of the doctrine of equitable conversion is not the answer ... 'Domicile' itself is a flawed concept for choice-of-law purpose.*" ((1986), *ibid.*, p432)

[169] Consider Jaffey's assertion that in America, "... *choice of law mainly consists of an investigation into the presence or absence of such interests.*" (Jaffey, A J E, '*The Foundations of Rules for the Choice of Law*' (1982) 2 Ox. J. L. S. 368, 368) Consider also, for example, the case of *Williams v. Williams* 390 A 2d. 4 (1978) (cited by Weintraub, R J, '*Commentary on the Conflict of Laws*' (1986), p458), in which the court explained that it had arrived at its decision (concerning matrimonial property rights upon divorce), using "*a conflicts analysis that requires us to evaluate the governmental policies underlying the applicable conflicting laws and to determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review.*" (p5/6) Consider also Von Mehren and Trautman's claim that "... *an understanding of the policies underlying the substantive rule of law can assist in rationally relating a transaction to a particular jurisdiction.*" (Von Mehren, A T and Trautman, D T, '*The Law of Multistate Problems – Cases and Materials on Conflict of Laws*' (1965), p108)

place."[170] Despite this criticism, interest analysis was utilised in *Kunstsammlungen zu Weimar v. Elicofon*,[171] an American case concerning the Federal Republic of Germany's attempt to recover two Albrecht Duerer portraits stolen, in 1945, from a castle located in what is now East Germany, and fortuitously discovered, in 1966, in the Brooklyn home of Edward I Elicofon, an American citizen, where they had been openly displayed by him since his good faith purchase of them more than twenty years earlier (and without the knowledge that the portraits were Duerers). The U.S. Court of Appeals concluded that New York's interest in regulating the transfers of property located within its borders overrode any interest which the German Democratic Republic might have had in applying to extraterritorial transactions its policy of *Ersitzung* (which awards title to the holder of property upon ten years' uninterrupted good faith possession thereof). In holding the plaintiff entitled to possession of the painting, the Court of Appeals affirmed the decision of the U.S. District Court for the Eastern District of New York.[172] The appellate court endorsed the view that, "[The contacts with New York] *are indeed relevant to effecting its interests in regulating the transfer of title in personal property in a manner which best promotes its policy.*"[173] Commenting upon the '*perfunctory*' interest analysis conducted by the District Court, Garro concluded that, in the circumstances, "*New York does have an interest in applying its law because its policy of protecting owners*

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[170] Morris, J H C, '*Law and Reason Triumphant - or – How Not to Review a Restatement*' (1973) 21 Am. Jo. of Comp. Law 322, 325. Consider too Morris' more general remarks regarding the Second Restatement: "*Although I applaud the 'most significant relationship' formula in torts, contracts and agency and partnership, I was surprised and perturbed to see it recurring as the general principle for 'property in general' (paragraph 222).*" (Morris, *ibid.*, p327) *Cf.* Weintraub: "*Although slower in coming than in other areas and with little assistance from the Second Restatement, functional resolutions of conflicts problems concerning realty have begun. Courts are inquiring into the policies underlying apparently conflicting situs and non-situs law and shaping their opinions to effect a maximum accommodation of those policies.*" ((1986), *ibid.*, p457)

[171] 678 F.2d. 1150 (1982).

[172] 536 F.Supp. 813, 829, *per* Jacob Mishler, J. The Court held that there was a false conflict (note 182, *infra*) which permitted it to apply the substantive *lex fori.*

[173] *Ibid.*, p846.

is not confined to resident owners, but extends to owners generally as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods."[174]

Interestingly, a rare British reference to interest analysis (in admittedly embryonic form) features in the third edition of Cheshire's *Private International Law*. The author depicts a scenario involving a car transferred, in England, from A to B, under a hire purchase agreement. Thereafter, B removes the car to Holland, where he sells it to C. Cheshire surmises that, according to Dutch law, hire purchase agreements must be recorded in a public register, and that the validity of a sale by a hirer depends upon whether the initial hire purchase agreement between A and B was recorded. Cheshire takes the view that the Dutch *lex situs* would require to examine its own municipal law to ascertain whether the recording requirement extended to agreements made abroad between two foreigners. This, he says, would necessitate an investigation into the policy of the Dutch law: was its object to protect all persons in Holland who paid money on the faith of an ostensibly good title? If the answer to this question is yes, registration would be deemed necessary in the case of *all* moveable property found within the jurisdiction. But Cheshire also suggests, in the alternative, that "... *the policy of the Dutch law might be different. Its design might be to strike only at agreements concluded in Holland.*"[175] The critical factor is the purpose or policy of the Dutch rule.[176]

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[174] Garro, A M, '*The Recovery of Stolen Art Objects From Bona Fide Purchasers*' (Lalive, P, ed., '*International Sales of Works of Art*') (1985), 503, at p507/8. Garro's personal verdict on *Elicofon* is more in line with the view expressed by Morris (note 170, *supra*), namely, that, "... *the merit of certainty of the situs rule is likely to be lost in the choice of law process of weighing competing governmental interests. The uncertainties of adopting a policy-oriented conflicts methodology are well illustrated by the rationale followed in Elicofon.*" (*ibid.*, p512)

[175] Cheshire, G C, '*Private International Law*' 3rd edition (1947), p587.

[176] *Cf. Goetschuis v. Brightman* 245 N.Y. 186, 156 N.E. 660, *per* Lehman, J.: "*Unless a regulation of this state* [New York] *is plainly intended to apply to property brought here without the consent of the*

Despite Cheshire's early reference to this policy-centred approach, generally in the United Kingdom, analysis of cross-border property disputes is conducted according to the classical formulae of characterisation of the cause of action, identification of the *lex causae* (designated by fixed and often longstanding localising factors), proof and application thereof and, where appropriate, limitation of that law.[177] Notwithstanding, it has been suggested that while the American movement has not achieved in the United Kingdom the revolutionary status which it secured at its source, its transatlantic influence is growing: "... *even codifications of private international law ... as well as international conventions show traces of modern American scholarship (e.g. the Rome Convention).*"[178]

In this Chapter, it has been argued that, "... *the preference for situs law should yield when there are no situs interests involved and the parties and the transaction are most*

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owner, it is clear that the courts should not extend the local rules so as to deprive the owner of those rights to his property which he possessed before the property was wrongfully removed." (paragraph 193); "*Clearly the* [New York] *statute may not be interpreted so as to include attempted regulation of the validity of contracts made without the state in regard to property situated elsewhere ... If the conditional vendee resides outside of the state and the property is not in the state, the contract cannot be filed. The statute has no application to a contract made under conditions which render compliance with the statute impossible.*" (paragraph 663) *Cf. Dublin Finance Corp. v. Rowe* [1943] N.I. 1 and *Dulaney v. Merry* [1901] 1 K.B. 536: registration requirements frequently are found to be intended to be of limited, local scope (by whatever reasoning).

[177] Page 31, *supra*. Consider Jefferson who, with reference to *Winkworth v. Christie, Manson & Woods* [1980] 1 Ch. 496, remarked that, "*The nagging doubt ... is that the submissions were within the traditional terminology of problem, connecting factor and legal system: the judge was not invited to evaluate the respective merits of the domestic laws of the possible systems.*" (Jefferson, M, '*An Attempt to Evade the Lex Situs Rule for Stolen Goods*' (1980) 96 L.Q.R. 508, 511) The inference is that had Slade, J. been invited (or permitted) to consider the respective interests of England and Italy in resolution of the dispute in question, his decision would have favoured Mr Winkworth rather than Dr D'Annone.

[178] Kegel, G, '*International Encyclopaedia of Comparative Law, Volume III, Ch.3, Fundamental Approaches*' (1986), p29. Consider too Yntema, who has judged that, "*The conception that legal problems ... should be studied in terms of social policies, and not as mere exercises in deductive or intuitive manipulation of abstract principles of justice represents a basic modern insight into the nature of law.*" (Yntema, H, '*The Objectives of Private International Law*' (1957) 35 Can. Bar Rev. 721, at p731) In 1987, Kay remarked that "*Whether local law policies should play a dominant or only a peripheral part in the solution of the choice of law problem is at the heart of the current academic debate over choice of law theory.*" (Kay, H K, '*Testing the Modern Critics Against Moffatt Hancock's*

closely connected with another state ..."[179] The premise, in effect, has been that, "[An] ... *analysis of policies and interests involved in real property conflicts shows that too often the situs rule leads to inequitable and irrational decisions ... the situs rule can force the application of inappropriate laws, and ignore more important and more directly affected policies and interests.*"[180] The assumption in this premise is that it is a relatively straightforward task to discern precisely what are the directly affected policies, or the specific interests which a particular rule of law was designed to protect. Brainerd Currie, the father of governmental interest analysis, clearly mapped out criteria to determine which state's rule of law should apply (in effect, which state's interest should prevail), once it has been determined which law(s), in fact, express(es) an interest in the matter in hand.[181] Currie, however, did not formulate any method by which the specific interest(s) or policy(ies) which a substantive rule of law purportedly protects, were to be ascertained.[182] At most, Currie

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Choice of Law Theories' (1985) 73 Cal. L. Rev. 525, 526) Primarily, the debate raged in the context of conflict rules of contract and delict.

[179] Hay, P, '*Property Law and Legal Education; the Situs Rule in European and American Conflicts Law – Comparative Notes*' (1988), p119.

[180] Alden, R, '*Modernizing the Situs Rule for Real Property Conflicts*' (1987) 65 Texas L. Rev., 585, 610. *Cf.* Kay (1987), *ibid.*, who remarks that the situs rule "*tends to encourage a mechanistic mode of thinking that diverts judicial attention away from what* [Hancock] *views as the central importance of the 'policies or purposes of the domestic rules.*'" (p259)

[181] Currie, B, "*Notes on Methods and Objectives in the Conflict of Law*" (1959) Duke L.J. 177, reprinted in "*Selected Essays on the Conflict of Laws*" (1963).

[182] The four interest analysis combinations presented by Currie in his *Selected Essays* are summarised by Kegel (1986, *ibid.*, p29): - (1) If only one state shows an interest in having its rules applied, apply that law (a false conflict); (2) If both the forum and a foreign state demonstrate an interest, there is an apparent conflict. If it emerges, on a 'more restrained interpretation of the policies', that only one state insists upon the application of its substantive law, there is a false conflict. [Questions of the intensity of a state's interest then arise – this is even more difficult to assess than whether the interest exists in the first place, and again, no suggestions are proffered by Currie regarding how this process should be conducted]. If, however, both states wish to apply their law (a true conflict), then the forum's rules of substantive law ought to prevail; (3) If several states have a strong governmental interest in the application of the policy of their own substantive law (a true conflict), the forum's rules of substantive law ought to prevail; and (4) If none of the several foreign states claims an interest (the 'unprovided for' case), the forum's rules of substantive law should again prevail. Consider also Von Mehren and Trautman who, like Currie, skip to the question of competing interests without dealing with the logically prior question of how one, in fact, determines interests in the first place: "... *once the aims of particular states can be determined, it will often become clear that one or more of the states involved in a transaction are not concerned jurisdictions with respect to a given issue and hence have no claim to regulate the question.*" (Von Mehren and Trautman, *ibid.*, p108) Consider also Weintraub, who states with misleading simplicity that, "*The policies underlying each state's rules are identified. Then the*

advocates that, "*An 'interest' ... is the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.*"[183]

Clearly, the assumption that intrinsic interests or policies can be easily and swiftly ascertained is mistaken, for as Lando has explained, "... *the purpose of a statute or other rule of law is sometimes obscure. Sometimes it is also complex. Even when the purpose of the statute is known and straightforward, its application in space is doubtful ...*"[184] Similarly, Professor Reese has detected that, "*The legislative history of a state rule is frequently unavailable and, even if it were, it would be the rare case where this history would cast any light on what extraterritorial application, if any, the legislature would have wished that its rule be given. Probably the legislature never thought about this problem at all and, in any event, the burden involved in trying to ascertain a usually non-existent intent would rarely be worth the effort.*"[185] In determining the underlying policy of a particular rule of law, account must be taken not merely of its internal, domestic purpose, but also of whether that purpose is echoed externally, through intended extraterritorial application of the rule.[186] It may, of course, be the case that the legislatures in question have no formulated intentions regarding the territorial reach of their statutory provisions.

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question is asked; 'which states are likely to experience the social consequences of implementing or frustrating those policies?'" (Weintraub, (1986), *ibid.*, p46)

[183] Currie, B, "*Selected Essays on the Conflict of Laws*" (1963), p621. Hay subsequently suggested that relevant governmental policies would include matters regarding the health, safety or welfare of a state's citizens, or its financial stability. (Hay, P, "*Flexibility versus Predictability and Uniformity in Choice of Law*' (1991) I *Receuil des Cours* 285, 353)

[184] Lando, O, '*International Encyclopaedia of Comparative Law, Volume III, Ch.24 – Contracts*' (1976), p80.

[185] Reese, W L M, '*Book Review - Studies in Modern Choice-of-law: Torts, Insurance, Land Titles*' (1984) 9 Dalhousie Law Journal 181, 183. If it is difficult to determine the purpose or policy of a legislative enactment, it is submitted that this difficulty is only exacerbated as regards common law rules.

Furthermore, it seems widely to be assumed that there is only ever one purpose underlying any rule of law; it is never supposed by interest analysis protagonists that a rule of law may have two or more purposes which, in Professor Reese's words may, "*point in different directions so far as concerns choice of the applicable law.*"[187] Professor Hancock's functional analysis/statutory construction approach and Professor Currie's interest analysis approach both confer upon the judiciary apparently unbridled discretion to determine, first, what is or is not the underlying policy of a rule of law (either of his/her own state, or indeed of a third state) and its extent, and secondly, whether the interests of a particular state, as enshrined within its rules of law, will be furthered by its application to the case in hand.[188]

Obviously, it is preferable to apply a law the purpose of which would be furthered by its application to the facts in hand, than to apply one whose purpose is not to deal with

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[186] *Cf.* Trautman, D T, '*The Revolution in Choice of Law: Another Insight*' (1986) 99 Harv. L. Rev. 1001,1110: "... *it is important to reiterate that a proper functional analysis cannot be limited to an analysis of the policies of domestic law.*"

[187] Reese (1984), *ibid.*, p187. *E.g.* The purpose of a rule preventing married women from acting as guarantors for their husbands' debts could be (a) to protect married women domiciled in the state where those debts are situated (or indeed domiciled anywhere) and (b) to protect creditors domiciled in that state. One might consider the comments of Castel, J G, regarding *Bank of Africa Limited v. Cohen* [1909] 2 Ch. 129, *viz.*: "... *the court failed to consider what was perhaps the real question, namely, whether, even if it is admitted that the capacity to convey or mortgage land is governed by the lex loci rei sitae, a rule of that law relating to the capacity of married women is intended to be limited to women domiciled in the country of the situs, or extends (as the court assumed) to women domiciled elsewhere.*" (Castel, J G, '*Cases, Notes and Materials on the Conflict of Laws*' (1960), p574) *Cf.* also Morris who, despite reservations later expressed [note 170 *supra*] argued that the court in *Bank of Africa* should have inquired as to the policy of the Transvaal domestic law; the policy may have been to protect Transvaal married women, rather than Transvaal land: "*The lex situs was applied. The reasoning is, however, most unsatisfactory.*" (Morris, J H C, '*Cases on Private International Law*', 4th edition (1968), p350)

[188] Rather scathingly, Professor Reese suggests that "... *Professor Hancock applies what is really his own hunch in determining the underlying purpose of the rule involved and whether this purpose would be served by the rule's application to the issue at hand.*" ((1984), *ibid.*, p183) Reese adds, however, that, "... *although legislative history will usually be lacking, a fair conclusion can frequently be reached on what was the probable purpose, or purposes, intended.*" (*ibid.*) This seems hardly scientific.

circumstances such as those in issue.[189] The American approach is to be applauded insofar as it calls for a more "*enlightened inquiry into legislative purpose ... looking not just at the words adopted by the legislature, but at whether the assets, or the donor's family, or the activity in question were intended objects of the forum/situs state's regulatory scheme.*"[190] However, it is submitted that whilst the proposed guessing game as to what is, or is not, the underlying purpose of a rule of law, may be a satisfactory means by which to disentangle abstract conflict problems, it is not a proper basis for the resolution of concrete disputes.

Regarding the question, *what* are the legitimate interests of the *lex situs*, Von Mehren and Trautman, in taking what they term a functional analysis approach, advise that, "*The basic issue is whether a given jurisdiction has, with respect to the particular aspect of the matter that has given rise to the controversy and in view of those elements in the total situation that are related to the jurisdiction in question, a real concern or interest.*"[191] This, they argue, should be determined by ascertaining whether there is a relevant relation between the jurisdiction and the transaction and/or the parties, in terms of what they call "*relating elements*".[192] In the context of financial provision upon divorce and intestate succession to immoveables, it would appear that two legal systems, at least, have (in their own eyes) legitimate interest in the settlement of the dispute: in divorce, the consistorial forum settling the financial affairs of the separating spouses, and any foreign *forum rei sitae*, are both interested in the case, creating what Currie refers to as a true conflict; and in succession, the *lex*

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[189] *Cf.* Reese (1984), *ibid.*, p183.
[190] Lowenfeld, A F, '*Revolt Against Intellectual Tyranny*' (1985-86) 38 Stanford L. Rev. 1411, 1417.
[191] Von Mehren and Trautman (1965), *ibid.*, p102. *Cf.* Weintraub who states that, "... *a 'functional analysis' of choice-of-law problems describes a process that first focuses on the apparently conflicting domestic rules of two or more jurisdictions having contacts with the parties and with the transaction.*" (1986, *ibid.*, p46)

ultimi domicilii of the deceased and/or the common *lex domicilii* of the beneficiaries, and similarly the foreign *forum rei sitae* both express legitimate interest. In both of these scenarios, it is plausible that if the *forum rei sitae* were to adopt a '*more restrained interpretation*' of its policies (as proposed by Currie), it would become evident that what had arisen was, in fact, only an apparent conflict. In that case, only one state (the consistorial *lex causae*, or the *lex ultimi domicilii*, as appropriate) would insist upon the application of its substantive law.[193] As Weintraub has observed, "*Although two states have domestic rules pointing to different results if applied to interests in realty, analysis of the purposes underlying those domestic rules may reveal that the conflict is apparent rather than real. The purposes underlying one domestic rule may not be advanced by applying that rule to the transaction in issue; the policies of the other domestic rule, on the other hand, may be fully applicable.*"[194] The question must be asked, what are the legitimate interests of a particular legal system, and who or what is to determine what is or is not legitimate? It is suggested that legitimate interests, in this context, could be construed as being those interests which persist even after a state has engaged in a '*more restrained interpretation*' of its

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[192] *Ibid*, p104. *Cf.* Currie, at note 183, *supra*, paragraph (b).

[193] It is interesting to note, under Currie's analysis, that in the event of a true conflict, the *lex fori*'s rules of substantive law ought to prevail. This is significant in view of the potential manipulation of *in personam* jurisdiction so as to evade operation of the rule which confers exclusive jurisdiction on the *forum rei sitae*. Clearly, if *in personam* jurisdiction is exercised, that non-*situs* forum will not be bound, under Currie's analysis, to apply the *lex situs*.

[194] Weintraub, R J, '*An Inquiry into the Utility of Situs as a Concept in Conflicts Analysis*' (1966) 52 Cornell L. Q. 1, 16. The author concludes that, "*A rational solution will turn primarily on interests and policies which the two jurisdictions have in common and on clearly discernible trends and developments in the substantive area involved.*" (*ibid.*, p16) While sounding theoretically appealing, it is submitted that this is completely lacking in pragmatism and would amount, in practice, to little more than judicial whim. *Cf.* Kay's conclusion that, "... *Hancock expects a judge confronting a choice of law problem to analyze the competing laws and policies of both states by conducting detailed research into the domestic cases interpreting the conflicting laws and the legislative history of any relevant domestic statutes. He rejects the notion that judges should rely on a purely abstract estimation of what the underlying policies might reasonably be.*" (*ibid.*, p530) Interest analysis seems to operate most effectively in retrospect, and primarily as an academic tool for evaluating the appropriateness or otherwise of the solution arrived at using the established orthodox rule. It is interesting to note Lowenfeld's observation that, "*Characteristically,* [Hancock] *answers the question by using particular cases – going backwards to explore antecedents and sources, sideways to find actual cases that*

policies. One might reasonably inquire, however, how, and by whom, restraint is to be interpreted, and more fundamentally, *why* a state should even participate in the limitation exercise which Currie proposes.[195] One answer might lie in Hay's notion that the ultimate aim of interest analysis in the context of land transactions should be "... *the accommodation of the concerns of the situs state, the non-situs state, and of the parties in the conflict of laws regarding immoveables.*"[196] The *forum rei sitae* may, in a particular case, be prepared to defer to (or at least to tolerate) the application of *e.g.* the consistorial *lex causae*, so long, at least, as its own rules regarding alienability, title recording and land use are not compromised (for in these matters the interest of the *situs* must be paramount), and its public policy is not otherwise offended. Ultimately, the objective of interest analysis is articulated in Schott and Rembar's declaration that, "... *the state most deeply interested in the issue presented is the one which should determine the resolution of that issue* ..."[197] Whilst it is difficult to dispute the virtue of this sentiment, the tautology of the remark does not assist in the practical context of endeavouring to identify the '*most deeply interested*' state.

Regarding the question of *who* should determine whether a state is legitimately interested in applying its rules to the case in hand, the answer can only be that each state must determine this matter for itself, in the context of its own law, and through its own processes. When a state is performing this task, however, interest analysis protagonists argue that it should adopt an 'extrovert' approach, taking special note of

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illustrate his hypothetical variations, and forwards to see where solutions that satisfy in one case lead in another." (*ibid.*, p1424)

[195] Arguably, in these modern days of harmonisation of laws, legal systems are more conscious of policies, and ethnicity of law, in deciding what is 'non-negotiable'.

[196] Hay (1988), *ibid.*, p110.

[197] Schott & Rembar, '*Choice of Law for Land Transactions*' (1938) 38 Columbia L. Rev. 1049, 1059.

the peculiar foreign elements in the factual scenario, and not adhering too closely to its assessment of its interests in an equivalent domestic scenario. Cook has suggested that the question for the *forum rei sitae* should be, "*Does or should the policy laid down in our law for purely domestic situations apply to this factual situation with its foreign elements?*"[198]

Currie has argued that in the relatively few cases where a specific local policy can be discerned, it turns out to be, "*(1) an understandable reaction against a particularly irksome error of law on the part of the foreign court, or (2) mere pride of local law manifested in unwillingness to bring about a result which could not regularly have been achieved by an action in the local courts in the first instance or (3) a not very clearly articulated apprehension that recognition would inject uncertainties or anomalies into the local system of recording land transactions.*"[199] Only (3) is specific to land transactions and the strength of this as an argument in support of the *lex situs* rule will be considered in Chapter Twelve, *infra*.

At the most basic level, Weintraub has suggested that "... *a functional analysis reveals that the situs qua situs ... has an interest in applying its own law to affect the interests of persons in property only when choice of law will affect the use of the land.*"[200] This moves away from issues of formal validity to one of essential validity, and is in accord with what has hitherto been stated regarding the *situs*' obvious and incontrovertible interest in the uses made of its own land. But, even in such a case,

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[198] Cook, W W, '*The Logical and Legal Bases of the Conflict of Laws*' (1942), p289. Cook goes on to remark that, "... *each conflicts situation must be examined by a court of the situs of the land, to see whether or not the case before it is to be decided in the same way in which a purely domestic situation would be.*" (*ibid.*)

[199] Currie, B, '*Full Faith and Credit to Foreign Land Decrees*' (1954) 21 Uni. of Chi. L. Rev. 620, 634.

[200] Weintraub (1966), *ibid.*, p16.

Weintraub would propose that the *situs* rule should yield "... *to the conflicting rule of another state which has a genuine interest in validating a transaction that the situs would invalidate*"[201] or, alternatively, that the *situs* should succumb to the rule of that state which will have to bear the 'social consequences' of the decision. It has been suggested by *situs* rule antagonists that while the *lex situs* must naturally protect third party interests by means of recording provisions, and regulation of land use through burdens and title conditions,[202] most cases concerning property in fact "... *raise questions about the policies underlying the transaction that brings the parties together. These policies concern succession, family law, contract, or even ... tort, and they far outweigh any interests of the place where the land is located.*"[203] The *lex situs* rule, it is claimed, does not address these policies, or weigh in the balance competing interests, in the manner that an interest or functional analysis approach would endeavour to do.

Proponents of an interest or functional analysis approach perceive that a choice of law rule of property which only and always applies the *lex situs* to property disputes will result, in certain instances, in the application of a law which is largely disinterested in the social problem in respect of which the dispute has arisen, and which the litigation

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[201] Weintraub (1966), *ibid.*, p42. Consider the negative attitude of Scots common law, compared with any more facilitative an approach by the *lex situs*, to the creation of a floating charge over a company's immoveable property, wherever situated. (*Carse v. Coppen* 1951 S.C. 233) Sensitivity to the need for possession in the matter of security rights manifested itself again where Scots law was the *lex situs* in Romalpa cases.

[202] It is evident that in cases concerning the actual use of land, no state other than the *situs* can claim a legitimate interest: "*When one considers the nature of various property rights (obligations between neighbours, riparian rights ... servitudes and the like), it becomes rather clear that much property law is deeply rooted in locally developed legal traditions which for hundreds of years have addressed these issues in the manner most adapted to the locality.*" (Gambaro, A, '*Perspectives on the Codification of the Law of Property: An Overview*' (1997) 5 European Review of Private Law 497, at p497)

[203] Trautman (1986), *ibid.*, p1110.

is intended to resolve.[204] It is their view that, "*A seemingly simple, settled rule results in a growing number of adjudications that are dysfunctional responses to a social problem*"[205], and they perceive that, " ... *a full functional re-analysis of the field emerges through re-focusing on the underlying social problem that the rule was supposed to solve.*"[206]

Whilst this seems relatively persuasive, interest and functional analyses are not without their critics, even (or especially) in the U.S.A. wherein the approaches originated. Stumberg, for instance, has argued that, "*Abstract theories of state power and exaggerated views of local policy are insecure foundations on which to build satisfactory doctrines of conflict of laws.*"[207] The foundations are insecure because the theories are inherently ambiguous; already it has been argued that a judge seeking to apply either of Currie or Hancock's theories would be engaging in a process marred by guesswork and caprice.[208]

While Currie's original analysis, so called *governmental* interest analysis, advocated a consideration merely of the interests of *states*, the concept of 'interests', if it is to be fully effective in distinguishing between the genuine and the spurious application of a

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[204] Contrast the view articulated by Von Mehren and Trautman, to the effect that, "*A community in which a person lives is often concerned with particular substantive issues ... because of its substantive concern for the situation out of which the issue arose.*" (1965, *ibid.*, p162)

[205] Weintraub (1986), *ibid.*, p51.

[206] Weintraub (1986), *ibid.*, p51. When re-analysis is achieved, the author says, "*The unarticulated becomes articulated and jargon becomes comprehensible.*" (*ibid.*) Weintraub comments that in the U.S.A., "*In recent years, judicial treatment of choice-of-law problems concerning personal property has demonstrated a welcome trend towards functional analysis of the problem based on inquiry into policies underlying putatively conflicting domestic rules ... [evidencing] movement toward more thoughtful solutions to personal conflicts problems.*" (*ibid.*, p460)

[207] Stumberg (1942), *ibid.*, p550.

[208] *Cf.* Shapira, A, '*The Interest Approach to Choice of Law*' (1970), at p185: "*The evaluative function which judges will have to undertake for this purpose is indeed of an ad hoc nature.*" There is inevitably scope for what Shapira refers to as '*Khadi justice, or coin flipping*'. (*ibid.*, p176) Reese highlights the dangers in this exercise: "*There is also the danger of ascribing non-existent purposes to a rule, and of*

state's law[209] should be wider-ranging, and not limited to the interests of states.[210] One should recall Savigny's mid-nineteenth century admonition that, "*We must never forget that rules of law are made for the parties, whose real interests it is their purpose impartially to further* ..."[211] Although Hancock's theory of functional analysis, effected through statutory construction, focuses upon wider policies and is less restricted in terms of the factors which it takes into account than is Currie's interest analysis model,[212] even so, it only takes into account the interests of the parties via the indirect means of retrospective policy analysis. It seems, therefore, that the call to interest or functional analysis is half-hearted, failing as it does fully to embrace *all* of the interests which are, in fact, at stake in the dispute.

Professor Reese, witness to American interest analysis in practice, has concluded that courts faced with conflict of laws disputes have "*fared worst when they have disregarded* ... [the] *purposes* [sought to be achieved by potentially applicable rules of the states involved] *and unthinkingly applied some broad choice-of-law rule, such as one calling for application of the law of the situs.*"[213] This is an interesting, though perhaps not surprising, observation by the reporter to the Second Restatement, which generally adopts a more flexible approach to choice of law issues than does the First Restatement under the superintendence of Professor Beale. Nevertheless, it is

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disregarding actual ones, in order to arrive at what is thought to be the best solution of the case on the merits." (1984, *ibid.*, p183)

[209] Lowenfeld suggests that the aim of interest analysis is, "... *to separate the genuine and the spurious – especially in regard to the so-called interest of states.*" (1986, *ibid.*, p1430)

[210] Consider Kegel's view that, "*Regard must be had to the interests of individuals, with special reference to the need to accord equal treatment to foreigners, to the interests of the national society in which the facts materialise, and to the interests of the international society ... It may be asked who this international society is. Does it include emigrants, refugees, guest workers, tourists, nationals working for aliens, persons dispatched abroad, diplomats, artists and playboys*?" (1986, *ibid.*, p14)

[211] Von Savigny, F C, '*A Treatise on the Conflict of Laws*' (1869), p93.

[212] Kay, for example, states that Hancock's method "... *is not a search for a specific legislative intent about the geographical scope of domestic law; it is instead a more comprehensive interpretation of local policy to see whether it rationally encompasses the extrastate facts.*" (1985, *ibid.*, p538)

significant that Professor Reese has questioned the value and accuracy of seeking to ascertain the specific policies upon which rules of law are allegedly anchored.[214] Such attempts, he concludes, "... *are likely to be time-consuming and would often prove unproductive.*"[215]

Ultimately, Professors Currie and Hancock entirely forsake the use of established territorial contacts, favouring instead a 'soft' approach to choice of law. It is submitted that the point which these esteemed Professors were endeavouring to impress upon their conflicts audience was, and is, a wholly valid one, namely that the use of mechanical connecting factors does not always result in application of the most interested or most appropriate law. Nevertheless, it is submitted that the interest and functional analysis protagonists overstate their position. Whilst the interest or policy or purpose underlying a particular rule of the *lex situs* or other system may be important, there is little to commend an approach according to which these elusive and amorphous concepts completely outweigh other significant factors, including, for example, indisputable territorial connections or the justified expectations of the parties

Finally, it is essential to note that whilst, fundamentally, Currie was advocating "*total abstinence*" from conflict rules,[216] he had in mind interstate as opposed to

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[213] Reese (1984), *ibid.*, p184.

[214] "*Worse still, there is the constant danger that a judge, consciously or unconsciously, would let his desire to reach a particular result influence his assessment of a policy's strength or weakness.*" (Reese, (1984), *ibid.*, p186/7) Reese concludes that, "*When all is said and done, Professor Hancock is too much of a simplicist.*" (*ibid.*)

[215] Reese (1984), *ibid.*, p187.

[216] Kegel (1986), *ibid.*, p29/30. Kegel explains that "*Currie formulated these rules as a substitute for the total complex of conflicts rules of the Restatement Second, which he rejected.*" (*ibid.*)

international conflicts.[217] One must ask what, if any, difference this makes.[218] Traditionally, American conflicts scholars did not make any distinction between conflicts rules operating interstate and those operating internationally, [219] but, in 1962, Ehrenzweig advised that, "... *it has become advisable to treat many interstate and international conflicts separately*."[220] Principally, Ehrenzweig viewed the uniform treatment of these different types of conflict problem as impeding the proper development of bespoke interstate conflict rules.[221] International conflict of law problems were, he perceived, far more complex than their interstate equivalents: "*In a New York court, the law of an adjoining Canadian province will receive different treatment than the law of Saudi Arabia. The treatment of international conflicts may not only differ from that of interstate conflicts, but may differ as to each foreign country; yet, insistence on general formulas covering both international and interstate conflicts may have prevented recognition of this fact.*"[222]

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[217] *Cf.* Hancock, whose theorising, according to Lowenfeld, "... *exemplifies an elegantly rational approach to interstate (and interprovincial) controversies.*" (1986, *ibid.*, p1417) Consider, however, Shapira, who remarks that, "*The possible bearing of the differing characteristics of interstate and transnational conflicts situations on the shaping of an appropriate choice-of-law system has been given very limited consideration by American writers.*" (*ibid.*, p41)

[218] *Cf.* Shapira, who poses the question whether, "*the proper resolution of transnational conflicts requires an approach different from that adopted in the interstate sphere.*" (*ibid.*, p34) Consider the remarks of Nadelmann who is of the view that, "*The simultaneous study of conflicts prevention problems on both the international and the interstate level has great advantages. Experience on one level can be of value to the other. Contrary to a widespread belief, the internal American problem is not incomparable to others.*" (Nadelmann, K H, '*Marginal Remarks on the New Trends in American Conflicts Law*' (1963) 28 Law and Contemporary Problems 860, 868)

[219] Consider Ehrenzweig, A A, '*A Treatise on the Conflict of Laws*' (1962), p16, at paragraph 6: "*Traditionally ... American texts ... have treated interchangeably cases and principles relating to international and to interstate problems.*"

[220] Ehrenzweig, *ibid.*

[221] "*Full Faith and Credit between the state of the Union would and should grow if finally divorced from the precarious concept of 'comity' between foreign nations.*" (Ehrenzweig, *ibid.*, p17, paragraph 6.1)

[222] Ehrenzweig, *ibid.*, p18/19, paragraph 6.2. For example, the rules on proof of 'foreign' law differ according to whether the 'foreign' law is that of a disconnected foreign state, or merely that of a sister federal state: "*American courts ... will usually require the law of a foreign country (but no longer that of a sister state) to be pleaded and proved.*" (*ibid.*, p19, paragraph 6.2)

Gradually, in the USA, there has been a distancing between the conflict rules governing interstate problems and those governing international ones.[223] It is appropriate then to inquire whether rules designed primarily for use in an interstate context can, or should, be extended to the international sphere.

Essentially, interest analysis is at variance with the jurisdiction-selecting tradition of Scottish and English conflicts methodology. Jurisdiction-selection disregards the substance of the *lex causae* (and *a fortiori*, the purpose or policies underlying, or inherent in, that law), pending selection and application of the applicable law. In contrast, scrutiny of the substantive content of the potentially applicable laws (and implicit in that notion, the purpose or policies behind those laws) is the fulcrum upon which rule-selection depends.[224]

Shapira has identified six factors regarding which interstate and international conflict problems differ, and has argued that these constitute legitimate reasons why rules and techniques developed to help resolve interstate conflicts issues should not be deployed in the resolution of international disputes.[225] The first factor is the impact of

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[223] To a large extent this is due to the development of rules specifically dealing with the different types of conflict issues which arise, respectively, interstate and internationally. Typically, interstate problems concern wrongful death statutes, the operation of statutes of limitations or workmen's compensation. On the other hand, "... *problems relating to currency fluctuations, expropriations or litigation concerning aliens are virtually limited to international transactions. So are those arising in bankruptcy, antitrust or admiralty, where interstate conflicts are eliminated by a national law.*" (Ehrenzweig, *ibid.*, p18, paragraph 6.1) *Cf.* Shapira, *ibid.*, p40. Consider also Kahn Freund, O, "*Book Review, XXth Century Comparative and Conflicts Law*" (1962) 76 Harv. L. Rev. 223, at p228: "...[T]*he Atlantic is still very much wider than the English Channel. The reason is only to a small extent the prevalence of interstate over international conflicts situations in the United States ...*"

[224] The difference between the two approaches is ultimately a matter of timing; while rule-selection appraises the content of the potentially applicable laws at the point of choosing the *lex causae*, the European jurisdiction-selecting orthodoxy prefers conflict rules which "*contain a priori value judgments.*" (Hay, P, '*Flexibility versus Predictability and Uniformity in Choice of Law*' (1991) I *Receuil des Cours* 285, 346)

[225] Shapira, *ibid.*, Chapter II, pp34-44. Shapira sets out to prove that, "*While multistate and multinational conflicts instances have much in common, they are at the same time distinguishable in several important aspects.*" (*ibid.*, p43) See also Du Bois, "*The Significance in Conflict of Laws of the*

constitutional mandates. The sister states of the U.S.A. are bound by the constitutional requirements of due process and the Full Faith and Credit clause, whereas outwith the federation there is a lack of overarching, supranational legal control.[226] Secondly, Shapira cites mutuality, reciprocity and sense of unity. This is related, in part, to the first factor. In Shapira's view, "*There is an undeniable gap between the intensity of socio-political affililation within a federal union and the corresponding sense of mutuality in the international arena.*"[227] The political, economic and cultural ties which bind the states of a federal union are inevitably stronger than those which may exist between or among unrelated nations, and it is to be expected that sister-states within a federation will be more accommodating (whether *ex lege* or *ex comitate*) of the laws of its confrères.[228] The limited sense of mutuality which exists between nation states does not compel the full and fair-minded consideration of the interests and policies which underlie another nation's rules of law, in the same way that the constitutionally-imposed standards of collaboration and co-operation bind the states of the U.S.A.[229]

The third factor identified by Shapira is the extent of substantive diversity among different legal systems and their respective laws. Professor Currie's predilection for the application of the *lex fori* in the event of a true conflict may already be seen as

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Distinction between Interstate and International Transactions." (1933) 17 Minn. L. Rev. 361; Kahn Freund, O, "*Book Review, XXth Century Comparative and Conflicts Law*" (1962) 76 Harv. L. Rev. 223.

[226] Although consider now the position in Europe, and the obligations imposed upon European sister states by virtue of the Treaty of Amsterdam (entry into force 1 May 1999). Article 65 of Title IV of the EC Treaty now forms the basis for new Community-wide international private law initiatives. See Beaumont, P, (1998) 48 I.C.L.Q. 225-9.

[227] Shapira, *ibid.*, p35.

[228] Predicting the advances in a united Europe, however, Shapira admitted that, "*This profound difference between interstate and international sense of community may lose ground with the progress of currently popular aspirations for some measure of international integration, whether economically-oriented (as in Western Europe) or politically-ideologically based (as in Eastern Europe) or otherwise.*" (*ibid.*, p36)

indicative of an unwarranted 'homing tendency'.[230] This tendency will doubtless be exacerbated in the event that the two or more laws being juxtaposed are fundamentally different in substance. The inference is that the laws of two sister-states are less likely to differ in substance than those of two entirely separate legal systems, and that if a Scottish or English court engaging in interest analysis were faced with a choice between determining and furthering the purposes of its own law, or those of an unrelated third state, it would, more than likely, prefer its own rule. 'Policies' within the constituent parts of one political unit may be easier to discern.[231]

Shapira's fourth and fifth factors are in some way related to the third, concerning as they do the practical possibility of forum-shopping (which he perceives to be more prevalent in the interstate than the international context[232]), and the feasibility of substantive law unification. These factors, however, are less pertinent to the question of whether an interest analysis approach should be applied to international disputes.

Finally, Shapira makes mention of the frequency and subject-matter of conflict-of-laws litigation, being of the view that, "*As a practical matter, the choice-of-law problem is far more recurrent in the interstate than in the international sphere.*"[233] This is related to the American theorists' general notion that from a 'soft' flexible

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[229] Shapira suggests that, "... *the adjudication of interstate cases can be more readily entrusted to a comparatively flexible outline of guiding principles administered by the judiciary.*" (*ibid.*, p36)

[230] *Cf.* Kegel, who claims that "[Currie] *nationalizes private international law by favouring the substantive rules of private law of the forum.*" (1986, *ibid.*, p32)

[231] *E.g.* Where the same, or different, legislative action or common law course has followed an active, *nationwide* debate (*e.g.* after 'technical' discussion, Parts III and IV of the Matrimonial and Family Proceedings Act 1984 – note 65, *et seq*, *supra*).

[232] *Cf.* Ehrenzweig, who remarks that, "*Interstate conflicts rules, whether or not adopted under constitutional compulsion, are largely dictated by the need of curtailing any forum shopping for the more advantageous law ... But this consideration has little meaning in international conflicts cases ...*" (*ibid.*, p20, paragraph 2) Forum-shopping in the international arena, however, is a popular pastime, but perhaps more from a (size of) remedy or enforcement perspective, than from conscious choice of law forecasting.

approach to choice of law there will, in time, emerge a body of more detailed conflicts rules and principles, with the result that implementation of the interest analysis process would gradually become less arduous.[234] The relative scarcity of international choice of law litigation (certainly in Scotland, and likewise in England), would mean, however, that this evolutionary process, if at all evident, would be extremely slow.

In summary, it is submitted that although interest and functional analysis approaches may be of some use in an interstate context, it is extremely unlikely that their reception into international conflicts usage would be successful or constructive.

The approaches may be utilised to reveal some inadequacies of the *situs* rule[235] – particularly regarding the transfer of property upon divorce, and intestate succession to immoveable property), but it is submitted that they would not form suitable foundations upon which to construct, in Scotland or in England, a re-modelled rule of choice of law in property.

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[233] Shapira, *ibid.*, p40.

[234] *Cf.* Reese's view of the Second Restatement approach to choice of law, *viz.*: "*I believe that one ultimate goal, be it ever so distant, should be the development of hard-and-fast rules of choice of law ... I believe that in the development of these rules consideration should be given to the basic objectives of choice of law, to the relevant local law rules of the potentially interested states ...*" (Reese, W L M, (1976) II *Receuil des Cours* 44, 65) Consider too Kegel's belief that, "*With growing experience ... Currie's doctrine of governmental interests could lead to the development of rules.*" (1986, *ibid.*, p32)

[235] It is interesting to note Kay's remark concerning Professors Hancock and Currie's antipathy towards mechanical connecting factors generally, *viz.*, "*Both men were heirs to the critical attack on the traditional approach by Professor Cook and others: an attack that had exposed the arbitrary and irrational nature of the traditional theory.*" (1985, *ibid.*, p531)

Chapter Eight

The Transfer of Corporeal Moveable Property

In this chapter, attention will be focused not on the *general* transfer of moveable property which might occur upon the event of death, bankruptcy or marriage,[1] but rather upon *particular* transfers of such property by means of gift, sale, mortgage or otherwise.[2] In particular, attention will be paid to corporeal moveable property, comprising "*all things having a physical corpus capable of actual possession.*"[3] In the normal run of events, title to corporeal moveable objects is evidenced not by formal written title (although motor vehicles, aircraft, ships and other such vessels will generally be accompanied by registration documents akin to documents of title), but merely by right. Hence, the law which determines the acquisition or transfer of rights in such property is not always immediately apparent.

The authors of Cheshire & North have stated that, "*This is one of the most intractable topics in English private international law, because most of the few relevant authorities are antiquated and they do not reveal with any certainty what principles govern the subject as a whole. A common but fallacious assumption is that all problems must be referred to one single law. In the course of time, varied views on what this is have been advanced. The law of the situs of the property, the law of the*

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[1] Events which Carter describes as "*occasions of legal trauma.*" (Carter, P B, '*Decisions of British Courts During 1981*' (1981) 52 B.Y.B.I.L. 329, 330)

[2] Consider Hellendall, F, '*The Characterization of Proprietary Rights to Tangible Moveables in the Conflict of Laws*' (1941) 15 Tulane L. Rev. 374, at p376: "*The question whether a claim relating to a tangible moveable is based on an individual transaction or upon a general assignment has arisen before the English and American courts ... only in relation to the validity of donationes mortis causa.*" *E.g. In re Korvine's Trust, Levashoff v. Block* [1921] 1 Ch. 343; and *In re Craven's Estate, Lloyds Bank v. Cockburn (No.1)* [1937] 1 Ch. 423.

[3] Walker, D M, '*Principles of Scottish Private Law*' (3rd edition), Volume 3, p367.

place of the parties' domicil or of the transferor, the law of the place of acting, the 'proper law of the transfer' - each of these has had its advocates. The assumption, however, is untenable. It represents an oversimplification of the position, because it is based on the fallacy that the possible questions arising out of a transfer of moveables all fall into the same category and are all of the same juridical nature."[4]

While selection of the appropriate conflict rule should be based upon considerations of justice, and the reasonable expectations and interests of those parties involved in a transfer of property, in this area of law, considerations of practical convenience are particularly significant: "*When called upon to solve a conflict case, a court will not follow a purely logical, but a practical process of reasoning.*"[5]

A more fundamental question (which draws into focus especially when third parties are introduced into the ownership equation) concerns the validity of the transfer itself: by which law should the transfer of moveable property be governed? As soon as a dispute has been characterised as one of property, the forum must proceed to the next stage of inquiry, namely to choice of law, and selection of the apposite connecting factor. Over the course of time, various connecting factors have been periodically favoured.

The *lex domicilii* theory

The connecting factor traditionally applied is based upon the brocard "*mobilia sequuntur personam*"[6] Lord Kames argued that "*although the local situation is*

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[4] Cheshire & North, '*Private International Law*' (1999), p938.
[5] Lalive, P A, '*The Transfer of Chattels in the Conflict of Laws*' (1955), p32.
[6] '*Moveables follow the person*'. Otherwise, "*mobilia ossibus inhaerent.*" Consider *Schmidt v. Perkins* (1907) 74 N.J.L. 785 (*per* Stumberg, G W, '*Conflicts – American Casebook Series*' (1956), p377), *per*

essential to a moveable no less than to land ... by their intimate connection with the proprietor, the law of his country ought to prevail."[7] Professor Anton has suggested that Erskine, likewise, favoured this principle, although Anton has advised that the passage in which Erskine refers to this issue[8] is "*open to various constructions.*"[9]

The *lex domicilii* rule was first propounded by the Italian statutists. Some (*e.g.* Paul Voet and Dumoulin) thought that laws concerning moveables were real (*statuta realia*), but that by fiction of law, all moveables were supposed to be situated at the place of the domicile of the owner.[10] Others, however, (*e.g.* D'Argentré) believed that laws dealing with moveables were *statuta personalia* because moveables, in the contemplation of law, have no *situs*.[11]

Since it was postulated that moveables are accessories of the person, it was supposed that they could not properly be associated with the country of their actual physical

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Swayze, J.: "*The maxim 'mobilia personam sequuntur'* [sic] *states a mere fiction of law which it is sometimes necessary to apply in order to do justice, but it ought not to be extended beyond that necessity.*"

[7] Kames, Equity III.8.3.

[8] Erskine, Institute III.2.40.: "... *though obligations to convey, if they be perfected secundum legem domicilii, are binding here; yet conveyances themselves of subjects within Scotland, are not always effectual, if they are not executed according to the solemnities of our law ... But in the case of a moveable subject lying in Scotland, the deed of transmission, if perfected according to the lex domicilii, is effectual to carry the property; for moveables have no permanent situation, but may, at the pleasure of the proprietor, be brought from any other place to his own domicil, and therefore are considered as lying in that territory where the deed is signed, according to the rule, Mobilia sequuntur personam.*"

[9] Anton, A E, '*Private International Law*' 1st edition (1967), p400.

[10] Venturini, G C, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 21 - Property*' (1976), at p3: "*The doctrine of the statutists distinguished between immoveables ... and moveables which ... were governed by the personal law of the owner, for since the latter were of little importance they could be exempted from the operation of territorial sovereignty.*" *Cf.* Graveson, R H, '*Private International Law*' (1974), *ibid.*, p456.

[11] Zaphiriou, G A, '*The Transfer of Chattels in Private International Law: A Comparative Study*' (1956), p17. Consider, however, Story: "*The probability is, that the doctrine itself had not its origin in any distinction between real laws or personal laws, or in any fictitious annexation of them to the person of the owner, or in their incapacity to have a fixed situs; but in the enlarged policy, growing out of their transitory nature and the general convenience of nations.*" (Story, J, '*Commentaries on the Conflict of Laws*', p552)

location.[12] Whilst it might reasonably be argued that the *mobilia* principle is a sensible rule as regards general transfers of corporeal moveables on death, bankruptcy or marriage (so as to ensure a uniform devolution of the *de cuius'* estate), it does not necessarily follow that the same principle should be applied to particular transfers of isolated or disconnected corporeal moveables: "*It may have been true in early times that articles of personal estate were few and were usually located at the owner's domicil. It is entirely untrue in modern commerce.*"[13] In spite of this, traces of the principle, as promulgated by medieval Italian statutists and widely accepted on the Continent, in England and America, can be identified in a long series of cases, as appropriate to determine the validity of a transfer of corporeal moveables.

Thus, in the eighteenth century case of *Sill v. Worswick*[14] Lord Loughborough opined that "*It is a clear proposition ... in every country in the world where law has the semblance of science ... that personal property has no locality; the meaning of that is, not that personal property has no visible locality, but it is subject to that law which governs the person of the owner. With respect to the transmission of it, either by succession or by the act of a third party, it follows the law of the person.*" This view was reiterated in later cases such as *Sommerville v. Sommerville,*[15] *Re Ewing,*[16] *Dulaney v. Merry*[17] and *Republica de Guatemala v. Nunez.*[18] Likewise, Lord Watson,

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[12] Consider Westlake, J, '*A Treatise on Private International Law*' (1925), at p189: "*The law as to individual moveables, as well as that on entire moveable fortunes, has been widely considered to depend on the person of their owner, on account of a special connection supposed to exist between them and him.*"

[13] Morris, J H C, '*The Transfer of Chattels in the Conflict of Laws*' (1945) XXII B.Y.I.L. 232, at p232.

[14] (1791) 1 H.B.L. 690.

[15] (1801) 5 Ves. Jun.750.

[16] (1830) 1 G & J 151.

[17] [1901] 1 Q.B. 536. In the later case of *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, at p688, Scrutton, LJ. observed that Channel, J. in *Dulaney v. Merry*, "*had not found any clear case of a transfer* [of personal property], *good according to the law of the domicile of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate.*" Consider also *Provincial Treasurer of Alberta v. Kerr* [1933] A.C. 710, *per* Lord Thankerton.

in *North Western Bank Limited v. Poynter, Son and Macdonalds*,[19] opined (rather incautiously) that, in a conflict between English and Scots law, English law should apply, since both the pledgor and the pledgee were English domiciliaries.[20] In fact, the decision in this case ultimately rested upon different reasoning, and the weight of the case as authority in support of the *lex domicilii* rule must be doubted since the two laws which could have been applied to determine the pledgee's title (English and Scots law), were not, in fact, divergent. Lord Watson revisited the point in *Inglis v. Robertson & Baxter,*[21] and adjudged that if a transfer is valid according to the *lex loci actus* and according to the *lex domicilii*, but void according to the *lex situs* of the chattel at the time of the alleged transfer, then the *lex situs* is applicable.[22]

In the United States, Story found justification for the rule in "*its simplicity, its convenience and its enlarged policy.*"[23] Since the rule was endorsed by scholars such as Story, it was common judicial practice to refrain from questioning its application. Many courts merely stated that the rule was "*self-evident*" or "*in the nature of things*", without attempting to justify it on practical or theoretical grounds.[24]

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[18] [1927] 1K.B. 669.
[19] (1894) 22 R. (H.L.) 1.
[20] "*When a moveable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is prima facie one of English law, and ought to be so treated by the Court in Scotland.*" (*ibid.*, p12, *per* Lord Watson)
[21] (1898) 25 R. (H.L.) 70.
[22] *Inglis v. Robertson & Baxter* (1898) 25 R. (H.L.) 70, at p74, *per* Lord Watson.
[23] Story, *ibid.*, Chapter IX, paragraph 370. Story explained that, "... *the general doctrine held by nearly all foreign jurists being, that the right and disposition of moveables is to be governed by the law of the domicile of the owner, and not by the law of their local situation ... by a fiction of law all moveables are supposed to be in the place of the domicile of the owner ... moveables have in contemplation of law no situs and are attached to the person of the owner wherever he is.*" (p549) The rule rested upon the concept of a fictional *situs*: "... *as moveables have no fixed and perpetual situs as lands have, it is necessary that their situs should depend upon the pleasure of the owner, and that they have the very situs which he wishes, when they have that of his own domicile.*" (p550) *Situs* at the owner's pleasure, while attractive in some respects, would give rise to difficulties concerning stolen property. The concept of a notional *situs*, being where the 'owner' wishes the goods to be, was considered a step too far in *Winkworth v. Christie, Manson & Woods Ltd.* [1986] 1 Ch. 496.
[24] *Freke v. Carbery* (1873) L.R. 16 Eq. 461, 466 (Lalive, *ibid.*, p42). Graveson makes the comment that this theory was "*fortified*" by Story. (*ibid.*, p456) Story himself remarked that, "[The doctrine] ... *has so general a sanction among all civilized nations, that it may now be treated as part of the jus*

It has been pointed out,[25] however, that Story adopted the view that where the *lex domicilii* did not require delivery in order effectively to pass property, but the *lex situs* did, in fact, require delivery, then the *lex situs* rule prevailed:[26] "*the laws of the owner's domicile should in all cases determine the validity of every transfer, alienation or disposition made by the owner, whether it be inter vivos or be post mortem, and this is regularly true unless there is some positive or customary law of the country where they are situate, providing for special cases (as is sometimes done) or from the nature of the particular property it has a necessary implied locality.*" Thus, it has been remarked that "*the lex domicilii theory was seriously qualified by Story.*"[27] Such an exception amounts to an almost unequivocal submission to the *lex situs* theory. In addition, for Story, the *lex domicilii* rule does not appear to have denied the owner of property the opportunity to elect to transfer it in accordance with some other system of law[28] (*i.e.* Story appears to have conceded a degree of party autonomy).

Other arguments in favour of applying the *lex domicilii* are the public law argument, (that the sovereignty of a state over its nationals abroad extends also to their moveable property, which is considered to be an adjunct of the person), and also the reasonable expectations argument (that a transferor cannot be expected to reckon with laws other

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gentium." (*ibid.*, p553) "*The same doctrine has been constantly maintained both in England and America, with unbroken confidence and general unanimity ... Foreign jurists are not less expressive in its favour.*" (*ibid..*, p555) Venturini has also advised that the theory was adopted in some continental codifications of the law. (*ibid.*, p3)

[25] Zaphiriou, *ibid.*, p21.

[26] Story, 1st edition, p315, and 8th edition, p543.

[27] Zaphiriou, *ibid.*, p21.

[28] (1834), *ibid.*, paragraphs 380, 383, and 384.

than his own[29] and he should, accordingly, be entitled to transfer property abroad with some degree of knowledge and certainty, thereby promoting – perhaps – international trade).[30] The former argument fails wholly to convince, for the reason that doubt will linger as to which (and whose) personal law should, in fact, apply.[31] Although it was generally assumed that the *mobilia* rule referred to domicile, and not to nationality, or to the more recently favoured factor of habitual residence, it was nowhere clearly stated that the domicile in question was that of the transferor, and not that of the transferee, or, in cases of transfer by a thief, that of the original owner.

In any event, it is illogical to argue that the *lex domicilii* of the owner should apply when the very point in dispute is "*Who* is the owner?". Were the rule to be adopted today, further refinements would be necessary, perhaps to the effect that the apposite *lex domicilii* would be that of the putative owner, giving rise to the usual 'time' problem.[32] However, the disadvantages of this are clear. Were a title dispute to arise

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[29] *Cf. Dinwoodie's Executrix v. Carruthers' Executor* (1895) 23 R. 234, *per* Lord Traynor, at p239: "... *in any question between the depositors themselves, or their representatives, Scotch law must govern, seeing that the depositors are both Scotch, that they were dealing with moveable estate situated in Scotland and that they cannot be presumed to have transacted with each other on any footing than that their respective rights should be determined by the only law with which they were supposed to be acquainted, that is, the law of their own country.*"

[30] Consider too Westlake, *ibid.*, at p191/2: "[The rule] *is ... a protection, not against the justice of the country to which the proprietor sends his ... merchandise, but against the possible failure of that justice ... No doubt the interests of commerce require that great freedom of disposition should be allowed to proprietors, and this consideration speaks in favour of an alienation made in the manner prescribed by the law of the alienor's domicile.*" Contrast the view of Wolff, M, '*Private International Law*' (1950), at p510: "*The owner's domicile ... may not only change any day, but it is frequently unknown to purchasers or creditors who are not in a position to ascertain it ... they cannot be expected to delve into the intricacies of foreign law. Thus the domicile principles appears calculated to hamper commercial intercourse.*" Also Graveson: "... *the chief defect of the domicile principle in this connection is its complete unpredictability in a world where men of commerce call, not always with success, for certainty. For not only is it difficult for A to be sure of B's domicile, and then to ascertain the legal effect under B's domiciliary law of the proposed transaction: it may be impossible for A himself by the light of nature to know his own domicile.*" (*ibid.*, p458) *Cf.* Zaphiriou, *ibid.*, p24.

[31] Consider Graveson: "*The advocates of the doctrine ... supported it on grounds of its simplicity and convenience ... it is a single ascertainable law to govern transactions taking place in countries ... in respect of moveables whose situation may not always be ascertainable ... But, however desirable it* is *to have a single system of law to govern any situation, it is essential that such a system should be easily ascertainable, which can rarely be said of domicile ...*" (*ibid.*, p456/7)

[32] Who was 'first' owner? Is the 'first' owner the putative owner?

between persons of different domiciles, the *lex domicilii* theory clearly fails to furnish a definitive guide to the applicable law. Even if the parties shared a common domicile, it is reasonable to doubt the value of applying the law of that country to determine ownership if the property is situated in a different country, particularly if it is in one, the law of which applies opposing principles of substantive property law.[33] Beale, somewhat scathingly, has concluded that the *mobilia* principle "... *proved to be a refuge of a judge in a hurry, confronted with a difficult situation.*"[34]

To permit either party to invoke the law of his domicile in respect of a dispute concerning the transfer of moveable property is commercially impracticable and inconclusive.[35] In a legal community where, not infrequently, domestic and international jurists alike are unable to reach agreement as to the definition, or determination, of an individual's domicile (both as regards the circumstances to be weighed in the balance, and the ultimate factual conclusion), it would be preposterous to expect the layman, with little or no knowledge of the legal vernacular, to transact in reliance upon such a concept. There is little, if any, rationale for introducing into the world of commerce the intricacies and convolutions inherent in determining domicile. However, the fact that an object of property had been (permanently) housed at a particular party's residence or domicile in country A, prior to theft and removal of the object to country B, may be relevant in ascertaining the law with which the question of ownership is most closely connected.[36]

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[33] As Graveson has stated, the *lex causae* should be "*one which has a real and substantial connection with the subject matter of the assignment.*" (*ibid.*, p457)
[34] Beale, J H, '*The Conflict of Laws*' Volume II, p978.
[35] Graveson, *ibid.*, at p458: "*While the difficulties inherent in the doctrine of domicile have to be accepted in the more important spheres of personal status and universal assignments, the application of domicile in the less vital matters of individual or particular assignments represents an unnecessary complication of law.*"
[36] See Chapter Fourteen, *infra* – 'The *Lex Proprietatis*'.

As regards the reasonable expectations argument, it must be doubted that transacting parties would have in mind the *lex domicilii* of either party at the time of transacting, particularly when the transaction is concluded outwith the jurisdiction of either party's domicile. Any expectations as to personal law are more likely, it is submitted, to pertain to *lex patriae*, rather than to *lex domicilii*. In any event, the 'reasonable expectations' of parties will differ according to status, *qua* thief, fence, *mala fides* purchaser, *bona fides* purchaser, or original owner; it is questionable whether nefarious expectations should ever be confirmed.

Although the significance of the *lex domicilii* should not be underestimated in the field of family law, its aptness to commercial matters should not be exaggerated. If a rule is implemented beyond the limits of its logical application, then it becomes necessary, in order to escape the ludicrous consequences of its implementation, "*to resort to logical subterfuges, to introduce 'exceptions' in circumstances where the alleged connection between the goods and the owner is said to be severed, or simply to make an extensive use of the notion of public policy.*"[37] Overactive use of the public policy escape route would be detrimental and would detract from the cosmopolitan quality which should percolate through sophisticated systems of international private law.

For a time, the *lex domicilii* rule was applied beyond what was judicious. Now, however, its application is restricted to the boundaries set by Lord Devlin: "[the] *maxim mobilia sequuntur personam is the exception rather than the rule, and is*

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[37] Lalive, *ibid.*, p37.

probably confined to certain special classes of general assignments, such as marriage settlements and devolutions on death and bankruptcy."[38] In the past, the rule was applied too vigorously and a reaction against its exclusive character was reasonably to be expected.[39] It is appropriate, therefore, to consider those connecting factors which emerged during the recoil from the *mobilia* principle.

The *lex loci actus* theory

A second connecting factor which previously held sway was the *lex loci actus*, the law of the country where the transaction took place: "*The claim of the lex actus* [in the sense of *lex loci actus*] *to be the governing law of any international transaction has not only the rational appeal of simplicity, but a respectable tradition in both the common law and civil law systems.*"[40]

In *Alcock v. Smith*,[41] a bill of exchange, payable to the order of merchants in Norway, was indorsed in Norway and delivered by the payees to X. X delivered it to S, an agent of the plaintiff. While with S, it was seised by J, one of the plaintiff's creditors, in satisfaction of a debt. Later, in Norway, it was sold by public auction to M, before being transferred, in Sweden, to K and sent to Smith for collection. It was held that Swedish law, as the law of the place of the transaction governed the transfer, with the effect that the title validly acquired in Sweden was duly recognised in England. Kay

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[38] *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1QB 248, *per* Lord Devlin, at p257. *Cf. Provincial Treasurer of Alberta v. Kerr* [1933] A.C. 710, at p721, where the Privy Council stated that *mobilia sequuntur personam* means, not that moveables are deemed to be situated where their owner is domiciled, but simply that "*their devolution on his death is governed by his personal law.*"

[39] *Cf.* Carnahan, who said of the rule that, "... *its basis upon medieval conditions has long been outgrown by circumstances of travel and circumstances of ownership of property in more than one state.*" (Carnahan, W, '*Tangible Property and The Conflict of Laws*' (1935) 2 Uni. of Chi. L. Rev. 345, 346); and Graveson, *ibid.*, at p456: "*The doctrine has long been abandoned in America ... and no longer represents English law of general application.*"

[40] Graveson, *ibid.*, p460.

[41] [1892] 1 Ch. (C.A.) 238.

LJ. stated that, "*As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicil of the owner, but upon the law of the country in which the transfer takes place.*"[42] A similar situation arose in *Embiricos v. Anglo-Austrian Bank.*[43] In *North Western Bank Ltd v. Poynter, Son and Macdonalds,*[44] where the merchandise in question was afloat at the time of the transfer, and accordingly had no *situs*, Lord Chancellor Herschell noted that if there had been a difference between the provisions of the two potentially applicable laws, the law of England would have been applied because the contracting parties were both domiciled there and the transaction had taken place there: "*A transaction between a merchant in England and a bank in England and the rights which arise out of that transaction, cannot ... fall to be determined by anything but the law of England.*"[45] A primary objection to the *lex loci* theory, however, is that in most of the cases in which reference to it has been made, that law has coincided with the *lex situs.*[46] This must surely detract from the authority of the *lex loci actus, per se*. Consider, however, the dictum of Scrutton, LJ., in *Republica de Guatemala v. Nunez:*[47] "*On the question of the law applicable to an assignment of personal property invalid by the law of the country where the*

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[42] *Ibid.*, p267.

[43] [1905] 1K.B. 677. Vaughan Williams, LJ. remarked, at p683, that, "... [the] *effect of the decision in Alcock v. Smith that the rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque ... is right.*" Further, Romer, LJ., at p685: "*The plaintiffs contend that ... bills of exchange and cheques are wholly outside the general principle of private international law which gives effect to a title acquired by transfer abroad by the law of the country in which the transfer took place. I think that contention is erroneous.*" Vaughan Williams, LJ., opined, at p684, that, "... *the indorsement of a bill in a foreign country, valid under the foreign law, but invalid under English law, would be effectual to give the indorsee a good title to the bill as against the drawer or acceptor.*"

[44] (1894) 22 R. (H.L.) 1; [1895] A.C. 56 (H.L.) 66.

[45] (1894) 22 R. (H.L.) 1, 6. Note also the dissenting voice of Lord Young in *Robertson & Baxter v. Inglis* (1897) 24 R. 758, at p805: "*By what law, then, is the dispute regarding Inglis' right arising out of the transaction in question to be determined? I think clearly by the law of England, the country where it was made between two English merchants and who presumably – I should say certainly – had regard only to that law in expressing their intentions and doing what they knew or were advised was necessary to their accomplishment.*"

[46] *Macmillian Inc v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387, *per* Staughton, LJ., at p399: "... *the law of the place of the transaction (lex loci actus), in the case of the sale of a chattel, will almost invariably be the same as the law of the place where the chattel is (lex situs).*"

[47] [1927] 1 K.B. 669.

transaction takes place, ... but valid by the law of the country where the property is, or is deemed to be, situate, the English authorities are scanty and unsatisfactory ... Conversely, I have not been able to find, nor could counsel refer me to, any clear statement of the principles governing the question whether a transaction in personal property, as distinct from land, invalid by the law of the country where the transaction takes place, may be valid by the place where the property is situate. Mr Foote[48] *points out that in most of the judgements where general statements are made the transaction took place in the country where the property was, and a conflict between the lex loci actus and the lex loci rei sitae was not dealt with."*[49]

Although the *lex loci actus* may have some valid claim to determine matters of formal validity,[50] its wider application could produce incongruous results. The fact that a transaction is effected in a particular country is no reason for submitting the proprietary consequences of that transaction to that local law rule. In *Carse v. Coppen*, Lord President Cooper commented that "*in this matter, the lex* [*loci*] *actus does not impress me as of significance.*"[51] In those pre-1961 days,[52] he opined that "*It would never do to allow Scottish companies to create unrestricted floating charges over English assets by the simple expedient of sending two directors and the secretary across the border to sign the relative documents.*"[53]

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[48] '*Private International Law*', 5th edition, p293.
[49] [1927] 1 K.B. 669, at p688/9. Scrutton, LJ.'s remarks must be considered to be *obiter* since this case concerned the assignment of a chose in action, not a chose in possession.
[50] Consider Erskine III.II.40: "*All personal obligations or contracts entered into according to the law of the place where they are signed, or, as it is expressed in the Roman law, secundum legem domicilii, vel loci contractus, are deemed effectual, when they come to receive execution in Scotland, as if they had been perfected in the Scottish form.*"
[51] 1951 S.C. 233, 242.
[52] See now the Companies (Floating Charges) (Scotland) Act 1961, as amended by the Companies (Floating Charges and Receivers) (Scotland) Act 1972, in terms of which a Scottish company can grant a floating charge over its assets.
[53] *Ibid..*, p242. Note, however, the dissenting opinion of Lord Keith: "*The English courts, if the matter became litigious before them, would presumably satisfy themselves that the deed was properly executed*

Furthermore, the *locus actus* may be entirely adventitious,[54] or worse still, indeterminate, especially in cases where the constituent elements of the transaction (*e.g.* the offer to purchase, the corresponding acceptance, inspection and delivery of the goods) occur in different countries.[55] Where there is conflict between or among those potential *leges actus*, regarding an essential element of the negotiation or transacting, it is a legitimate objection to the *lex loci actus* theory that it lacks a clear rule as to which *locus actus* should take precedence.[56]

As regards acquisition of rights *in rem* by virtue of prescription or other implied operation of law, the *lex loci* theory is entirely futile since in such cases "*there is no lex* [*loci*] *actus which could possibly be consulted.*"[57] In spite of this, however, Graveson has declared that "*It is not unreasonable to suppose that the validity of an act should be governed by the law of the place where it is performed, for reasonable men expect to comply with the law of any country in which they carry out their transactions.*"[58] The veracity of Graveson's statement depends upon what the author intended by 'performance'. Performance could refer either to execution of the act

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according to the law of Scotland (the lex loci actus) and give the creditor a good title, but the effect of the deed would be judged by the law of England (the lex loci rei sitae). Once objection to the formal validity of the deed constituting the security, or to the title or capacity of the granter to the deed are overcome ... the effect of the security over foreign assets falls, in my opinion, to be determined by the lex loci rei sitae." (1951 S.L.T 145, at p151)

[54] Zaphiriou, *ibid.*, pp29/30.

[55] *Cf. Benaim v. Debono* [1924] A.C. 514; *Entores Limited v. Miles Far East Corporation* [1955] 2 Q.B. 327; *Brinkibon Limited v. Stahag Stahl und Stahlwarenhandelgesellschaft GmbH* [1982] 1 All E.R. 293.

[56] Graveson explains that "*The chief objection to lex* [*loci*] *actus as a theory would appear to lie in the likelihood of conflict between various leges* [*loci*] *actus in respect of several transactions carried out by different parties in relation to the same movables.*" (*ibid.*, p461) See note 60 *infra*, regarding inexact use of the expressions '*lex actus*' and '*lex loci actus*'.

[57] Wolff, *ibid.*, p518. Wolff drew attention, "*to the obvious fact that the lex loci actus doctrine cannot present a solution to questions not connected with human acts.*" Also Graveson, *ibid.*, p460; and Schmitthoff, C, '*English Conflict of Laws*' (3rd edition), p193. *Cf.* the significance of the '*locus regit actum*' principle and operation of a particular form of prescription in the context of choice of law rules of marriage: *Dysart Peerage Case* (1881) 6 App. Cas. 489.

which is characteristic of the transaction (*i.e.* the essential element of performance, rather than any reciprocal pecuniary obligation),[59] or merely to the place where the technicalities of agreement were struck. If the latter interpretation were intended, then it is submitted that Graveson's assertion should properly be limited to the *formal* validity of an act. If, however, the former interpretation were intended, then the statement is, in fact, more supportive of the *lex actus* theory.

The *lex actus* theory

Imprecise use of terminology has occasionally given rise to confusion between the *lex loci actus* and the *lex actus* theories. Wolff, for example, suggests that, "*G C Cheshire in declaring*[60] *the lex loci actus to be decisive uses this term in a sense differing from the usual meaning of the word. While ordinarily lex loci actus designates the law of the country where an agreement has been made, Cheshire has in mind the law 'which is equivalent to the proper law of a contract' or 'with which a transaction has the most real connexion'.*"[61] Ironically, what is intended by the '*lex actus*' idiom is the antithesis of the '*lex loci actus*': the *lex actus* indicates a 'proper law', objectively ascertained.[62]

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[58] *Ibid.*, p460.
[59] *Cf.* Article 4, Schedule 1, Contracts (Applicable Law) Act 1990.
[60] Cheshire, G C, '*Private International Law*' 3rd edition (1947), p564.
[61] Wolff, *ibid.*, p517. In fact, Cheshire is not guilty of the sin of which he is accused: on p546 of his third edition, Cheshire writes, "*The third law that may be chosen to govern questions arising out of a transfer of moveables is the lex actus. This expression is often taken to mean the law of the country where the transfer is effected, but its correct meaning is that legal system with which the transfer has the most real connexion. The lex actus, in other words, is equivalent to the proper law of a contract.*" *Cf.* Graveson's view that, "*much can be said in favour of the theory of the lex actus if one accepts the normal judicial meaning of the term as being synonymous with lex loci actus.*" (*ibid.*, p460)
[62] *Cf.* the plaintiff's averments in *Winkworth v. Christie, Manson & Woods Limited* [1980] 1 Ch. 496; Crawford, E B, '*International Private Law in Scotland*', p315, paragraph 14.15; and Zaphiriou, *ibid.*, p31.

Morris described the *lex actus* as "*the law of the State with which the transaction has the closest and most real connection, that is the proper law of the transfer, not necessarily the law of the State in which the transfer takes place.*"[63] Morris did not, however, indicate whether he conceived the *lex actus* to be a factor objectively, or subjectively, ascertained (*i.e.* whether the *lex actus* was the law with which the transaction could be said, objectively, to have the closest or most significant connection, or whether it was the law which best accorded with the expressed or implied intentions of the transacting parties).

It was Zaphiriou's belief that "... *the lex actus theory stands or falls with the attitude that one takes towards the proper law of the contract.*"[64] As will be illustrated at note 129, *infra*, the proper law of the transfer presently governs the transfer of goods which are in transit. One might additionally suggest that the *lex actus* rule would be equally appropriate to deal with transfers of aggregate moveables (where a common or universal *situs* does not pertain), or cases where moveable property situated in one state is to be transferred by parties acting in a different state (*e.g.* where the *lex loci actus* and the *lex domicilii* of the parties coincide with each other, but not with the *lex situs*). In such cases it cannot truthfully be argued that, "... *the centre of gravity of the transfer of ownership and of the creation of a proprietary interest is the place where the moveable is situated at that time.*"[65]

Morris speculated whether it was the "*inability of the situs rule to furnish an appropriate test in certain circumstances which has led Professor Cheshire (almost*

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[63] Morris, *ibid.*, p233. Significantly, Morris' rider 'rebuts' any 'presumption' in favour of the *lex loci actus*, and not, as one might have anticipated, the *lex situs*.
[64] Zaphiriou, *ibid.*, p38.
[65] Zaphiriou, *ibid.*, p41/2. *Cf.* Wolff, *ibid.*, p20.

alone amongst modern writers) to abandon it."[66] The clear interest of the *lex situs* in the majority of cases should not be denied, but it is submitted that the rule should be modified so as to introduce greater flexibility in appropriate cases. Morris was of the opinion that the necessary flexibility would be secured if "*the validity of a transfer in one State of chattels situated in another is governed by the proper law of the transfer, that is, by the system of law with which the transfer has the closest and most real connection, ... the proper law is presumed to be (but is not necessarily) the lex situs of the goods.*"[67] The value of a rebuttable presumption in favour of the *lex situs* will be considered in Chapters Thirteen and Fourteen, *infra*.

The most persuasive advocate of the *lex actus* theory has been Professor Cheshire, who proposed that "*all questions arising between parties themselves to a transfer, whether relating to the transfer or the preliminary contract, should be governed by the proper law of the transfer, the proper law for this purpose being objectively ascertained.*"[68] Graveson noted, however, that Cheshire upheld the dominance of the *lex situs*, when that law differed from the proper law, in questions of priority between the transacting parties and third parties.[69]

One might conclude that the *lex actus* theory never developed fully, being over-shadowed by support for a simple and straightforward theory. As will be demonstrated at note 235 *et seq.*, *infra*, however, recent attempts have been made to resurrect the *lex actus* theory.

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[66] Morris, *ibid.*, p238.
[67] *Ibid.*
[68] Cheshire, G C, '*Private International Law*' 7th edition, p410 (*per* Graveson, *ibid.*, p463).
[69] Graveson, *ibid.*, p463.

The *lex situs* theory

One of the reasons why the *lex domicilii* theory mustered considerable support, and evolution towards application of a different connecting factor was protracted, was simply because there was infrequent opportunity, in practice, to test it. In some cases, Counsel refrained from pleading the relevant foreign law,[70] whilst in others, the competing laws embodied virtually identical provisions, giving rise to false conflicts.[71] Eventually, however, "*The application of the lex situs was advocated both on territorial grounds, such as the sovereignty of the state of the situs over property within its territory or the implied submission of the owner of property to the law of the place where he chooses to leave it, and upon the more practical ground that, since the security of international transactions requires a simple rule pointing directly to a single system, this can be the only system which can effectively control the property.*"[72] Thus, the rule emerged that the essential validity of a particular, *inter vivos*, transfer of corporeal moveables is governed by the law of the country where the moveables are situated at the time of that transfer.

In *Winkworth v. Christie, Manson & Woods Ltd.*,[73] Slade J. advised that, "*At least before the decision in Cammell v. Sewell*[74] *... there had been some conflict of judicial opinion as to whether the validity of a disposition of moveables generally depended on the law of the owner's domicile ('lex domicilii') or on the law of the country where the relevant transaction was concluded ('lex loci actus'), or on the law of the country where the goods were situated at the time of the disposition ('lex situs') ... Pollock*

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[70] *Cochrane v. Moore* [1890] 25 Q.B.D. 57 (C.A.).
[71] *Mehta v. Sutton* (1913) 108 L.T. 214, 216.
[72] Anton (1990), *ibid.*, p612.
[73] [1986] 1 Ch. 496.
[74] (1858) 3 H&N 617, (1860) 5 H&N 728.

C.B. clearly affirmed the lex situs theory ... the principle of Cammell v. Sewell has been reaffirmed in many subsequent decisions."[75]

The *ratio* of *Cammell v. Sewell* provides that, "*If personal chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is binding in this country.*"[76] In the Exchequer Chamber, Crompton, J. noted that, "*Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or other countries.*"[77] Significantly, however, his Lordship advised that, "*Very little authority on the direct question before us has been brought to our notice.*"[78]

The court in *Cammell v. Sewell* was not unanimous in its decision: Byles, J. delivered a dissenting judgment, in which he enquired, "*Can such a foreign law as the law of Norway is alleged to be, avail in England to take the property in the cargo out of the English owners?*"[79] His Lordship concluded that, "*I should feel great difficulty in acceding to the universal proposition however true it may be in general, that in the absence of a judgment in rem, a disposition of moveable property, effectual by the law*

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[75] *Ibid.*, p501/2. Further, at p504, "... *Cammell v. Sewell is thus, in my judgment, clear authority for the following proposition: the mere circumstances that the goods in the present case have been brought back to England, following the sale to the second defendant and that their proceeds are now in England do not entitle the English court to decline to apply Italian law for the purpose of determining the relevant issue if, but for those circumstances, that would be the law applicable.*"

[76] (1860) 5 H&N 728, at p744.

[77] *Ibid.*, p744.

[78] *Ibid.*, p745.

[79] *Ibid.*, p748. His Lordship continued, "... *the law of Norway amounts to this, that if the ship has satisfied the single but indefinite condition of 'wreck', the cargo, however large, valuable, uninjured and capable of transhipment, may be sold by the master. It is obvious that if a law of this nature were recognised by other countries as giving validity to the title of a purchaser, property at sea would be exposed to a species of confiscation.*" Further, at p750, "*This alleged law of Norway therefore, placing the cargo at the caprice of the master, seems to me to be a law not only of an alarming nature, but so far as I can perceive without precedent, without necessity and at variance with the general maritime law of the world, at least as understood in this country.*"

of the country where that property may at the time be locally situate, is necessarily operative, without any exception, into what country soever that personal property may afterwards happen to come."[80] Coinciding with the view expressed in the dissenting opinion, the court in *Castrique v. Imrie* subsequently declared that, "This [the *ratio* of *Cammell v. Sewell*], *we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications.*"[81]

In the Scottish case of *Todd v. Armour*,[82] Lord Justice Clerk Moncrieff affirmed that, "*The title of the bona fide purchaser in open market for full value will ... stand all the world over.*"[83] The Scottish court adhered to the *Cammell v. Sewell* principle, even although the property in question (a horse) had been stolen from its original owner,[84] was situated in Scotland at the time of the action, and the content of the Irish *lex situs* was viewed unfavourably by the court.

The *situs* principle has since been applied in numerous cases, including *Luther v. Sagor*,[85] *Princess Paley Olga v. Weisz*,[86] *Frankfurther v. W L Exner*,[87] *Anglo-Iranian*

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[80] *Ibid.*, p751.

[81] (1870) L.R. 4 H.L. 414, 429. Given the enduring influence of the decisions in *Cammell v. Sewell* and *Castrique v. Imrie*, it is unfortunate that Blackburn, J. concluded that, "... *we think it unnecessary in this case ... to enquire what qualifications, if any, ought to be attached to it as a general rule.*" (*ibid.*, p429)

[82] (1882) 9 R. 901. Lord Young, while supporting the *lex situs* principle, alluded, at p907, to one curious concession: "... *in the case of goods stolen in a foreign country by whose law the vitium reale is ... removed by a sale in market overt,* [ought] *we to hold that the market overt must be in the foreign country, the vitium remaining unaffected by a sale in market overt in Scotland* [?]" However, his Lordship concluded that, "*It certainly strikes one as unreasonable ... to require a Scotch court to protect the possession of a purchaser in open market at Armagh and refuse protection to a purchaser in open market at Falkirk – there being no other difference that the locus of the market.*" *Cf.* Rabel, E, '*The Conflict of Laws: A Comparative Study – Volume I*) (1958), p50: "*As a rule, the requirements of the lex situs may be complied with at any place by an act which, on the other hand, may mean nothing under the law of such place.*" (Emphasis added)

[83] *Ibid.*, p906. *Winkworth v. Christie, Manson & Woods Ltd.* [1986] 1 Ch. 496, *per* Slade, J., at p507, "*Todd v. Armour is thus a good example of a court faithfully applying the principle of Cammell v. Sewell ...*"

[84] *Cf. Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677, affirming [1904] 2 K.B. 870.

[85] [1921] 3 K.B. 532.

[86] [1929] 1 K.B. 718.

Oil Co Ltd. v. Jaffrate (The Rose Mary),[88] and *Bank voor Handel en Scheepvaart NV v. Slatford*.[89]

It should be noted that the *situs* rule extends not only to the *transfer* of title to corporeal moveable property, but also to the *creation* or *acquisition* of title to such property. In this context, '*lex situs*' means "*the law of the country in which the goods are brought into existence*."[90] Furthermore, the *situs* rule extends to gratuitous, as well as to non-gratuitous, *inter vivos* transfers of moveable property.[91] The stringency of this rule may not always be appropriate. Consider, for example, the gift of an engagement ring by a man to his fiancée, following a marriage proposal, say, in Italy. According to the *situs* rule, the validity of the donation would be determined by Italian law, even although the connection with Italy was, most probably, tenuous (*e.g.* where the parties were Scots domiciliaries and the intended matrimonial home was located in Scotland). If, for any reason, the engagement were broken, and question arose as to whether the gift of the ring were outright, or subject to a suspensive condition that the marriage would take place, the question of whether or not the

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[87] [1947] Ch. 629.
[88] [1953] 1 W.L.R. 246.
[89] [1953] 1 Q.B. 248.
[90] *Glencore International A.G. v. Metro Trading International Inc.* [2001] 1 Ll. Rep. 184, *per* Moore-Bick, J., at p296. *Cf.* Dicey & Morris, *ibid.*, p967, paragraph 24-010: "*The application of the lex situs at the time of the act in question will also determine ownership upon the making of a new thing (specificatio), or after the incorporation of the thing into another (accessio).*"
[91] *Cochrane v. Moore* (1890) 25 Q.B.D. 57, *per* Lopes, LJ. Further, *In re Korvine's Trust, Levashoff v. Block* [1921] 1 Ch. 343, *per* Eve, J., at p348: "... *it is not disputed that an assignment [inter vivos] giving a good title to moveables according to the law of the country where the moveables are situate at the time of the assignment is valid.*"; and *In re Craven's Estate, Lloyds Bank v. Cockburn (No.1)* [1937] 1 Ch. 423, *per* Farwell, J., at p429: "*It is said and said truly that the subject matter of this donatio consists of moveables situate at all material times in Monaco, that is to say, in a foreign country, and that the question of the ownership of moveables must be determined in accordance with the law of the place in which those moveables were.*"

fiancée was entitled to retain the ring would be governed by Italian law, the *lex situs* at the time when ownership was alleged to have passed.[92] This seems rather absurd.

It is interesting to note that the American conflict rule regarding the transfer of corporeal moveable property is quite different from the rule which pertains in Scots or English law. According to paragraph 244(1) of the Second Restatement, "*The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in paragraph 6.*"[93] Moreover, it would appear that paragraph 244(2) sanctions party autonomy, stating that, "*In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law.*"[94]

Inherent in the deceptively simple *situs* rule are complex questions of definition and interpretation: what *is* the *situs*, and in turn, what is meant by the *lex loci rei sitae*? By whom, and according to what law, is this connecting factor to be defined? The answers to these fundamental issues have been considered in detail in Chapter Four, *supra*. Additionally, the arguments in support of, and against, the *lex situs* connecting factor will be appraised in Chapter Twelve, *infra*.

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[92] If, for example, the proposal and donation had taken place in England, the fiancée would be protected by section 3(2) of the Law Reform (Miscellaneous Provisions) Act 1970, according to which there is a rebuttable presumption that the gift of an engagement ring is made unconditionally. *Cf. Gold v. Hume* (1950) 66 Sh. Ct. Rep. 85. *Contra Savage v. McAllister* (1952) 68 Sh. Ct. Rep. 11.

[93] Regarding the paragraph 6 principles, see Chapter One, *supra* – 'Choice of Law Methodology'.

[94] In comment (b) relative to paragraph 244, Professor Reese states that the paragraph is applicable to "*issues arising between the immediate parties and their privies from voluntary transfers inter vivos of interests in chattels ... e.g. capacity of transferor and transferee; formal validity and essential validity; nature of interests transferred.*"

Meantime, it is important to acknowledge the full extent of the *situs* rule. In 1958, Rabel stated that, " ... *the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated.*"[95] So the *lex situs* may be said to determine: alienability; the range of proprietary and security interests which are permitted;[96] the formal and essential requirements of the conveyance of property (including the proprietary effects of misrepresentation, fraud and illegality, which may vitiate intention to effect, or consent to, the transfer);[97] capacity to transfer and to receive property; competitions between transferors and transferees; the rights of creditors and priority of claims; proprietary rights and remedies, including arrestment, lien and stoppage in transit. As Zaphiriou noted, "*English judges seem to reject 'specialisation' in connection with the transfer of ownership in moveables. There is a clear tendency to treat the transfer of tangible moveables, including the capacity of the parties as a whole and to subject it to a single law.*"[98]

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[95] Rabel, *ibid.*, p30. *Cf.* Falconbridge (1947), *ibid.*, at p377: "... *the transfer of property in moveables or of any less extensive real rights in them , or more broadly, the creation, dismemberment, or extinction of the property in moveables, is governed by the lex rei sitae.*"

[96] *Cf.* Venturini, *ibid.*, p19; and Wolff, *ibid.*, p522.

[97] *E.g.* The need for delivery, which is likely to vary from system to system. *Cf.* Weir, T, '*Taking for Granted – The Ramifications of Nemo Dat*' (1996) 49 Current Legal Problems 325, at p327: "... *in order for an owner to effect a transfer of property to a willing transferee, was it enough that there be an intention that ownership should pass, or was there a further requirement that there actually be a good reason for the transfer, an objective causa traditionis?*" Consider too Rabel, *ibid.*, at p79: in an instance of "*sale and dispatch of goods from a country, where delivery is required to pass the title ... to another jurisdiction considering consent sufficient to do so ... Does title pass on the border?*"

Alienability

Savigny opined that, "*The capacity of a thing to become subject to private property, and therefore not to belong to the res quarum commercium non est, is to be judged by the law of the place at which the thing is situated.*"[99]

As regards alienability, Siehr has observed that, "*There are a few jurisdictions in which certain goods are res extra commercium i.e. goods which cannot be transferred by transaction of private law.*"[100] Included in the category of '*res extra commercium*', for example, may be, "*certain art objects exhibited or preserved in public museums and libraries ... exempted from the ordinary rules for moveables.*"[101] Difficulties emerge when inalienable goods are removed, either lawfully (*e.g.* for the purposes of loan or exhibition) or unlawfully (*i.e.* by theft or illegal export), from the state which has imposed the embargo, and taken to a state in which no such prohibition is applied or recognised.[102]

In matters of alienability the present *situs* of property may not always demonstrate the strongest connection with, or interest in, the property in question (*e.g. Duc de Frias v. Pichon*[103]). Consider, for example, the theft of Leonardo da Vinci's '*La Gioconda*', by an Italian waiter, Vicenzo Perrugia, from the Louvre in 1911. The painting was recovered, in 1913, allegedly from underneath the thief's bed. What might have

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[98] Zaphiriou, *ibid.*, p66.
[99] Savigny, F C, '*A Treatise on the Conflict of Laws*' (1869), p138. Further, "*The same rule applies as to the extent of the class of things sine domino, and therefore as to the admissibility or restriction of the acquisition by occupation of property in things of many kinds.*" (*ibid.*)
[100] Siehr, K, '*International Art Trade and The Law*' (1993) VI *Receuil des Cours* 9, 82.
[101] Siehr (1993), *ibid.*, p64.
[102] *Cf.* Von Plehwe, T, '*E.U. and the Free Movement of Cultural Goods*' (1995) 20 European Law Rev. 431, at p441: "*Foreign sale prohibitions applying to certain types of cultural or church property will not be considered if the chattel is subject to a transfer at the new situs and the law of the place does not classify the object as res extra commercium.*"
[103] [1886] 13 *Journal du Droit International* 593.

happened had the felon returned home to Italy with his haul, and there sold the painting to a good faith (albeit somewhat naïve) purchaser? According to the *lex situs* rule, the sale would have been valid, and the transfer of title effective, even although, according to French law, the painting (an '*objet mobilier classe*') would have been unmarketable and recoverable, without limitation of time, by the French state.[104] Whilst in *Duc de Frias v. Pichon*, the French state might have benefited from the contrived application of French law, in the case of the Mona Lisa, the *situs* rule might well have worked to its detriment, had Signor Perrugia ventured to carry his treasure across the French-Italian border.[105]

Consider also the case cited by Biondi, namely, *French Minister of Cultural Heritage v. Italian Minister of Cultural Heritage and De Contessini Corte di Casszione*,[106] in which two seventeenth century tapestries, declared, in 1901, to be French national treasures, were stolen, in 1975, from the *Palais de Justice* in Riom, France, and sent to Italy, where they were bought two years later by an antique dealer. The French government raised an action in the Italian courts for return of the two tapestries, alleging that since they belonged to the French State they were unmerchantable according to French law. The action, heard at all levels of the Italian legal system, ultimately failed. The main argument was that since the sale had taken place in Italy and the tapestries were actually held in Italian territory, the case was subject to Italian, not French law. The antique dealer was considered to be a *bona fide* purchaser, so restitution was denied. The tapestries are now in Italy.

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[104] The current French rule is contained in Article 18 of the Law of 31 December 1913 on Historical Monuments. (Redmond-Cooper, R, '*Passing of Title and Limitation Periods*' (1998), p4)

[105] Consider Lagarde's remark that, "*The case of the ciborium of Burgos (Seine, 17/4/1855) shows that symmetrical rules apply.*" (Lagarde, P, '*Le commerce de l'art en droit international privé français*', at p408 - In Lalive, P A, '*International Sales of Works of Art*' (1988))

Capacity to transact

The commentary to paragraph 244 of the Second Restatement narrates that the "*grant of capacity is a determination that a person is not in need of the protection which a rule of incapacity would bring* ... [there is] *usually little reason why the local law of some state* [other than the *situs*] *should be applied to give him this protection.*"[107] Likewise, Rabel has stated that capacity to acquire and dispose of real rights in moveable property is determined by the *lex situs*.[108]

It is apparent, however, that the connecting factor in respect of capacity to deal in moveable property has altered in line with the generally applicable connecting factor. Savigny, for example, considered that, "*The capacity of a person to acquire property, and likewise the capacity of a person to dispose of the property belonging to him, is to be judged by the local law of the domicile of the one or the other person and not therefore by the law of the place where the thing is situated, because each of these incapacities is only a particular branch of the general capacity to have rights and to act, and therefore pertains to personal status.*"[109]

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[106] Case 24/11/95, No 12166. (Biondi, A, '*The Merchant, The Thief and The Citizen*' 1997 C.M.L.R. 1173, 1174)

[107] Reese, W L M, '*Restatement of the Law Second, Conflict of Laws*' (1971), paragraph 244, comment (h). *Cf.* Beale, J H, '*Restatement of the Law of Conflict of Laws*' (1934), paragraph 219, and comment (c): "*If the conveyor has capacity to make a transfer according to the law of the state where the chattel is at the time of the conveyance, it is immaterial that he has not such capacity according to the law of the state of his domicile or of the state in which the conveyance is made. If the conveyor has not capacity to make a transfer according to the law of the state where the chattel is at the time of the conveyance, it is immaterial that he has capacity according to the law of the state of his domicile or of the state in which the conveyance is made.*" *Contra* Venturini, *ibid.*, at p24: "*It is necessary to differentiate rules of a restrictive character according to their function, namely whether they regulate the condition of persons or of certain goods. Only in the latter case the lex rei sitae applies.*" Evidently, Venturini adopts a more refined, *quasi*-interest-analysis approach to the matter of capacity.

[108] Rabel, *ibid.*, p40.

[109] Savigny, *ibid.*, p136/7. Savigny noted objection to this theory, stating that, "*Many say that these capacities belong, not to the abstract qualities of the person, but to the legal effects of these qualities; and that as to these it is not the law of the domicile that is applicable, but the law of the judge who determines in each case.*" (*ibid.*, p137)

There do not appear to be any Scottish or English cases which deal expressly with the question of capacity to deal in corporeal moveable property, but it is surmised that the *lex loci rei sitae* would govern this matter. It is submitted, however, that an '*in favorem*' approach[110] would be preferable, so that capacity according to any one of the *lex rei loci sitae*, the *lex loci actus*, or the *lex domicilii* of the *de cujus* would suffice. A provision equivalent to Article 11 of the Rome Convention would further buttress the *in favorem* principle, *e.g.* "*In a transfer concluded between persons who are in the same country, a party who would have capacity under the law of that country may invoke his incapacity resulting from another law* [*e.g.* his or her *lex domicilii*, or the *lex loci rei sitae* of the goods (at the time of the transfer)] *only if the other party to the transfer was aware of this incapacity at the time of the transfer, or was not aware thereof as a result of negligence.*"

Formal validity

Savigny expressed the opinion that the formal validity of a transfer of moveable property must be determined according to the *lex loci rei sitae*. Thus, "*If a Parisian sells his furniture situated in Berlin to a Parisian in Paris, the property is transferred only by tradition; but if, conversely, a Berliner sells his goods situated in Paris, to a Berliner in Berlin, the mere contract transfers the property.*"[111] Disregarding the appropriateness, or otherwise, of this rule, there may be occasional difficulties in its

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[110] *Cf.* Capacity of a beneficiary to take a bequest of moveables. In English conflict rules, the *lex domicilii* of the beneficiary, or of the testator, whichever confers capacity at the earlier age, will apply: *Re Hellman's Will* 1866 L.R. 2 Eq. 363 (albeit the *lex situs* must be satisfied as regards bequests of immoveables). Dr Crawford advises that "*There seems no reason why a similar rule should not also apply in Scotland.*" (*Ogilvy v. Ogilvy's Trustees* 1927 S.L.T. 13) (Crawford, *ibid.*, p356, paragraph 17.09)

[111] Savigny, *ibid.*, p139, paragraph 367. *Cf.* Beale (1934), *ibid.*, paragraph 256, and comment (a): "*The rule stated in this Section is applicable with respect to such requirements as those of writing, of delivery, of a seal, or acknowledgement.*" *Contra* Second Restatement, paragraph 244.

application.[112] Although Savigny noted the potentially accidental or transient nature of the *situs*, he dismissed it as irrelevant: "*It will suffice to bring this rule into operation if the continuance of the things at a place should be only transient and very short; for in every case the transference of the property depends on a momentary act, and therefore fills no long space of time.*"[113]

Is a transfer between parties in state X, relating to moveable property situated in state Y, to have no effect, even between the contracting parties, merely because it fails to satisfy certain requirements of formal validity of Y law, and even where the *res litigiosa* is thereafter to be removed to state X, according to the law of which all requirements of formal validity have been satisfied (albeit whilst the *res* was situated within the jurisdiction of state Y)?

Of course, if the rule governing questions of formal validity were to differ from that which governs questions of essential validity, preliminary difficulties of characterisation would arise. Which law, for example, should determine whether a requirement, say, of writing, or notarial execution, or delivery should be characterised as a formal or essential condition?[114]

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[112] *E.g.* Regarding aggregate moveables. Consider Beale (1934), *ibid.*, paragraph 256, caveat, *viz.*:"*The* [American Law] *Institute expresses no opinion whether the conveyance of an aggregate unit of moveables may not be governed by the law of the place where the various items are aggregated as a unit, or that a conveyance of an aggregate unit made up of a number of units, themselves aggregates, may not be governed by the law of the place where the entire unit is managed so far as such conveyance is not contrary to the public policy of a state in which any constituent unit is.*"

[113] Savigny, *ibid.*, p139, paragraph 367.

[114] *Cf.* the difficulties encountered in characterising parental consent to marriage as a matter of formal or essential validity: *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67 and *Ogden v. Ogden* [1908] P. 46.

Competing claimants

Reference has already been made to Lord Watson's dictum in *North Western Bank Ltd. v. Poynter, Son & Macdonalds*,[115] to the effect that "*When a moveable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is prima facie one of English law, and ought to be so treated by the Court in Scotland.*"[116] The effect of this remark was that, in a conflict between English and Scots law, English law should apply, since both the pledgor and the pledgee were English domiciliaries.[117] Lord Watson, revisiting the point in the ensuing case of *Inglis v. Robertson & Baxter*,[118] determined that the *lex situs* of the chattel at the time of the alleged transfer is applicable: "... [the] *relative rights of the pledgor and the pledgee depended upon the law of England, the country in which the pledge of the bill of lading was made and in which the facts which were said to have destroyed the right of the pledgees occurred.*"[119] Lord Watson explained, however, that, "*It would ... be contrary to the elementary principles of international*

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[115] (1894) 22 R. (H.L.) 1.

[116] Note 20, *supra*.

[117] *Cf. Forbes v. Official Receiver in Bankruptcy* 1924 S.L.T. 522, *per* Lord Morison, at p524: "*There is here a dispute about a moveable fund – situated in Scotland – between domiciled Englishmen, and I think the question as to their respective rights to it inter se must be determined by the law of England.*" Note, however, the remarks of Anton, 1st edition, at p404: "*This remark* [by Lord Watson] *was clearly a slip of the tongue in a case where the question was inadequately argued; up to the House of Lords the case had proceeded upon the assumption that every aspect of it fell to be governed by Scots law and even in the House their Lordships, being of the view that English law and Scots law were identical upon the substantive question raised by the transactions, did not need to choose between the two systems.*"

[118] (1898) 25 R. (H.L.) 70. In the Court of Session, a whole court of 11 judges was convened to hear this case. Roberston & Baxter, the respondent, successfully argued that, "*Where, as here, a question arose as to the competing rights of the security holders or creditors doing diligence with reference to corporeal moveables situated in Scotland, the competition ought to be determined by the law of Scotland as the lex situs of the goods and the lex fori of the competition. The question depended upon whether or not a real right had been completed in the person of the creditor and that question could not be determined except by the law of the place where the res was situated, and where the preference was claimed.*" ((1897) 24 R. 758, at p772) Lord Young was alone in delivering a dissenting judgment.

[119] *Inglis v. Robertson & Baxter* (1898) 25 R. (H.L.)70, *per* Lord Watson at p74. In *Glencore International A.G. v. Metro Trading International Inc.*, *ibid.*, Moore-Bick, J. explained, at p292, that Lord Watson's later dictum undermined his *North Western Bank* dictum: "[Lord Watson] *explained the decision in North Western Bank v. Poynter as turning on the relative rights of the pledgor and pledgee, and in that case, of course, both the original pledge and the redelivery of the bills of lading, which was the transaction by which those rights were said to have been altered, had taken place in England.*"

law ... to hold that the right of a Scottish creditor when so perfected can be defeated by a transaction between his debtor and the citizen of a foreign country which would be, according to the law of that country, but is not according to the law of Scotland, sufficient to create a real right in the goods."[120] Professor Anton has reconciled the dicta of Lord Watson in *North Western Bank Limited v. Poynter, Son & Macdonalds* and *Inglis v. Robertson & Baxter,* by concluding that the two decisions may be looked upon as, "*establishing that, while the contractual aspects of a contract to assign corporeal moveables are governed by its proper law, the final question of proprietary right must be determined by the lex situs.*"[121] This accords with Robertson & Baxter's averment that, "*It might be true that where a contract was made in England with reference to moveables in Scotland, the rights of the parties to the contract would fall to be determined by the law of England as the lex loci contractus, but where the party having right under the contract sought to vindicate his right in and to the thing itself against third parties, then the question depended not upon his contract, which affected only the contracting parties, but upon whether or not he had obtained a real right in the thing itself which he could vindicate against all the world. This question could be determined only by the lex situs.*"[122]

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[120] *Ibid.*, p73.

[121] Anton (1967), *ibid.*, p405. *Cf.* Zaphiriou, *ibid.*, p17; and Webb, P R H & Brown, D J L, '*Casebook on the Conflict of Laws*' (1960), p375.

[122] (1897) 24 R. 758, at p772. *Cf. Connal & Co v. Loder* (1868) 6 M. 1095, *per* Lord Neaves, at p1101, and Lord Justice Clerk Patton, at p1110: "*It seems to me that in a question of competition, either with respect to a right to moveables intra territorium, or with reference to obligations of Scotch creditors with respect to the delivery of such moveables, we must, where there is a conflict and competition, go according to the law of Scotland.*"

Goods in transit

It has been said that "*Only where the situation of the moveables in one country or another is at the time of their transfer unascertainable or merely transitory does the lex situs theory break down.*"[123]

Accordingly, a specific exception to the *lex situs* rule pertains where goods are in transit and their *situs* is casual[124] or not known: *ex sua natura*, the *lex situs* of such goods is inconstant and indeterminable.[125] This exception exists largely because it would be impossible, *ex post facto*, to determine the *situs* as at the relevant time,[126] and additionally, because to do so would not accord with party expectations.[127] The acquisition or transfer of title[128] to such goods will be governed by the proper law of the transfer, and "a *transfer which is valid and effective by its proper law will (semble) be valid and effective in England* [and in Scotland]."[129] The natural question,

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[123] Graveson, *ibid.*, p462.

[124] Consider *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, *per* Sellers, LJ., at p301: "*When goods secured in the hold of a ship are being moved inexorably across an ocean, their locality changing with every thrust of the propeller ... there seems to be no good reason to apply the lex situs to goods so situated.*"

[125] Consider Prott's observation that, "*In the contemporary art market many ... transactions are possible involving the transit over long distances of cultural objects (tribal art, for example, from the Pacific area which is much in demand in Europe and the US.*" (Prott, L V, '*Problems of Private International Law for the Protection of the Cultural Heritage*' (1989) V *Receuil des Cours* 215, 264)

[126] Unless, of course, the transit had been interrupted, in which case, the general rule would revive: *Cammell v. Sewell* (1858) 3 H&N 617, (1860) 5 H&N 728. See Chapter Four, *supra* – 'Defining the '*Situs*'', note 22.

[127] *Cf.* Westlake, J, '*A Treatise on Private International Law*' (1925), at p150: "*It would be pedantic to apply the general doctrine so as to bring in the law of a casual or temporary situs not contemplated by either party in the dealing under consideration.*" (Emphasis added)

[128] The proper law of the transfer determines not only the transfer of ownership, but also the acquisition of an inferior right, such as a right in security (*e.g.* pledge or lien). Hellendall advises that, "*The same would apply to the power of the government of the country of transit to confiscate or attach the goods and the effect of such confiscation or attachment.*" (Hellendall (1939), *ibid.*, p31) It is submitted, however, that territorial control (*i.e.* the *lex situs*) would, in fact, determine this matter: in *Cammell v. Sewell* (1958 3 H&N 617, 1860 5 H&N 728) the cargo was effectively in transit from Russia to Hull. It is submitted that if, when the vessel grounded in Norway, the cargo had been confiscated, rather than sold, the Norwegian *lex situs* would have governed the confiscation, not the 'proper law' of the transfer. The casual Norwegian *situs* would have assumed greater significance than the connection of the goods with either Russia or England.

[129] *Winkworth v. Christie, Manson & Woods Ltd.* [1986] 1 Ch. 496, *per* Slade, J., at p501. See Chapter Four, *supra* – 'Defining the '*Situs*'', note 21 *et seq*. See also Dicey & Morris, '*Conflict of Laws*', 13th edition, p968, paragraph 24E-015: "*If a tangible movable is in transit, and its situs is casual or not*

therefore, is, what is meant by the 'proper law' of the transfer of such property?[130] Carter has suggested that this simply comprises "*the law with which the transfer is most closely connected.*"[131]

In determining the proper law, there are several potentially applicable localising agents, including, the *lex loci destinationis* (the law of the place of destination) and the *lex loci expeditionis* (the law of the place of dispatch).[132] Venturini favoured application of the *lex loci expeditionis*, since a definite connection exists with that state, and it "*constitutes the last effective territorial contact with the goods, while the place of destination can always be modified and is not always reached.*"[133] The objective, however, is not merely to ascertain territorial contacts, but, is, as Wolff has suggested, to determine the "*centre of gravity of rights in rem.*"[134] Although goods necessarily have a *locus expeditionis*, once they have departed from that state, any connection with it may be remote, or might even have been permanently severed,[135] so there may be little sense in having that law govern the validity of a subsequent transfer of the itinerant goods.[136] In contrast, the ultimate destination may exercise

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known, a transfer which is valid and effective by its applicable law will semble be valid and effective in England."; Crawford, *ibid.*, p317, note 58; and Morse, C G J, '*Retention of Title in English Private International Law*' (1993), p172.

[130] *Cf.* Hellendall, *ibid.*, p8.

[131] Carter, P B, '*Transnational Trade in Works of Art: The Position in English Private International Law*', p319 (In Lalive, *ibid.*).

[132] Zaphiriou advised that the starting point and the ultimate destination are the "*natural connecting factors of a res in transitu*" (Zaphiriou, *ibid.*, p194), but Cheshire considered that, "*A case ... may perhaps be made for the lex domicilii when the moveables are in transitu.*" (Cheshire, G C, '*Private International Law*', 3rd edition (1947), p593)

[133] Venturini, *ibid.*, p12.

[134] Wolff, *ibid.*, p520.

[135] *Cf.* disagreement among domicile-favouring countries upon the merit of continuance of the domicile of choice when the *propositus* is *in itinere*: *In the Goods of Bianchi* (1862) 3 Sw. & Tr. 16. *Contra Re Jones' Estate* (1921) 182 N.W. 227 (Sup. Ct. of Iowa).

[136] *Sed contra*, the tenacious quality of the domicile of origin: such a domicile cannot be displaced until acquisition of a domicile of choice *animo et facto*. See Crawford, *ibid.*, p76, paragraph 6.06, and further, at p78, paragraph 6.08: "... *departure in a final manner from the domicile of origin effects no change unless/until domicile of choice is established clearly elsewhere.*" *E.g. Bell v. Kennedy* (1868) 6 M. (HL) 69.

eventual, and possibly enduring, control over the goods. Additionally, one might suppose that application of the *lex loci destinationis* would accord with the reasonable expectations, first, of the transacting parties, and secondly, of third parties who wish to exercise a right of stoppage in transit, or of lien. Against application of the *lex loci destinationis*, however, is the fact that parties' intentions may change, the goods may be lost during transit, or the terms of the charter party may be such that the ultimate destination of the goods is speculative: in short, the intended destination may never be reached.

Zaphiriou also referred to the possibility of applying the *lex situs praeteritus*, according to which, "*the property effect of the transaction will remain in suspense until the goods arrive at their ultimate destination. Whether this destination is the original one is immaterial.*"[137] This theory seems inherently flawed: the objective of the proper law doctrine is to permit property transactions to proceed, notwithstanding the fact that the goods themselves are temporarily in transit. The objective is *not* to adjourn further dealings with the goods pending their safe arrival on identifiable territory. In any event, ultimate reference to the *lex loci destinationis* is a veiled capitulation in favour of that theory.

The applicable law may be particularly important as regards a seller's right of stoppage in transit. Although such a right may sometimes be characterised as contractual, this will not always be appropriate[138] and, in such cases, it would be premature to determine the seller's rights in accordance with the *lex loci*

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[137] Zaphiriou, *ibid.*, p196.
[138] Falconbridge (1947), *ibid.*, p394.

destinationis.[139] Faced with a contest between applying Russian law (according to which rights of stoppage still existed) and English law (according to which the right of stoppage could no longer be exercised), the court in *Inglis v. Usherwood*[140] preferred to apply the Russian *lex loci rei sitae*.[141] Although the casual *situs* gave rise to a close connection with Russia, it appears that Grose J., in adopting a *quasi*-rule-selecting approach, was strongly influenced by the *content* of the Russian law: "... *the Russian law is a most equitable provision, and ought to have a liberal construction; for it enables that justice ... be done between the parties, which I have often lamented could not be obtained here.*"[142]

No more refined test has been formulated than simply to state that the proper law of the transfer will apply. Unless party autonomy is permitted, however, this law can only be identified *ex post facto*, in light of all the relevant circumstances. This clearly hinders advance or anticipatory regulation of property transactions. While Zaphiriou has admitted that, in theory, this solves all difficulties, he has criticised it as being "*a vague and uncertain test ... a form of legal escapism.*"[143] Nevertheless, in practice, the test does not appear to have produced many difficulties, so this disadvantage of the *lex actus* theory should not be unduly exaggerated.

It should be noted that, when one is concerned with objects of property conveyed by means of a document of title, the *lex loci actus* may be relevant; otherwise, the validity of title acquired under, say, a bill of lading would be significantly impaired. Graveson has stated that "*the importance of this* [goods in transit] *exception is*

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[139] *Inglis v. Usherwood* (1801) 1 East 515; 102 E.R. 198.
[140] (1801) 1 East 515; 102 E.R. 198.
[141] By this time the goods had acquired a 'temporary' *situs*, as had the cargo in *Cammell v. Sewell*.
[142] *Inglis v. Usherwood, ibid., per* Grose, J. (*per* Webb & Brown, *ibid.*, p371)

considerably diminished by the mercantile practice of treating the normal documents of title to such goods ... as representative of the goods themselves, so that in effect the relevant situs is generally that of the documents of title." (*i.e.* the *lex loci cartae*)[144] To ascertain, by reference to the *lex actus*, whether or not such documents do, in fact, represent the goods in question, would be to create a *circulus inextricabilis*, so it is submitted that the *lex cartae* should instead determine, first, whether or not the document is a valid and conclusive representation of the goods,[145] and secondly, whether there has been a valid transfer of ownership by means of the document of title.[146] If the goods are in transit, the *lex loci cartae* will invariably coincide with the *lex loci actus*.

Recognised exceptions to the *situs* rule

It is recognised that, in certain limited circumstances, exclusive reference to the *lex situs* could cause hardship to a deprived owner were his or her moveable property to be dealt with in a foreign country. For this reason, the court in *Winkworth v. Christie, Manson & Woods Ltd.*[147] articulated a number of specific exceptions to the *lex situs* rule. In a recent case before the Commercial Court of the Queen's Bench Division, namely, *Glencore International A.G. v. Metro Trading International Inc.*,[148] attempt was made to introduce a further exception. In light of the close analysis in these cases of the particular exceptions to the general rule, it is instructive to consider them in some detail.

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[143] Zaphiriou, *ibid.*, p198.
[144] Graveson, *ibid.*, p462. *Sed contra* Venturini, who considers that, "... *the fact, very frequent in international trade, that the goods in transit are being negotiated by means of commercial documents ... appears to be irrelevant.*" (Venturini, *ibid.*, p12)
[145] Note, however, that the *lex fori* will determine whether such a rule is evidential or substantive: *Owners of The Immanuel v. Denholm & Co.* (1887) 15 R. 152.
[146] *Cf.* Zaphiriou, *ibid.*, p202.
[147] [1980] 1 Ch. 496.
[148] [2001] 1 Ll. Rep. 284.

***Winkworth v. Christie, Manson & Woods*: vice over virtue?**

The plaintiff, Mr Winkworth, sought declaration against the defendants (the English auctioneers, Christie Manson & Woods Limited, and an Italian art collector, the Marchese Paolo Da Pozzo, otherwise designated Dr D'Annone), that certain works of art (reputedly a collection of Japanese *netsuke*) had, at all material times, remained the plaintiff's property. In addition, he sought an injunction restraining Christie's from paying to Dr D'Annone any part of the proceeds of sale of the *netsuke*, or from disposing of any part of the collection then in their possession. As a complimentary measure, Mr Winkworth sought an injunction preventing Dr D'Annone from receiving any part of the sale proceeds, or from disposing of any part of the collection then in his possession. Furthermore, the plaintiff sought an order for return of the collection, or its value, and an order for damages for detinue or, alternatively, for conversion.

The goods in question had been stolen, whilst in England, from the lawful possession of Mr Winkworth, an English domiciliary who was, at the time of the theft, the lawful owner of the goods.[149] Thereafter, the goods had been removed to Italy where they were sold and delivered by an unknown, unidentified third party to Dr D'Annone, the *bona fide* third party purchaser.[150] The sale was made under a contract concluded in Italy, and the contractual rights of the parties were governed by Italian law. At the time of sale and delivery respectively, the goods were physically situate in Italy.

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[149] Slade, J. advised, at p499, that, "*On the agreed facts the second defendant has on no footing violated any actual possession of the goods by the plaintiff, who, by reason of the theft, had already lost such possession before the time when the contract of sale was concluded in Italy.*"

[150] Harding and Rowell have described this tripartite scenario as "*one of the most basic and most common frauds of commercial law.*" (Harding, C S P, and Rowell, M S, '*Protection of Property Versus Protection of Commercial Transactions in French and English Law*' (1977), p355)

Significantly, Mr Winkworth neither knew of, nor consented to, the removal of the goods to Italy, nor to any subsequent dealings with, or movement of, them.

Some time later, the collection was delivered by Dr D'Annone to Christie's, in England, for sale there on his behalf.[151] A certain proportion of the goods were sold, in England, by Christie's, but before the sale proceeds could be transferred to Dr D'Annone, Mr Winkworth asked for, and received, undertakings from Christie's that they would not part with the sale proceeds, or the *netsuke* which remained in their possession, at least pending judicial determination of the issues between the plaintiff and Dr D'Annone.

In his counterclaim, Dr D'Annone averred that he had acquired good title according to Italian law, the *lex situs* of the goods at the material time. Accordingly, the preliminary point of law which required to be decided was whether English domestic law or Italian domestic law should be applied in order to determine ownership of the works of art as between the plaintiff and the second defendant.

As against Dr D'Annone, Mr Winkworth required to establish an immediate right to possession of the goods. There was no suggestion that any other individual, not a party to the proceedings, had ever acquired title to the goods such as could have destroyed the plaintiff's right to immediate possession. At least until the point of sale in Italy, nothing had occurred which extinguished Mr Winkworth's entitlement.[152] The crucial issue was this: was the effect of the sale in Italy to confer upon Dr

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[151] The factual scenario occurring in *Winkworth* was predicted almost fifty years earlier, by Carnahan (1935), *ibid.*, at p534. Carnahan identified two possible means of solving the problem: by application of (a) the *lex fori* (*qua* present *situs* of the chattel), or (b) the *lex situs* (being the law of the state to which the chattels had been surreptitiously removed).

D'Annone a title to the goods which was valid even against Mr Winkworth? More importantly, should this issue be determined in accordance with *English* domestic law or *Italian* domestic law? This question was one of some import to the parties: if English law applied, Dr D'Annone could not have acquired title to the stolen goods, but if Italian law applied, title could potentially have been transferred to Dr D'Annone.[153]

Counsel for Dr D'Annone argued that Italian law applied for the simple reason that, "*There is ... a general rule of private international law that the validity of a transfer of moveable property and its effects on the proprietary rights of any persons claiming to be interested therein are governed by the law of the country where the property is situated at the time of the transfer ('lex situs').*"[154]

Counsel for the second defendant recognised five specific exceptions to this general rule, namely: "*The first 'if goods are in transit and their situs is casual or not known, a transfer which is valid and effective by its proper law will (semble) be valid and effective in England' ... The second exception ... arises where a purchaser claiming title has not acted bona fide. The third exception is the case where the English court declines to recognise the particular law of the relevant situs because it considers it contrary to English public policy. The fourth exception arises where a statute in force in the country which is the forum in which the case is heard obliges the court to apply*

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[152] Slade, J., p499/500.

[153] The second defendant's pleadings (founding upon Articles 1153 and 1154 of the Italian Civil Code), averred that, "*Under Italian law a purchaser of movables acquires a good title notwithstanding any defect in the seller's title or in that of prior transferors provided that (1) the purchaser is in good faith at the time of delivery, (2) the transaction is carried out in a manner which is appropriate, as regards the documentation effecting or evidencing the sale, to a transaction of the type in question rather than in some manner which is irregular as regards documentation and (3) the purchaser is not aware of any unlawful origin of the goods at the time when he acquires them.*" (Slade, J., p500)

[154] Slade, J., p501.

the law of its own country ... Fifthly ... special rules might apply to determine the relevant law governing the effect of general assignments of movables on bankruptcy or succession."[155] It was conceded that none of these exceptions bore any relevance to the immediate case. Accordingly, the second defendant submitted that the court was bound to apply Italian law to determine whether Dr D'Annone had acquired good title, not only *vis-à-vis* the vendor, but also *vis-à-vis* Mr Winkworth.

Counsel for Mr Winkworth, faced with an undeniably strong line of authority in support of the *lex situs* theory,[156] accepted that as a *general* rule, the validity of a transfer of moveable property is governed by the *lex situs* and, as a result, Italian law would be the relevant law for determining the rights of Dr D'Annone and the Italian vendor from whom he had purchased the goods, as between themselves and their respective successors.[157] Counsel argued, however, that this case was concerned not with such a scenario, but with the respective proprietary rights of the deprived owner, Mr Winkworth, and Dr D'Annone. He contended that an accumulation of factors gave the case an unusually strong association with England: "*At the time of the theft, the goods were situated in England, in the ownership and lawful possession of a person who was domiciled in England. The plaintiff neither knew of nor consented to the removal of the goods from England or anything which made such removal more probable. The goods have now been voluntarily re-delivered to England where they*

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[155] At p501. The merits of these exceptions will be discussed in detail in Chapter Twelve, *infra* – 'The '*Situs*' Rule – For and Against'.
[156] Including, *inter alia*, *Cammell v. Sewell* (1858) 3 H&N 617, (1860) 5 H&N 728; *Todd v. Armour* (1882) 9R. 901; *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677; *Luther v. Sagor* [1921] 3 K.B. 532; and *In re Anziani* [1930] 1 Ch. 407.
[157] Slade, J., p502.

or their proceeds of sale still remain. Finally, it is an English court which is now hearing the matter."[158]

It was suggested, therefore, that these five connecting factors were significant, individually and collectively, and clearly connected the case with England. Counsel for Mr Winkworth sought to devise an avenue of escape from the seemingly ineluctable *lex situs* rule. Accordingly, he made two separate submissions. First, he argued that, in this instance, the *lex situs* should be treated as being English, rather than Italian, since the goods were in England at the date of the theft *and* at the date of the court action and, furthermore, they had not left England with the owner's consent. Alternatively, he argued that if the *lex situs* rule resulted in the relevant issue being determined according to Italian law, "*then the exceptional facts of the case bring it outside this principle.*"[159] These were enterprising attempts to circumvent the dominant *lex situs* principle.

Despite the strong line of authority in support of the general *situs* rule, Slade, J. acknowledged that, "*No authority has been cited the facts of which can be said to be precisely on all fours with the present case, in the sense that all the English connecting factors relied on by Mr Mummery are present.*"[160] To that extent,

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[158] Slade, J., p502/3. Consider in this regard Jefferson's remarks at p510: "*What interests the conflicts lawyer is the unsuccessful attempt by the plaintiff to evade the application of a long-standing and arbitrary rule by using a more precise technique ..., namely the grouping of significant contacts.*" (Jefferson, M, '*An Attempt to Evade the Lex Situs Rule for Stolen Goods*' (1980) 96 L.Q.R. 508) One should perhaps enquire whether the facts of *Winkworth* were, in fact, 'exceptional'; consider notes 150 and 151, *supra*.

[159] Slade, J., p503.

[160] *Ibid.*, p503.

therefore, there was sufficient (if not abundant) scope for a display of judicial ingenuity.[161]

As regards the fictional *situs* argument, for the purpose of determining the respective proprietary rights of the plaintiff and the second defendant, the plaintiff contended that the court was entitled and obliged to hold that the *situs* of the goods remained English throughout: "*They were in England at the date of the theft; they are still here; they never left England with the plaintiff's consent; there was never any voluntary act on his part which connected or was even likely to connect the goods with any foreign system of law.*"[162]

Slade, J., however, would not countenance the fictional *situs* argument, declaring that, "*... the lex situs of the relevant disposition cannot be treated as being English rather than Italian. Intolerable uncertainty in the law would result if the court were to permit the introduction of a wholly fictional situs when applying the principle to any particular case, merely because the court happened to have a number of other English connecting factors.*"[163] Curiously, uncertainty as to *situs* has not hindered reliance upon a fictional *situs* in other rules of choice of law in property (*e.g.* as regards incorporeal moveable property, or constructive fixtures).

Slade, J. held fast to the traditional *lex situs* rule, accepting that the principle is "*capable of applying so as to bind and destroy the proprietary rights of a third*

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[161] Slade J. remarked, at p506, that, "[*Cammell v. Sewell*] *is binding on me except insofar as it can properly be distinguished on its material facts.*"

[162] At p508. Further, Slade, J., at p509: "*Mr Mummery submitted the alleged connection of the situs with Italy, for the purpose of determining the plaintiff's rights, is a spurious connection which should be disregarded by the court.*"

person, even though he was not a party to the relevant disposition and did not consent to it, but asserts his claim by virtue of a title prior in time to that of any such party."[164] A chink of light, however, is evident in his Lordship's judgment insofar as he considers *Cammell v. Sewell* to be authority for the proposition that, "*if a person acquires a title to goods situated in England at the date of the purchase, by virtue of a purchase in market overt, and that title is a good one under English law, the English court will generally still recognise his title to them in priority to that of the previous owner, even though such previous owner may be a foreigner from whom the goods had been stolen and the laws of the previous owner's country would not regard his title as having been divested by the purchase.*"[165] Regrettably, his Lordship did not elaborate upon the exceptional instances where the general rule may be displaced.

His Lordship upheld a strict, jurisdiction-selecting approach,[166] remarking that, "... *the English court will not, I conceive, decline to apply a well-established principle of private international law merely because a British subject will suffer thereby or merely because adherence to the principle must result in the application of rules of foreign law which it may regard as inferior to its own equivalent rules.*"[167]

Accordingly, if Mr Winkworth were to have succeeded, it could only have been on the basis of Counsel's second submission. Counsel sought to formulate an additional

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[163] *Ibid.*, p509. *Cf.* Carter, P B, '*Decisions of British Courts During 1981*' (1981) 52 B.Y.B.I.L. 329, p331: "*This resort to mysticism was decisively, and with respect rightly, rejected by the learned judge.*"
[164] Slade, J., p 505.
[165] *Ibid.*, p505. (Emphasis added)
[166] Interestingly, Mr Winkworth's Counsel did not try to persuade the court to adopt a rule-selecting approach: "*Mr Mummery ... pointed out that for the purpose of the present application, he did not rely on the content of the relevant Italian law as a reason why this court should refuse to recognise any rights of ownership thereby conferred on the second defendant vis-à-vis the plaintiff.*" (*ibid.*, p510)
[167] *Ibid.*, p506. *Cf.* Beale, J H, '*Jurisdiction over Title of Absent Owner in a Chattel*' (1927) 40 Harv. L. Rev. 805, at p806, regarding *Edgerly v. Bush* 81 N.Y. 199: "*The fact that Canadian law with respect to*

exception to the general rule, *viz.*: "*where moveables have been stolen from country A or otherwise unlawfully taken from the owner in country A and are then from country A removed without the owner's knowledge or consent and are then dealt with in country B without his knowledge or consent and are then returned voluntarily to country A, the law of country A should be applied to determine whether the original owner is or is not still the true owner of the moveables.*"[168] Whilst Mr Mummery was unable to cite any authority in support of this proposition, nor could the defending Counsel cite any cases which showed it to be improper.

Mr Mummery argued that three factors justified the application of the law of country A (*i.e.* English law).[169] First, since the goods were situated in England at the time of the litigation, there could be no objection on grounds of ineffectiveness to the application of English domestic law. Secondly, there had been no voluntary act on the part of the original owner leading to any connection between the goods and Italy. Finally, "... *the legal concept of security of titles is an important one and country A is justified in making an exception to the general principle ... for the purpose of securing a prior title recognised by its own system of law.*"[170]

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the passing of title differs from New York law is not in itself enough to justify New York in giving no recognition to the Canadian title."

[168] *Ibid.*, p510. *Cf.* Falconbridge (1947), *ibid.*, at p380: "*One important question is whether any modification of the general rule should be admitted if the chattel is removed from one country to another without the express or implied consent of the owner.*" In *Cammell v. Sewell*, *ibid.*, the timber was *en route* (on a particular route), with the consent of the owner, but arguably, no-one anticipated its coming to rest in Norway, or impliedly consented to the consequences thereof. The distinction between *Winkworth* and *Cammell*, however, rests upon the *unlawful* element; in *Winkworth*, but not in *Cammell*, dispossession of the original owner was involuntary *and* unlawful.

[169] *Ibid.*, p510/511.

[170] *Ibid.*, p511.

As to the first factor (ineffectiveness), Slade, J., took the view that although this did not negative Counsel's contention, nor did it actually lend any positive support to the proposition.

Regarding the second factor,[171] Counsel relied on certain American authorities which suggest that the knowledge of an owner that his or her goods have been removed to the jurisdiction of another state, or his or her consent thereto, or acquiescence therein, is relevant to the question of determining whether or not his or her title has been divested.[172] In America, this factor has generally been considered to be pertinent to the issue of jurisdiction, not to choice of law.

Joseph Beale wrote that, " ... *the law of a state into which chattels have been surreptitiously removed without the knowledge of any owner and against his will does not apply its law to divest the title of the absent owner ... a state has no jurisdiction over the title of an absent owner in a chattel which has been brought into that state without any act of his sufficient to submit his interest in the chattel to the jurisdiction of the state.*"[173]

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[171] Consider Savigny, *ibid.*, p129. See Chapter Twelve, *infra* – 'The '*Situs*' Rule – For and Against', note 39, *et seq.*

[172] *E.g.* Beale, J, H '*Treatise of the Conflict of Laws*' (1935), Volume 1, p298 *et seq.* Slade, J., *ibid.*, at p511: "[Mr Mummery] *suggested ... that the broad considerations of policy, which have influenced many American states in protecting the title of an owner who has not consented to his goods being removed to another state, are relevant ... in determining whether* [this court] *should formulate an exception to the rule in Cammell v. Sewell ...*"

[173] Beale (1935), *ibid.*, p511, and Beale (1927), *ibid.*, p810. *Cf.* Davis, J L R, '*Conditional Sales and Chattel Mortgages in the Conflict of Laws*' (1964) 13 I.C.L.Q. 53, 74; and Note (unattributed), '*Jurisdiction over Moveable Property Brought into State Without Owner's Consent*' (1910/11) 24 Harv. L. Rev. 567, at p567: "*Although it is often asserted that all property within a certain territory is absolutely subject to the control of its sovereign, it does not necessarily follow that the sovereign has absolute control over the rights of the former owner of such property. Whenever property is in the territory of a state with the consent of the owner, the state has power, not only over its physical disposition, but also over the owner's title, which he has impliedly subjected to the control of the state by placing his property under its protection ... it is not a necessary conception that rights in property are entirely dependent on its physical control ... the contrary assertion would imply that national power was based rather on brutum fulmen than on justice or law.*" [*i.e.* a state into which property has

Beale's statement of principle may be compared with paragraph 52 of the proposed Final Draft of the Conflict of Laws Restatement of the American Law Institute, No.2, which stated that, "*If a chattel belonging to a person who is not a citizen of, or domiciled in, the State, is brought into the State without his consent, the State has no jurisdiction over his title to the chattel until he has had a reasonable opportunity to remove it, or until the period of prescription in the State has run.*" The comments following paragraph 52 direct that: -

(a) A state in which a chattel is has jurisdiction to deal with it in any way that does not divest the owner's title.

(b) A state in which a chattel is may not divest the owner's title unless: -

(1) The owner is a citizen of or domiciled in the state;

(2) It was in the state when the owner acquired title or he allows it to remain there after having a reasonable opportunity to take it out of the state;[174]

(3) The owner allows it to be taken into the state;[175]

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been taken without the consent of the owner may regulate possession, but not ownership thereof.] *Cf.* Castel, J G, '*Notes and Materials on the Conflict of Laws*' (1960), p581; Falconbridge, *ibid.*, p381; and Scottish Law Commission, Consultative Memorandum No. 27, '*Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer or Another's Property*' (1976) (hereinafter 'S.L.C. (Moveables)'), at p4: "*Possibly the least complex of the compromises adopted in Western legal systems is to protect the bona fide acquirer in possession on an onerous title habile to transfer ownership in cases where the original owner had voluntarily parted with possession of his property in the first place – but not in cases of dispossession by forcible or clandestine means*." (Emphasis added)

[174] No indication is given as to what is considered to be 'reasonable opportunity': would the original owner, for example, be required to exercise due diligence in seeking to locate the property?

[175] Consider Carnahan, *ibid.*, at p371: "... *what constitutes consent? Obviously expressed consent or permission. So also if it is intended or contemplated by the parties that the goods shall be removed to another jurisdiction ... consent is inferred.*" (*e.g.* where a conditional seller or chattel mortgagee should have contemplated removal of the chattel into another jurisdiction) Note, however, Stumberg, G W, '*Chattel Security Transaction and the Conflict of Laws*' (1942) 27 Iowa L. Rev. 528, 537 *et seq.*,

(4) The owner places it in the hands of a bailee without express stipulation against taking it into the state and the bailee takes it there;[176]

(5) It remains in the state after the period of prescription has run in the state.

Paragraph 52 effectively draws a distinction between cases of voluntary and involuntary dispossession of the original owner.[177] Beale commented that, "[Paragraph 52] *has met with as much opposition as support; and it has not been definitively accepted by the* [American Law] *Institute itself, or by its Council as a sound statement of law; nor has it been rejected.*"[178] In England, Cheshire made the point that, "*The lex situs is chosen because in the last resort it is the only effective law. Of what use would it be, for instance, for English private international law to ordain that the lex situs applies only if the res litigiosa has been moved to the situs with the consent of the owner? What indeed is the relevance of consent?*"[179] The relevance, it is submitted, is that the requirement of securing the owner's consent to

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particularly at p541: "... *consent to removal is by no means the equivalent of consent to a transfer of* [the creditor's/the owner's] *interest.*"

[176] Account should clearly be taken of the extent to which the original owner has 'facilitated disposal' of the object by permitting a dishonest intermediary to acquire possession thereof. *Cf.* S.L.C. (Moveables), p42; Stumberg, *ibid.*, p550; and Harding and Rowell, *ibid.*, at p357, where the authors consider the "*quasi-moral issue of fault – who is to blame, as between owner and third party acquirer, for the wrongful transfer of the property to the latter.*"

[177] *Cf.* the view of Professor Hahlo, *viz.*: "*Theft, and to some extent, loss, have the unpredictability of lightning, and there is relatively little the owner can do to protect himself against them. It is of his own free will, on the other hand, that the owner parts with the possession of goods of his own to another by way of loan, lease, deposit, pledge etc. and he has every opportunity of investigating the integrity of that person before doing so. It is only fair and equitable, therefore, that the risk should fall on him rather than on the innocent purchaser. The fact that he has in the first instance voluntarily parted with possession swings the delicate balance of equity in his favour.*" (Hahlo, H R, '*Quebecois Study on Sale of Another Person's Property*' [*per* S.L.C. Moveables, Appendix, p14])

[178] Beale (1927), *ibid.*, p810. *Cf.* Falconbridge, *ibid.*, at p380/1, regarding the First Restatement, paragraph 49: no opinion was "*expressed on the question whether a state from which a chattel has been removed without the consent of the owner may not also exercise legislative jurisdiction over the title to the chattel.*" Falconbridge explains, however, that a comment following paragraph 49 states that: "*Even though a state may have jurisdiction over a chattel brought into the state without the consent of the owner, it does not, at common law, exercise such jurisdiction over the title to the chattel.*" (*ibid.*, p381) Stumberg warned that, "... *the matter of state power over property wrongfully removed deserves more than passing notice ... lack of power is sometimes attributed to a hypothesis that the secured creditor cannot be deprived of his interest unless he consents.*" (*ibid.*, p541)

[179] Cheshire, G C, '*Private International Law*' 3rd edition (1947), p588.

removal of the *res* would prevent an artificial nexus being created between the *res* and the second *situs*, particularly in cases where a thief intended to exploit the *lex situs* rule, by laundering the stolen or illegally removed object in a more favourable *situs*. Furthermore, in scenarios such as that which arose in *Winkworth*, it is wrong to argue that the *lex situs* '*is the only effective law*', since, by the time of the litigation, the only effective law may, in fact, be the *lex fori*. It is extremely unlikely that Cheshire was implying that the *lex situs* at the time of litigation should apply, since nowhere else did he proffer that suggestion. Although one may argue that the effect of bad faith on the part of the purchaser of stolen goods, or of the owner's lack of consent to the removal of the *res* from the first *situs*, should be matters for consideration by the *lex situs* at the *tempus inspiciendum* (*i.e.* the subsequent *lex situs*),[180] *Winkworth* demonstrates that this may provide inadequate protection of the deprived owner against deliberate exploitation by a thief of a 'pro-purchaser' *situs*. It is submitted, therefore, that there is some virtue in the 'consensual' approach, and that the involuntariness of an original owner's dispossession should justify moderation of the *situs* rule.

Arguably, the sentiment expressed in paragraph 52 is implicit in Savigny's affirmation of the *lex situs* rule[181] (*i.e.* if an owner did not voluntarily submit himself and his property to a particular jurisdiction, such as in instances of theft and sale by a non-owner, the *situs* rule should not apply). It is not clear, however, from the face of Savigny's writings, what would be the substitute rule in such a case.[182]

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[180] *E.g.* Morris, J H C, '*The Transfer of Chattels in the Conflict of Laws*' (1945) XXII B.Y.I.L. 232, 240.

[181] Chapter Twelve, *infra* – 'The '*Situs*' Rule - For and Against', note 39 *et seq.*

[182] Although, following the tenor of Savigny's writing, one could seek to determine the matter by reference to the 'real seat' of the *res litigiosa* (which, in *Winkworth*, for example, would most likely

Beale supposed that the second *situs* (the place to which the property had been surreptitiously removed) would be prohibited from exercising jurisdiction, on the ground that, if ownership (being a legalised relation between a person and a thing) exists not only in the thing, but also in the *person* of the owner, then unless the owner has personally submitted to the law of the new *situs*, or has acquiesced in the prorogation of that jurisdiction, "*there is no jurisdiction in that state to affect the rights of the 'absent person'*."[183]

In effect, Beale's proposition builds upon the distinction between a factual *situs*, and a legal *situs*, as employed in the context of the law of fixtures.[184] As Lalive has noted, however, "*No authorities can be found to support the view that the situs should be not merely 'factual' but 'lawful' ... States have generally affirmed their power to apply their laws whatever the reason for the presence of the chattel in their territory.*"[185] Typically, in this context, the *prima facie* right of control has been viewed as being more significant than the concept of a 'legal' *situs*.

One might be inclined to draw a parallel between Beale's proposition, and the handling of cases involving the wrongful removal of a child into a foreign state, by an abducting parent. The courts of states which have ratified or acceded to the 1980

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have been England, given that the goods were stolen from England and were situated there at the time of the proceedings).

[183] Beale (1927), *ibid.*, p812. He continued, "*If the state where the thing is has no jurisdiction over the absent owner's title, any provision of its law by which his interest as owner is affected will be given no force abroad.*" (*Cf.* Chapter Twelve, *infra* – 'The '*Situs*' Rule – For and Against', note 39 *et seq.*)

[184] Chapter Three, *supra* – 'The Distinction between Moveable and Immoveable Property'. *Cf.* Falconbridge, *ibid.*, p381.

[185] Lalive (1955), *ibid.*, p176. *Cf.* Davis, *ibid.*, p74.

Hague Convention on the Civil Aspects of International Child Abduction[186] may be entitled to exercise an urgent, protective jurisdiction over children within their territory, in order to safeguard the immediate welfare of those children,[187] but those courts likewise acknowledge the closer connection which exists between the child and the state in which he or she is habitually resident. Following the wrongful removal or retention of a child from the state of his or her habitual residence, the courts in the destination state will generally[188] order the return of the child to the state of its habitual residence, in order that the courts of that state may determine substantive questions concerning the child's residence and welfare. By analogy, it could be argued that the courts of a state into which property has been surreptitiously removed should likewise generally[189] order return of the property to the *locus originis* (the place from which it had been clandestinely removed, or, if different, the place in which the original owner is habitually resident[190]), in order that the *forum originis* may determine ownership of the property in accordance with the internal *lex loci originis*. It is intended to return to this suggestion in Chapter Fourteen, *infra.*

Counsel for Mr Winkworth sought to rely, in particular, on the American case of *Edgerly v. Bush.*[191] Interestingly, the American case tackled the problem of sale by a non-owner from the angle of jurisdiction, whereas Counsel for Mr Winkworth, in fact,

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[186] The United Kingdom became party to this Convention (as well as to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children) by virtue of the Child Abduction and Custody Act 1985.

[187] *E.g.* Section 12 of the Family Law Act 1986. *Cf.* Article 12 (Provisional, including protective, measures) of Council Regulation (EC) No. 1347/2000 ('Brussels II').

[188] An order for return of the child may be denied if circumstances are proved such as are described in Articles 12 and 13 of the 1980 Hague Convention.

[189] Return of the property could feasibly be refused on grounds akin to those in Articles 12 and 13 of the Hague Convention (*e.g.* by operation of a rule of limitation of action, return could be refused where a certain period of time had elapsed since the date of the theft or the date on which the original owner, exercising due diligence, could have located the property or identified the possessor).

[190] This, of course, has overtones of *mobilia sequuntur personam.*

sought to tackle the same problem from the perspective of choice of law. The facts of *Edgerly v. Bush* were as follows: an individual by the name of Baker granted to the plaintiff a chattel mortgage over a span of horses. Both parties were then resident in New York and the horses were situated there also. Baker subsequently took the horses to Canada where they were sold on his behalf by a trader dealing in horses. The purchaser bought in good faith and without knowledge of Edgerly's claim. Thereafter, Bush, a resident of New York, purchased the horses in Canada.[192] Upon Bush's refusal to deliver the horses to Edgerly, the plaintiff raised an action for conversion.

Essentially, the question before the court was equivalent to that which arose in *Winkworth*, namely, "... *which law is to prevail in determining this contest – that of Lower Canada, or that of this State?*"[193] Chief Justice Folger detailed the various factors which connected the case with New York law: "... *the plaintiff, and Baker from whom the plaintiff got title, were residents of this State when the transfer was made between them; ... it was a transfer of property which was then here, whence it was taken without the consent of the plaintiff; ... the transfer was made by mutual consent, and was executed and valid here; ... the consideration for the transfer existed and passed here; ... the plaintiff and defendant were and are residents of this State; ... the forum in which they stand is here. Thus the law of the domicile, and the*

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[191] (1880) 81 N.Y. 199. See further Note (1910-11), *ibid.*, p567, which cites, in addition, the case of *Houghton v. May* 17 Ont. W. Rep. 750 (1910), in which an attachment, levied in a state where property was brought without the owner's consent, was dissolved. *Cf.* Falconbridge, *ibid.*, p382.

[192] *Edgerly v. Bush, ibid.* (Westlaw Report), *per* Folger, CJ., at p3, explains that the relevant Canadian law incorporated a rule of *market overt*, akin to the rule then pertaining in the City of London. In contrast, the law of New York favoured the original owner: "*Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. It would be to the contravention of that policy, and to the inconvenience of our citizens, if we should give effect to these statutes of Lower Canada ... Notions of property are slight, when a bona fide purchase of stolen goods gives a good title against the original owner ... We are not required to show comity to that extent.*" (*ibid.*) This suggests that the content of the *lex situs*, if prejudicial to a deprived owner, is not beyond policy reproach.

[193] *Ibid.*, *per* Folger, CJ., at p3.

law of the then situs of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff."[194]

The New York Court of Appeals, distinguishing *Cammell v. Sewell*,[195] held that Edgerly was entitled to recover the horses, since, "*As between citizens of this State, the title to personal property cannot be divested without the assent or intervention and against the will of the owner, by the removal of the property from the State by another, having no authority from the owner, and its sale in another country under different laws.*"[196] The accumulation of factors which connected the case with the state of New York was deemed sufficient to displace the operation of the relevant Canadian law. Accordingly, the American case supports a further exception to the general *situs* rule, to the effect that the law of the state into which property has been surreptitiously removed, without the knowledge of the owner (according, that is, to the original *lex situs*), and against that party's volition, will *not* be effective so as to denude the (original) owner of his or her pre-existing title.

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[194] *Ibid.* The conflict rule applied by the American court seems to be an unusual hybrid between the *lex domicilii* and the *lex situs* theories, although ultimately, the court seems to prefer the *lex situs* theory: "*Though a transfer of personal property, valid by the law of the domicile, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated and where a different law has been set up, when it is necessary for the purpose of justice that the actual situs of the thing be examined.*" (Folger, CJ., at p3, citing *Green v. Van Buskirk* 7 Wall. 139)

[195] Folger, CJ. explained that, "... [In *Cammell v. Sewell*] *the property had not been in England until after the sale in Norway, and had never been in the possession of the English owners. We doubt whether, in a case like this, where, after a title to property has been acquired by the law of the domicile of the vendor, and of the situs of the thing, and of the forum in which the parties stand, in a contest between citizens of the State of that forum, it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another State, and a sale of it there under different laws.*" (*ibid.*) Note Beale's criticism of this dictum: "*This extract seems to allege several reasons without alleging that any one alone is enough to satisfy the decision.*" (1927, *ibid.*, p806) Ironically, it is precisely this accumulation of factors (as in *Winkworth*) which gives volume to the cry for application of a more closely connected, non-*situs* law.

[196] *Ibid.*, p1. "... [*C*]*onsidering that the contest was between citizens of New York, and all the other circumstances of the case, the New York law should apply; and the mortgage, according to that law, giving the plaintiff a title which could not be devested* [*sic*] *against his will, the defendant was liable for a conversion.*" (*ibid.*, p2) The whole Court of Appeals concurred, save for Rapallo, J. whom the report describes as "*not voting*". Nevertheless, Beale subsequently remarked that, "*That the knowledge of an owner of the removal of his chattel into another state makes a difference as to his claim to the chattel,*

In *Winkworth*, Slade, J. was little aided by the decision in *Edgerly v. Bush*: "*I find it of no assistance for present purposes, since, with due respect, the judgement of the court is expressed in such confusing language that it is impossible to extract from it any coherent reasons for the ultimate decision.*"[197] The current author finds it rather surprising that the English court encountered such difficulty in deciphering the *ratio* of the New York case, since the opinion of Chief Justice Folger would appear to be framed in quite easily discernible terms.[198] The English judge did not pass comment on the grounds on which the New York court distinguished *Cammell v. Sewell*, but merely concluded that, "*I find it impossible to derive from the English cases any principle that the absence of such voluntary act should preclude or even deter the court of country A from applying the law of country B in accordance with the principle of Cammell v. Sewell.*"[199]

Finally, Slade, J. was most strongly persuaded by Mr Mummery's third factor in support of the application of the law of country A, namely, security of title: "*This, I think is by far his strongest point. In principle, any court must surely regard, with*

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in spite of the fact that by the law of the state into which the chattel is taken his title is divested, is plain from the cases." (Beale, J H, '*The Conflict of Laws*' (1935), Volume II, p806)

[197] Slade, J., *ibid.*, p511/2. *Cf.* Beale, (1927), *ibid.*, at p805: "*The opinion of C.J. Folger is not a satisfactory one. It is full of curious and obsolete notions, and avoids a specification of reasons. The nearest to any form of decision is in the form of a doubt.*"

[198] Given Beale's overriding preference for hard, inflexible choice of law rules [bear in mind that Beale's preferred means of dealing with the problem of theft and sale-on was to introduce an exceptional rule of *jurisdiction*, not of *choice of law*], the cynic might suggest that it was this general antipathy towards a more flexible choice of law provision which underpinned Beale's criticism of Folger, CJ.'s judgment, rather than any obvious error or confusion in the court's reasoning.

[199] Slade, J., *ibid.*, p512. *Contra*, albeit in a different context, the view of the Scottish Law Commission: "*We are not at all convinced that abolition of the doctrine of vitium reale attaching to property of which an owner had been forcibly or clandestinely dispossessed is desirable. We think that the owner who had not voluntarily handed over possession of his property has a preferable right to a bona fide purchaser.*" (S.L.C. (Moveables), *ibid.*, p54) Although the matter was not specifically addressed, it would not seem altogether logical for a different conclusion to be reached merely where the *bona fide* purchaser makes his purchase in a different *situs* than that in which the original owner acquired or exercised his right of ownership.

some initial sympathy, the position of a blameless person ... who, if attention is paid solely to the law of the country of that court, has at all material times had and retained good title to the goods which are the subject of his claim."[200] In reality, this sympathy was short-lived, being wholly diluted by the counter-balancing consideration of security of transaction.[201] Whilst security of title demands an *immutable* connecting factor (the *lex situs* at the time when title vested), security of transaction (perceived by Slade, J. to be the higher goal), depends upon a *mutable* factor, that is, the *lex situs*, from time to time.

Slade, J. explained that, "*Were the position otherwise,* [*i.e.* were not the *lex situs* applied] ... [a purchaser of valuable moveables] *would have to try to effect further investigations as to the past title, with a view to ensuring, so far as possible, that there was no person who might successfully claim a title to the moveables by reference to some other system of law; and in many cases even such further investigations could result in no certainty that his title was secure.*"[202] It is submitted, however, that further investigations would not, in every instance, be unreasonable (*e.g.* when acquiring a painting, it would be reasonable to request, and be given sight of, a detailed provenance, and to consult a stolen art database such as the Art Loss

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[200] *Ibid.*, p512. Nott, S M, '*Title to Moveables Acquired Abroad*' (1981) 45 Conveyancer and Property Lawyer 279, 280: "*Undoubtedly sympathy was felt by the court for the entirely blameless individual ... This expression of sympathy went no further.*" *Cf.* Beale's view of *Edgerly v. Bush*, "*... the case must be supported, if at all, on the ground of the 'surreptitious' removal of the thing into another state.*" ((1927), *ibid.*, p807)

[201] *Cf.* Falconbridge, *ibid.*,at p382, where enquiry was made as to whether it was "*socially desirable*" that the general *situs* rule be modified. *Contra* Franklin, M, '*Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase*' (1932) 6 Tulane L. Rev. 589, 601, where the author urged that, in some contexts, security of title should be protected at the expense of security of contract; and Harding and Rowell, *ibid.*, at p357/8, where it was suggested that "*For instance, during periods of political instability, considerations of public order may necessitate an added protection of property rights* [as opposed to commercial expediency]."

[202] *Ibid.*, p512.

Register[203]). If the purchaser did not exercise the requisite due diligence, then it could be argued that he or she did not act in good faith, or exercise the necessary degree of care.[204]

Slade, J. concluded by stating that, "*I cannot accept the plaintiff's submission that the court should regard such facts as giving rise to a further exception, based on the grounds that the goods were stolen from the plaintiff in England, then removed to Italy and sold there without the plaintiff's knowledge or consent and have now been returned to England.*"[205] Accordingly, the question of title as between Mr Winkworth and Dr D'Annone fell to be determined in accordance with Italian domestic law, not English domestic law.

The case report does not reveal what happened thereafter, but one can assume that if Dr D'Annone were able to prove that he acted in good faith at the time of conclusion

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[203] *Cf. Attorney-General of New Zealand v. Ortiz* [1984] A.C. 1; *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.* 717 F. Supp. 1374 (1989), 917 F. 2d. 278 (1990), *per* Bauer, CJ. (U.S. Court of Appeals - Westlaw report): "*In such cases, dealers can (and probably should) take steps such as a formal IFAR* [International Foundation for Art Research] *search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like. If Goldberg would have pursued such methods, perhaps she would have discovered in time what she has now discovered too late.*" *Cf.* Garro, A M, '*The Recovery of Stolen Art Objects from Bona Fide Purchasers*' (In Lalive, P, *ed.*, '*International Sales of Works of Art*' (1988)), at p517, where the author speaks of the "*duty of inquiry*" which is incumbent upon the purchaser [*i.e.* '*caveat emptor*']; International Foundation for Art Research Journal (1998), Volume 1, Number 3, at p19: "*In this current age of repatriation, a collector would be wise to tread lightly in this area ... Those interested in collecting* [artworks] *... would be wise to monitor the developing legal landscape in this area on a consistent basis to ensure that opportunities to deal in such items are lawful as well as enticing.*"; and Hayworth, A E, '*Stolen Artwork: Deciding Ownership is No Pretty Picture*' (1993) 43 Duke Law Journal 337, at p341, quoting an American lawyer: "*Collectors used to ask* [art connoisseurs] *... if something was good. Now they have a phalanx of lawyers telling them whether it's legal.*" Further, (in a different context) Stumberg, *ibid.*, at p546: "*Sympathy for a purchaser diminishes materially when it is realised that he as a reasonable person should have taken into consideration the possibility of the existence of a prior lien.*"

[204] *Cf.* Article 11, Schedule 1, Contracts (Applicable Law) Act 1990: in a contract concluded between persons who are in the same country, a natural person may invoke his incapacity under another law only in a case where the other contracting party was aware of the incapacity at the time of conclusion of the contract, "*or was not aware thereof as a result of negligence.*" (*i.e.* if circumstances were such as to create a possibility – or likelihood? – that there was incapacity under another law, but the transacting party in question did not take appropriate steps to verify the other's capacity.)

of the Italian contract, that he was not aware of any defect in the title of the vendor in Italy, that suitable documentation evidenced the sale, and that he had grounds for believing that the vendor was entitled to dispose of the goods to him, and assuming that no question of *renvoi* arose, then Dr D'Annone's ownership of the goods would be duly admitted and recognised in England. The likely result is that Mr Winkworth would be deemed to have no better title to the *netsuke* than would a complete stranger to the case.

The problem which arose in *Winkworth* occurs also in the context of hire purchase and conditional sale agreements, and chattel mortgages, for "[these transactions] *raise in a particularly acute form the old problem of where the line is to be drawn between security of titles and security of transactions.*"[206] Davis has remarked, in line with Ziegel,[207] that, "*Since 1945 there has been a noticeable trend, especially in Canada and to a lesser extent in the U.S.A., towards supporting the innocent purchaser against the mortgagee or conditional vendor.*"[208] The general problem can be stated thus: A sells a chattel in State X to B under either a conditional sale agreement, or a chattel mortgage, in terms of which B pays the price by instalments, whilst taking immediate possession of the chattel. Ownership of the chattel is to remain with A, until such time as B has paid the price in full. Prior to making payment in full, B removes the chattel from State X to State Y, where (a) he sells the chattel to C, a *bona fide* purchaser for value, or (b) the chattel is seised by B's creditors (also designed C) and diligence is thereafter effected upon it. In each of these scenarios, according to the internal law of State X, A remains the owner of the chattel, whereas according to the

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[205] Slade, J., *ibid.*, p514.
[206] Dicey & Morris, *ibid*, p971, paragraph 24-025.
[207] Ziegel, J S, '*Conditional Sales and The Conflict of Laws*' (1967) 45 Can. Bar Rev. 284, at p297.

internal law of State Y, since B was the purported owner of the chattel, C's title is *prima facie* valid and marketable. The most common manifestation of this problem concerns motor vehicles. The proliferation of motor vehicles means that, in federal states or in countries whose boundaries are contiguous with those of another country, "*a dishonest person need only pay the hire-purchase deposit on a motor car before driving it to another state, selling it to an innocent purchaser and disappearing with the proceeds, while the purchaser is left to argue out his title with the original owner, usually a large finance company.*"[209]

While Slade J.'s judgment in *Winkworth* constitutes clear affirmation of the *lex situs* rule, it is important to emphasize his Lordship's declaration that, "*The rule, however, is not one of universal application; in particular it is not likely to be applied in any of the five exceptional cases already mentioned.*"[210] His Lordship's use of the words '*in particular*' implies that the categories of exception to the general rule are not yet closed. The five exceptions specifically enumerated in *Winkworth* are particular instances of displacement of the general rule, but it would appear that further 'exceptions' may still be admissible. A recent attempt, however, to expand the categories of exception met with failure.

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[208] Davis, J L R, '*Conditional Sales and Chattel Mortgages in the Conflict of Laws*' (1964) 13 I.C.L.Q. 53, at p53.

[209] *Ibid.*, p55. More worryingly, Ziegel has remarked that, "*If the reported cases are any guide, the overwhelming number of chattels (usually vehicles) which are surreptitiously removed from one province into another are wrongfully disposed of in the second situs before the end of four months.*" (Ziegel, *ibid.*, p301) Consider also the criminal law implications: *R v. Atakpu* [1993] 4 All E.R. (Ch. D.) 215, concerning interpretation by an English forum of section 3(1) of the Theft Act 1968. Ward, J. concluded, at p218, that, "*The theft was complete abroad and the thieves could not steal again in England.*" In quashing the convictions of the appellants ("*a pair of thoroughly dishonest rascals*"), his Lordship outlined the nature of their "*simple but audacious scheme to hire expensive motor cars abroad, have them driven into the United Kingdom but then, after ringing the changes to the vehicles, to sell them to unsuspecting purchasers.*" (*ibid.*, p217)

[210] *Ibid.*, p514. (Emphasis added)

Glencore International v. Metro Trading: more oil on troubled waters?

It is clear from the foregoing discussion that a property dispute may occur either between the actual parties to the transfer of the object in question ('an original-party dispute'),[211] or between one of those original parties, and a third party claiming otherwise to have acquired or derived title to the property in question ('a remote-party dispute').[212] In 1947, Cheshire proposed that, for the purposes of choice of law, a distinction should be made between these two types of dispute.[213] Rather than apply an identical connecting factor to the two types of dispute, Cheshire argued that different rules should determine the respective *leges causae*.[214]

As regards original-party disputes,[215] Cheshire submitted that, "... *questions of this type are on principle governed by the lex actus ... there is no English authority which replaces this law by the lex situs.*"[216] The *lex actus*, he argued, was "... *equivalent to the proper law of the contract and is ascertainable in the same way. It is the law with*

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[211] *E.g.* Where the transferor and the transferee disagree as to the validity of "... *an assignment made in London of goods situated in Paris ... valid by English law but void by French internal law.*" (Morris, J H C, '*The Transfer of Chattels in the Conflict of Laws*' [1945] XXII B.Y.I.L. 232, 234)

[212] *E.g.* "... *where, though there has been a previous dealing with the goods between A and B, the claim is made by a third person C who relies upon some later independent transaction quite unconnected with the earlier one between A and B.*" (Morris, *ibid.*, p234) (*e.g.* where a motor car, transferred under hire purchase agreement from A to B, in Scotland, is taken by B (or by a thief), to France, where it is sold to C.)

[213] Cheshire, G C, '*Private International Law*' 3rd edition (1947), p576; *Cf.* Cheshire (1935), *ibid.*, p 84, and '*Private International Law*' 4th edition (1952), p435. Cheshire had earlier remarked that, "... *the ideal is that there should be one system of law which will be applicable to every case.*" ('*Private International Law*' 2nd edition, p416), but as Professor Anton has subsequently advised, "... *no one system of law has a claim to govern every question relating to the transfer of moveable property.*" (1990, *ibid.*, p613) Consider also Trautman, D, '*The Revolution in Choice of Law: Another Insight*' (1986) 99 Harv. L. Rev. 1101, at p1110: "*In some situations, the law of the situs must protect certain third-party interests ... But most cases ... instead raise questions about the policies underlying the transaction that brings the parties together ... Good judges ... understand that these family and transactional concerns must be respected.*"

[214] Cheshire adopted a more fact-sensitive, refined analysis, prompting Morris to remark that, "... *the treatment of the subject by Professor Cheshire marks a notable advance from the jejune and contradictory rules of Dicey.*" (Morris, *ibid*, p234) *Cf.* Foster, who considered that Cheshire "... *provided us with a brilliant rationalisation of existing decisions.*" (Foster, J G, '*Some Defects in the English Rules of Conflict of Laws*' (1935) XVI B.Y.I.L. 84, 94)

[215] Including *inter vivos* donations of corporeal moveable property. (Cheshire, 1947, *ibid.*, p578)

[216] Cheshire (1947), *ibid.*, p576.

which, having regard to all the relevant circumstances, the transfer is most closely connected – the law to which the reasonable man would turn should any dispute arise with regard to the transfer."[217] Cheshire was careful to emphasize that the *lex situs* should not automatically be considered to constitute the *lex actus*.[218] So, for example, in a case concerning the transfer by A, domiciled and resident in England, of goods situated in Spain, to B, domiciled and resident in Holland, while Cheshire considered that the *lex actus* would *probably* be Spanish law, he advised that the forum would require to know, *inter alia*, "*Where was the transfer effected? Was the transaction, if reduced to writing, drafted in terms peculiar to English, Dutch or Spanish law? Were the goods only temporarily in Spain?*"[219]

The effect of this would be that, if, say, delivery of the property in question were required under the *lex situs*, but not under the *lex actus*, then, notwithstanding lack of delivery, the transaction would nevertheless, be effective, *as between the original parties*, so as to transfer title to the goods to the transferee, on satisfaction of the requirements imposed by the *lex actus*. This is farther reaching than the distinction proffered by Morris, whereby, "*as between the parties, an assignment may be ineffectual as an executed transfer, but effectual as an executory contract to transfer.*"[220]

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[217] Cheshire (1947), *ibid.*, p576. The author advised that, "... *the lex actus is not necessarily the same as either the lex loci actus or the lex situs ... it may be either of these laws, or it may be both where they coincide, or it may be some different law altogether, as, for instance, the law of the place where the moveables are to be delivered to the transferee.*" (*ibid.*) Further, in the 4th edition, at p436, Cheshire stated that, "... *questions of a proprietary nature affecting the validity or effect of a transfer and arising between the parties themselves are governed by the lex actus where this law differs from the lex situs.*"

[218] (1947), *ibid.*, p577: "*The danger ... is to avoid the assumption that the lex situs always constitutes the lex actus.*"

[219] (1947), *ibid.*, p577.

[220] Morris (1945), *ibid.*, p236. The inadequacy of the contractual analysis is apparent if, as Morris urged, "... *we assume that the original assignment was by way of gift, for then the assignor would be*

Cheshire concluded that, "*As compared with the arid dogma of the lex situs, it is reasonably clear that the doctrine of the lex actus provides a test which is more elastic and better calculated to fulfil the expectations of the parties.*"[221] This, it is submitted, is accurate insofar as it is restricted to original-party disputes. Furthermore, it should give rise to no greater evidential burden than does ascertainment of the contractual *lex causae*.[222]

As regards remote-party disputes, where the third person was not privy to an earlier transfer of the *res litigiosa*, but instead relied upon a subsequent, independent transaction, Cheshire recognized that, "*... in this type of case ... on realistic grounds it becomes futile to cling obstinately to the principle of the lex actus ... the lex actus must ex necessitate give way.*"[223] He did not, however, concede that the *lex situs*, in this context, was more appropriate on grounds of logic or principle, but purely on the basis of practical expediency.[224]

The original-party/remote-party distinction is observed, to some extent, in dealings with incorporeal moveable property: disputes between the creditor and debtor under an incorporeal right (*e.g.* an insured party and his or her insurer) are largely governed

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under no contractual obligation at all to the assignee, and a pure question of title would arise." (*ibid.*) (*Cf. Cochrane v. Moore* (1890) 25 Q.B.D. 57)

[221] (1947), *ibid.*, p577.

[222] Under Articles 3 and 4 of the Rome Convention on the Law Applicable to Contractual Obligations, or under the common law rules if the contractual obligation in question is of a type listed in Article 1(2) of the Convention.

[223] (1947), *ibid.*, p583. Further, "*... experience ... has shown the futility of any attempt to enforce the lex actus in the teeth of a contradictory lex situs.*" (p587) Cheshire made reference to the "*inescapable fact*" that "*physical power over the moveables rests with the authorities in the situs.*" (*ibid.*, p583) It is not clear whether he would have persisted in applying the *lex actus* in cases where a *conflit mobile* meant that the *situs* at the *tempus inspiciendum* no longer exercised control over the asset.

[224] Cheshire (1952), *ibid.*, p438.

by the proper law of the right,[225] whereas disputes between the assignor and assignee of that right are largely determined according to the proper law of the assignation.[226]

The significance of the original-party/remote-party dichotomy came to the fore in *Glencore International A.G. and Others v. Metro Trading International Inc.*[227] This conflict of laws dispute was the first phase of what has become known as 'the Metro Litigation',[228] which arose out of the collapse, in February 1998, of an oil storage facility operated in Fujairah[229] by the defendant ('MTI'). The five plaintiffs had all entered into agreements with the defendants, in terms of which they delivered oil products to the defendants, for storage. MTI were engaged in the business of storing the oil and thereafter re-selling it, after carrying out blending and other processes. When MTI became insolvent, the claimant oil companies asserted proprietary rights to the oil then held by MTI. In addition, four banks claimed that they were entitled to a first charge over various sums of money due to MTI from purchasers of fuel oil, and over products remaining in storage, as security for amounts outstanding under loans to MTI. Furthermore, the purchasers of various cargo parcels of fuel oil ('the purchasers') alleged that they had good title to the oil. Hence, the case concerned the competing claims to property, from both within, and among, different classes of litigants.[230] In order to tackle the preliminary issues, a number of assumptions were

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[225] Consider Article 12(2) of the Rome Convention.
[226] Consider Article 12(1) of the Rome Convention. See Chapter Eleven, *infra.* – 'The Assignation of Incorporeal Moveable Property'.
[227] [2001] 1 Lloyd's Rep. 284.
[228] The litigation, in its entirety, comprises 35 separate actions, and involves more than 50 litigants. Rix, J. directed that the litigation should be disposed of in a series of separate phases, each dealing with a limited group of issues. This particular phase was argued in the Commercial Court before Moore-Bick, J.
[229] Fujairah is one of the seven emirates which form the federation of the United Arab Emirates.
[230] Although the interests of the five plaintiffs coincided in relation to the conflict of laws issues arising, their interests conflicted to the extent that it would have been impossible to satisfy all of their claims out of the oil remaining in MTI's possession.

made.[231] Moore-Bick, J., explained that, "*These assumptions are fundamental to the determination of the issues arising under phase 1, but it is right to emphasize that they are no more than assumptions.*"[232]

The primary issue of conflict of laws was: what system of law governs the transfer of title to oil delivered by the plaintiffs to MTI, and by MTI to the purchasers, and any non-contractual liabilities which MTI and the purchasers may have incurred to the plaintiffs?

MTI and the purchasers alleged that the transfer of title to the oil in Fujairah was governed by the law of Fujairah (according to which, the property had passed from the claimants to MTI, and thence to the purchasers). The plaintiffs, on the other hand, sought to rely on the law which governed the contract between themselves and MTI. The issue, therefore, was whether, "... *as between the immediate parties to a contract under which goods are delivered by one party to the other, the passing of property is governed by the intention of the parties as expressed in the contract (the proper law) or by the law of the place where the property is situated (the lex situs) where these do not coincide in their effect.*"[233]

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[231] These are detailed in an Appendix to the judgment, at p333.

[232] *Ibid.*, p290. It was assumed, *inter alia*, that: (1) The relevant contractual relationships between the oil company claimants (other than Texaco) and MTI were governed by English law; (2) Title to the oil was vested in the oil company claimants immediately before the carrying vessel arrived at Fujairah; (3) The storage vessels were at all times within the territorial waters of Fujairah, and all acts of commingling, blending, sale and delivery took place within Fujairah; and (4) Everything done by the purchasers in relation to the purchase, delivery, consumption and disposal of the oil was done in Fujairah.

[233] Moore-Bick, J., at p290.

Mr Schaff, Q.C., Counsel for Glencore, acknowledged that the general rule in English law is that the passing of property in moveables is governed by the *lex situs*,[234] and observed that some limits to this principle have already been recognized. Counsel further submitted that an additional exception ought to be recognized, namely, where goods have been transferred by one person to another under a contract. Noting that in matters of contract, English law gives effect to the proper law of the contract and thereby, to the parties' intentions as expressed in the contract, Counsel submitted that when issues relating to the passing of property arise *as between the immediate parties to the contract*, English law ought to resolve any conflict between the terms of the contract and the *lex situs*, by recognising and giving effect to the contract in accordance with its proper law, rather than the *lex situs*. Mr Schaff argued that none of the decided cases, in fact, precluded such an approach,[235] which, he contended, would better accord with the commercial expectations of the transacting parties. Counsel conceded that this approach would require to be modified were a third party to become involved.[236] As Chesterman has indicated, "... *the claim should not be*

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[234] *Ibid.*, p291. Reference was made to Dicey & Morris, '*The Conflict of Laws*' 13th edition, p963, and to Cheshire & North, '*Private International Law*', 13th edition, p942, as well as to *Cammell v. Sewell* (1858) 3 H&N 617, (1860) 5 H&N 728; *Castrique v. Imrie* (1870) L.R. 4 H.L. 414; *Re Anziani* [1930] 1 Ch. 407; and *Bank voor Handel en Scheepvaart N.V. v. Slatford* [1953] 1 Q.B. 248.

[235] This point was accepted by Moore-Bick, J., at p292.

[236] *Cf.* Von Mehren and Trautman who considered that, "... *when persons other than parties to a transaction become involved, the situs of the chattel is an obvious focal point.*" (Von Mehren, A T, and Trautman, D T, '*The Law of Multistate Problems – Cases and Materials on Conflict of Laws*' (1965), p196) *Cf.* Chesterman, M R, '*Choice of Law Aspects of Lien and Similar Claims in International Sale of Goods*' (1973) 22 I.C.L.Q. 213, at p234: "*The law which most satisfactorily reflects the interests of the third party is the lex situs as at the time when the conflict between the claimant and the third party arises.*" (It is suggested that the author's qualification as to time refers to '*lex*', rather than to '*situs*'. *Cf. Lynch v. Provisional Government of Paraguay* (1871) L.R. 2 P&D 268) Mr Schaff did, nevertheless, contend that whilst, "... *ordinarily questions of title arising between the true owner and a third party purchaser would be governed by the lex situs ... in this case the contracts under which the purchasers bought bunkers from MTI were not subject to Fujairah law but contained an express choice of English law and jurisdiction. To that extent they could be said to have been aware of the fact that the passing of property was intended to be governed by English law rather than by the law of Fujairah.*" (*ibid.*, p298) Moore-Bick, J., dismissed this argument (rightly, it is submitted) rather brusquely: "... *although the transactions in question can in one sense be viewed as part of a single chain, the interposition of MTI means that the choice of English law to govern the transaction between MTI and the purchasers was entirely fortuitous as far as the oil claimants were concerned. There is in reality no link between them and the purchasers of a kind which would justify treating them as if they were parties to an agreement*

resolved entirely by a law which the claimant may well have been wholly or partly responsible for selecting and the identity of which may not be known to the third party until after litigation begins."[237]

Although none of the decided cases precluded such an approach, reference was made to the dictum of Lord Justice Diplock in *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association.*[238] Diplock, LJ. advised that, "*The transfer of the* [contractual] *documents is a symbolic act which has as a consequence in English law the transfer of the property in the goods wherever they may be. But it does not follow from this that the place where the property in the goods passes is the place where the symbolic act is done and not the place where it has its effect, that is to say the place where the goods are. The proper law governing the transfer of corporeal moveable property is the lex situs.*"[239]

Moore-Bick, J. made reference to the views of Professor Cheshire who noted that, "[In 1965] *there was then no ... English authority preferring the lex situs over the proper law of the transfer when the dispute was limited to the two parties to the*

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governed by English law ... as between the oil claimants and the purchasers questions of title are governed by the law of Fujairah as the lex situs." (*ibid.*, p298)

[237] Chesterman (1973), *ibid.*, p234.

[238] [1966] 1 W.L.R. 287.

[239] *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, at p330. His Lordship continued, "*A contract made in England and governed by English law for the sale of specific goods situated in Germany, although it would be effective to pass the property in the goods at the moment the contract was made if the goods were situate in England, would not have that effect if under German law (as I believe to be the case) delivery of the goods was required in order to transfer the property in them. This can only be because the property passes at the place where the goods themselves are.*" His Lordship's remarks, however, must be considered to be *obiter dicta*, and not, therefore, binding upon Moore-Bick, J.

transfer. [Professor Cheshire] *suggested that in such a case the proper law of the transfer was to be preferred on the grounds of principle and convenience.*"[240]

Mr Schaff referred the court to relevant Scottish cases dealing with competing transfers, including *North Western Bank v. Poynter, Son and Macdonalds*[241] and *Inglis v. Robertson & Baxter*,[242] but Moore-Bick, J. concluded that, "*Such support as Mr Schaff obtains from* [*North Western Bank*] *... is undermined by Inglis v. Robertson.*"[243] Reference was also made to *Zahnrad Fabrik Passau G.m.b.H. v. Terex*,[244] in particular, to *obiter* remarks by Lord Davidson to the effect that whether or not title had passed was a matter to be determined by reference to the contract:[245] Lord Davidson stated that, "*If, as s.17 of the Sale of Goods Act 1979 provides, the parties to a contract are entitled to agree when property is to pass, then I think it is wrong to regard the lex situs as being an inflexible corpus of law.*"[246] Moore-Bick, J., however, conceived that this meant no more than that, "*the lex situs itself may recognize the effect of the transaction and hence its proper law.*"[247]

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[240] Moore-Bick, J., at p292, referring to the 7th edition of Cheshire's '*Private International Law*'. The court noted that Professor Cheshire's view was not repeated in the 8th or subsequent editions (including the current edition). This may possibly have been due to a change in authorship: the Preface to the 9th edition, written by Dr P M North, states that, as regards the 8th edition, "*I was primarily responsible for much of the work,* [although] *it was all subjected to Dr Cheshire's careful scrutiny.*"

[241] [1895] A.C. 56.

[242] [1898] A.C. 616.

[243] Moore-Bick, J., at p292.

[244] 1986 S.L.T. 84.

[245] *Cf. Kahler v. Midland Bank Ltd.* [1950] A.C. 24; and *Zivnostenska Banka National Corporation v. Frankman* [1950] A.C. 57, in which questions concerning possession were governed by the proper law of the contract. Consider Counsel's reference to the remarks of Lord Reid in *Zivnostenska*, at p 83: "*... there is no apparent reason why the parties should find it attractive that rights under the contract with regard to deposited property should vary according to the place where that property might be at the time; and should, so long as that property was deposited abroad, be settled by a law with which the parties were perhaps unfamiliar.*"

[246] *Ibid.*, p88.

[247] Moore-Bick, J., *ibid.*, p293. This interpretation amounts, in effect, to a *renvoi* by the *lex situs*.

Seeking to counter the customary arguments in support of the *lex situs* rule, Mr Schaff argued that, "... *where property is disposed of by contract, as between the parties to the transaction the natural expectation of reasonable men is that property will pass in accordance with the contract, and that where no third party interests are involved practical control over the goods is of relatively little importance because contractual remedies will usually be sufficient to ensure that the goods are delivered or title is perfected.*"[248] Moore-Bick, J., however, stated rather starkly that, "*These arguments have their attractions, but ultimately I do not find them persuasive.*"[249] His Lordship showed greater support for "*consistency of principle ... whether or not third party interests are involved.*"[250] He further opined that, "... *it would be highly anomalous if questions of title to the goods were to be governed by English law as the proper law of the contract if the seller had not purported to re-sell the goods to a third party, but by German law as the lex situs if he had.*"[251] With respect, what is relevant is not whether or not the seller may have purported to re-sell the goods (an interpretation which would confer upon the seller some degree of control regarding determination of the *lex causae*), but rather, whether or not the circumstances are such that a third party could, at his or her own instance, establish a putative interest in, or claim to, the goods in question.

His Lordship noted that, "*Questions of title are most likely to be of importance when one party to the transaction is insolvent. The interests of third parties in the form of a general body of creditors may clearly be affected in such a case, but it would be equally anomalous if the law governing the passing of property depended on*

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[248] *Ibid.*, p294.
[249] *Ibid.*
[250] *Ibid.*, p295.
[251] *Ibid.*, p295.

considerations of this kind."[252] It is respectfully submitted that this would not be anomalous, but merely, fact-sensitive.[253] It is not suggested that the original-parties exception would be widely employed,[254] but it is urged that the exception should pertain where circumstances indicate that the *lex situs* is not the most appropriate law to apply.[255] It is accepted, however, that if the law applicable to the contract between the original parties has not been chosen by the parties (whether expressly, or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case[256]), but rather falls to be ascertained by the court in accordance with Article 4 of the Rome Convention, it is arguable that the *lex situs* may be the more appropriate law to determine the proprietary issues between the contracting parties, for in such a case, the parties' expectations may best be satisfied by applying, not the contractual *lex causae*, but rather the *lex loci rei sitae*.[257]

Moore-Bick, J. concluded that questions as to who, as between MTI and the plaintiffs, acquired, retained, or lost title to the oil, upon and after its arrival within Fujairahan territorial waters, are governed by the law of Fujairah, *qua lex situs* of the oil.[258]

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[252] *Ibid.*, p295.
[253] *Cf.* Section 12 of the Private International Law (Miscellaneous Provisions) Act 1995.
[254] Moore-Bick, J. stated that, "*I am not persuaded that such a rule* [the *lex situs*] *is likely to prove unsatisfactory in many cases.*" (*ibid.*, p295) The *general* correctness of the *lex situs* rule is not disputed.
[255] Moore-Bick, J. himself recognised, at p294, "... [the] *apparent oddity of applying a lex situs rule to the transfer of property in goods temporarily situated abroad under a contract made between two Englishmen in London.*"
[256] Article 3 of the Rome Convention.
[257] In such a scenario, it is relatively likely that the contract (unless it is a business-to-business contract – in which case Article 3 is, in any event, more likely to apply) would, at any rate, be deemed to be most closely connected with the *lex loci rei sitae*.
[258] Moore-Bick, J., *ibid.*, p296. It was not disputed that contractual claims by the plaintiffs against the defendants were governed by the proper law of the contract. Furthermore, his Lordship advised that, "... *subject to the application of the law of Fujairah in relation to the passing of property, the law applicable to determine claims by the oil claimants against MTI is that system of law which is identified as the proper law of the relevant contract in each case.*" It appears, from a somewhat opaque passage, that this extends even to claims against MTI in tort, the case falling under section 12 of the Private International Law (Miscellaneous Provisions) Act 1995. (*ibid.*, p296) Note, however, that claims in tort by the plaintiffs against the *purchasers* (based upon wrongful interference with goods) were *not* considered to fall within the section 12 rule of displacement. Mr Schaff submitted that, "... *a comparison between the factors connecting the case with Fujairah and those connecting it with*

Conclusion

It may be virtually impossible to state dogmatically that one theory above all others should govern the transfer of corporeal moveable property. If, from the outset, one were to adopt the broader perspective that more than one law may be relevant (or, at least, that not merely the *lex situs* is relevant), it would be possible to identify the particular system(s) of law which is (are), in fact, most closely connected to the transfer in question, or more particularly, to the incident in question.

In *Carse v. Coppen*[259] Lord President Cooper was led "... *to abandon the search for an overhead solution ..., and indeed to doubt the wider validity claimed for many of the earlier decisions pronounced at a stage when private international law was less developed that it has since become.*"[260] The Lord President concluded that, "*I prefer to particularize the problem more narrowly.*"[261] More recently, in *Bankhaus H Aufhauser & Ors. v. Scotboard Ltd*,[262] Lord Hunter cautioned that, "*The opinion of the Lord President in Carse v. Coppen, contains ... a salutary warning against attempts to state general principles in this particular area of Scots private international law.*"[263] The challenge now is not to articulate the general principle, but rather, it is to moderate (not, it is emphasised, wholly to subvert) the grip of the general *situs* rule, and to formulate a rule which allows greater sensitivity to the circumstances of a

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England indicated that it was substantially more appropriate for the applicable law in the present case to be English law." (*ibid.*, p298) Moore-Bick, J., however, held that, "*I am quite unable to accept that the mere fact that MTI agreed to sell bunkers on English law terms is sufficient to displace the general rule in s.11. The fact that all the events in question occurred in Fujairah where the goods themselves were situated seems to me to provide the strongest possible connection with that country.*" (*ibid.*)

[259] 1951 S.L.T. 145.

[260] *Ibid*, p148.

[261] *Ibid.*

[262] 1973 S.L.T. (Notes) 87.

[263] *Ibid.*, p89. Lord Hunter humbly concluded that, "*I shall not attempt a task which has been regarded as impracticable by judges more eminent than myself.*"

property dispute, and to the *particular* issues which have arisen. In 1935, Foster expressed the view that it was not too late for a "*set of logical and comparatively simple propositions on assignments to be laid down by the courts.*"[264] One hopes, almost seventy years later, that this proposition still holds true.

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[264] Foster (1935), *ibid.*, p94.

BEYOND THE INELUCTABLE:

AN EXAMINATION OF CHOICE OF LAW RULES

IN PROPERTY

(APPENDICES)

JANEEN MARGARET CARRUTHERS

Thesis submitted for the degree of Ph.D.

School of Law

Faculty of Law and Financial Studies

University of Glasgow

March 2002

BEYOND THE INELUCTABLE:

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(Appendices A - K)

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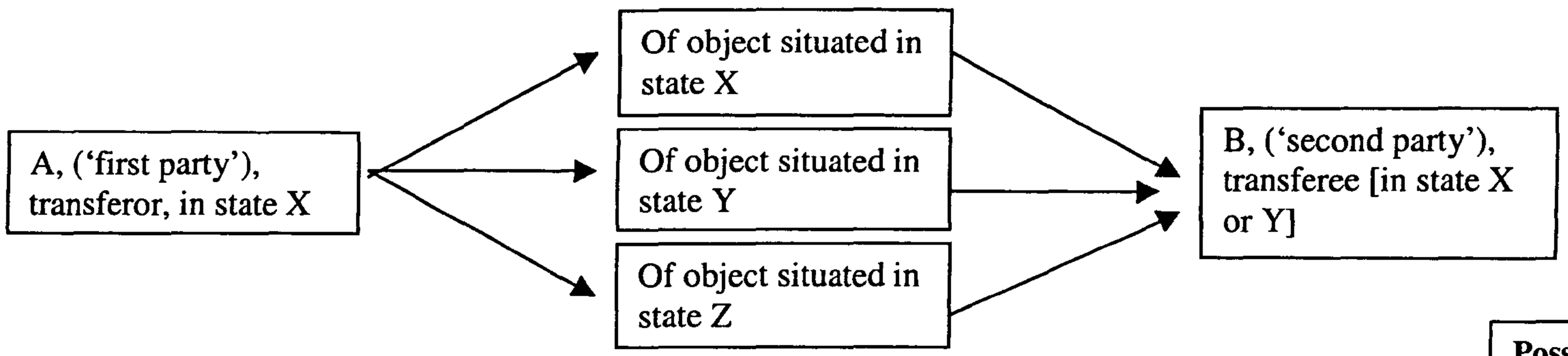
CORPOREAL MOVEABLES: MODEL 1, PARAGRAPHS 11 – 16 **APPENDIX A**

TRANSFER FROM THE 'FIRST PARTY' TO THE 'SECOND PARTY' ('THE ORIGINAL PARTIES')



- Paragraph 12 - Party autonomy between original parties, A and B.
- Paragraph 13 - In event of failure to exercise party autonomy, application of the law of closest connection, presumed to be the situation of the object at the time when the interest is alleged to have been transferred, *unless* the situation is unknown or unascertainable.
- Paragraph 14 – As between original parties, A and B, displacement of presumptions in favour of a more appropriate law.
- Paragraphs 15 and 16 – General rule and displacement provisions for *static* conflicts (*i.e.* where the *situs* remains constant, but the *lex loci rei sitae* conflicts with the 'contractual' *lex causae*).
- Paragraphs 18 and 19 - Protection of *remote* parties (*e.g.* B's creditors), via mandatory rules of the *lex loci rei sitae* concerning inalienability [and attachment by creditors].

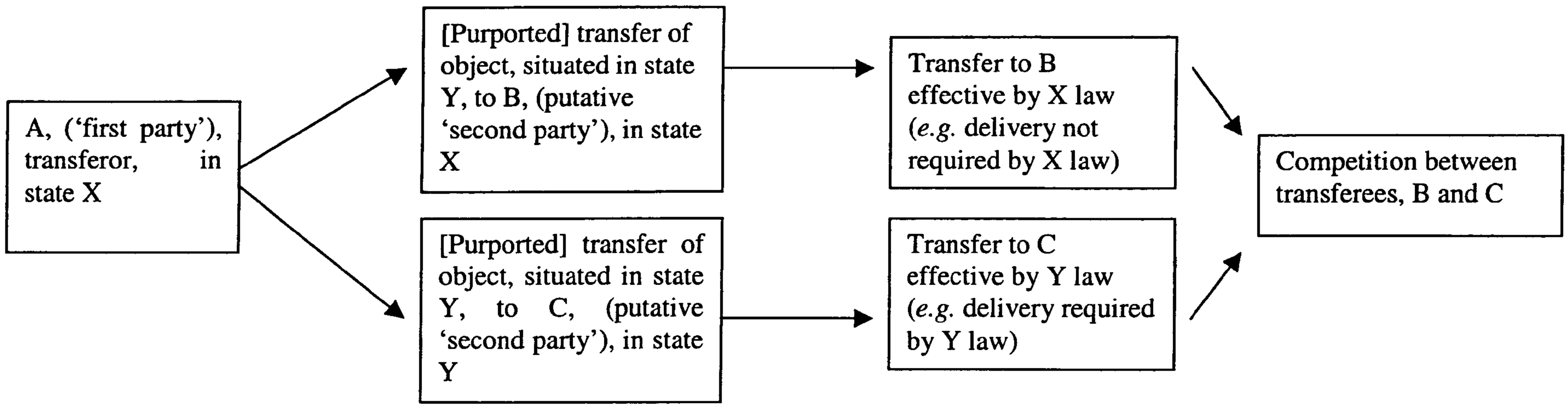
Possible scenarios:-

- **A, B, and object in state X (No choice of law issue, unless through party choice);**
- **A and B in state X, and object in state Y;**
- **A in state X, B and object in state Y; or**
- **A in state X, B in state Y, and object in state Z.**

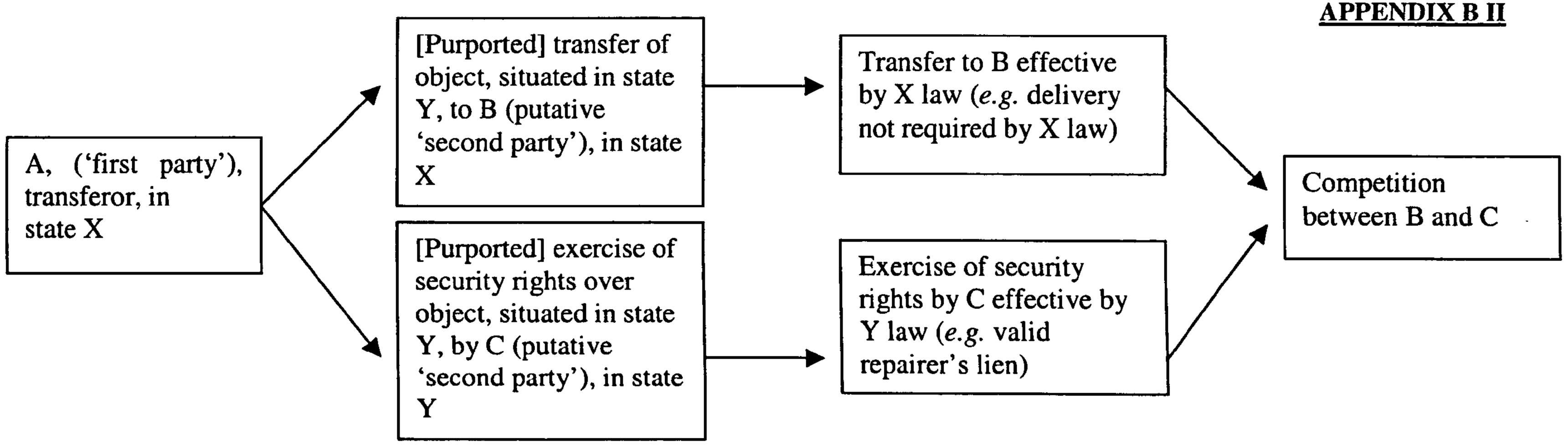
CORPOREAL MOVEABLES: MODEL 1, PARAGRAPH 17

APPENDIX B I

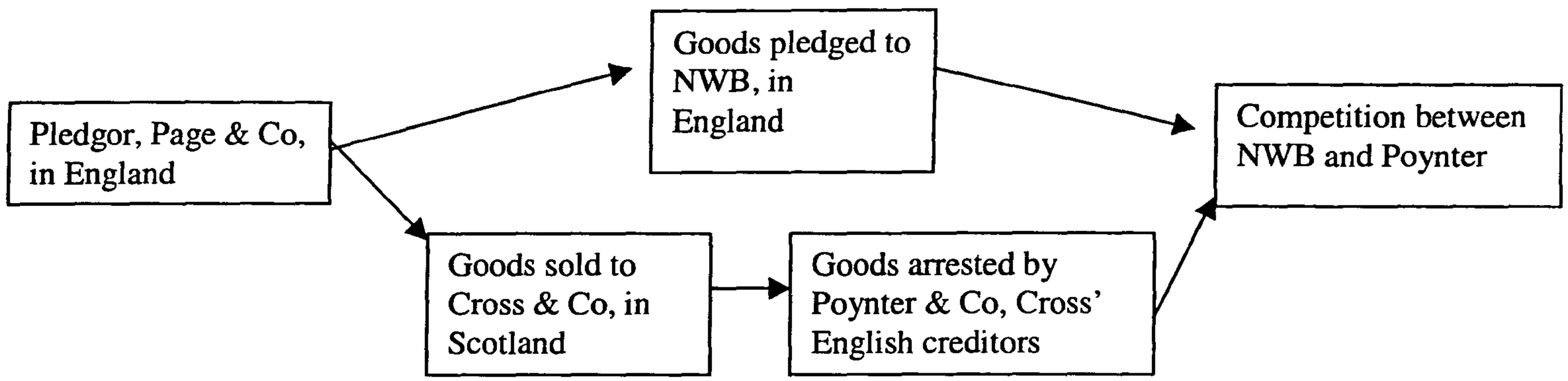
COMPETING TRANSFEREES



APPENDIX B II



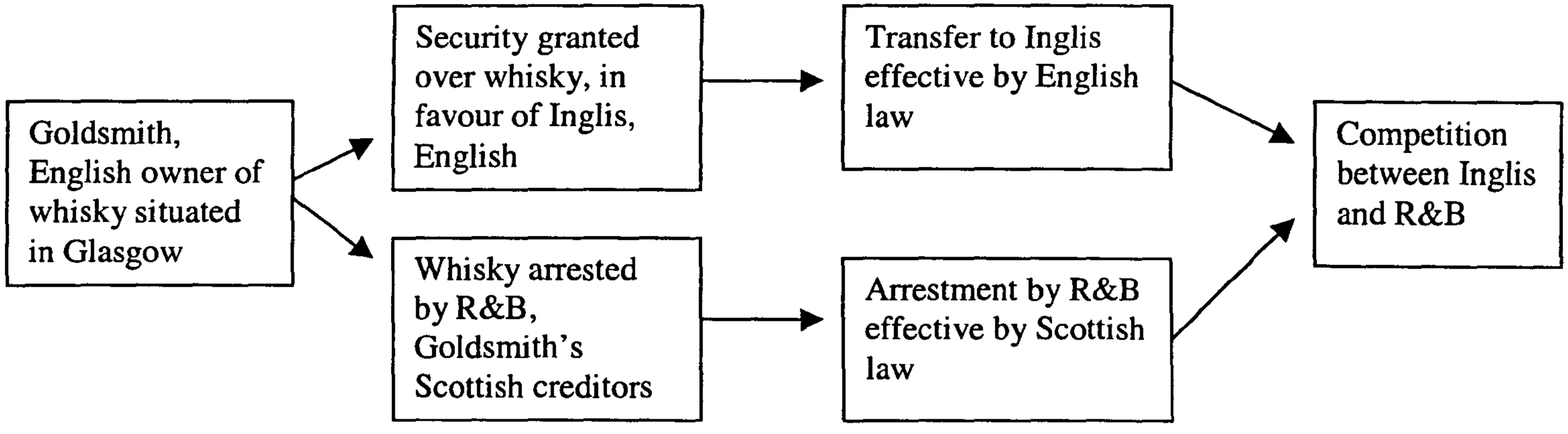
Example: ***North Western Bank Ltd. v. Poynter, Son & Macdonalds*** **(1894) 22 R. (HL) 1**



APPENDIX B III

According to paragraph 17, the competing claims should be resolved by application of (a) the common applicable law; *or* (b) the relevant *lex loci rei sitae* (the situation of the object at the time of the later transaction). *North Western Bank v. Poynter*: paragraph 17(a) results in application of English law

Example: ***Inglis v. Robertson & Baxter*** **(1898) 25 R. (HL) 70**

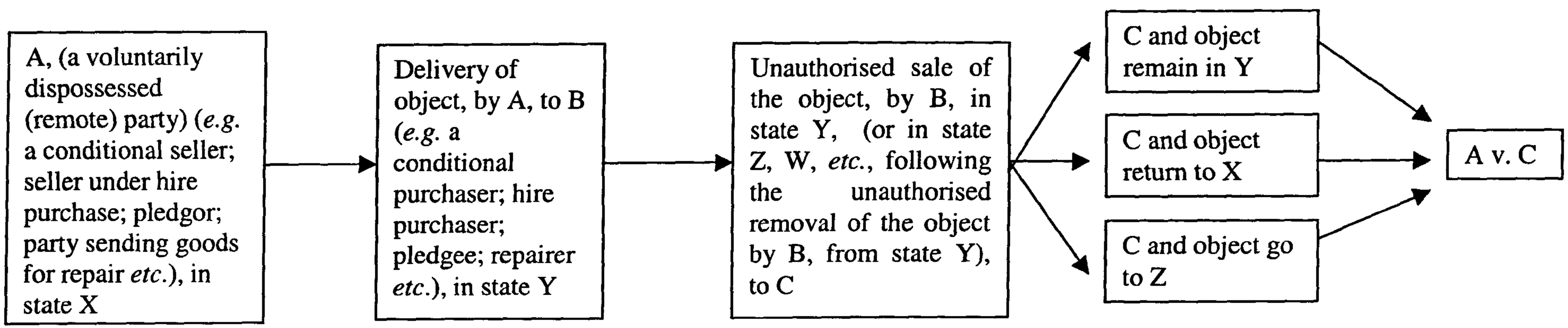


APPENDIX B IV

According to paragraph 17, the competing claims should be resolved by application of (a) the common applicable law; *or* (b) the relevant *lex loci rei sitae* (the situation of the object at the time of the later transaction). *Inglis v. Robertson & Baxter*: paragraph 17(b) results in application of Scots law

CORPOREAL MOVEABLES: MODEL 1, PARAGRAPHS 18-20 **APPENDIX C**

VOLUNTARILY DISPOSSESSED REMOTE PARTY

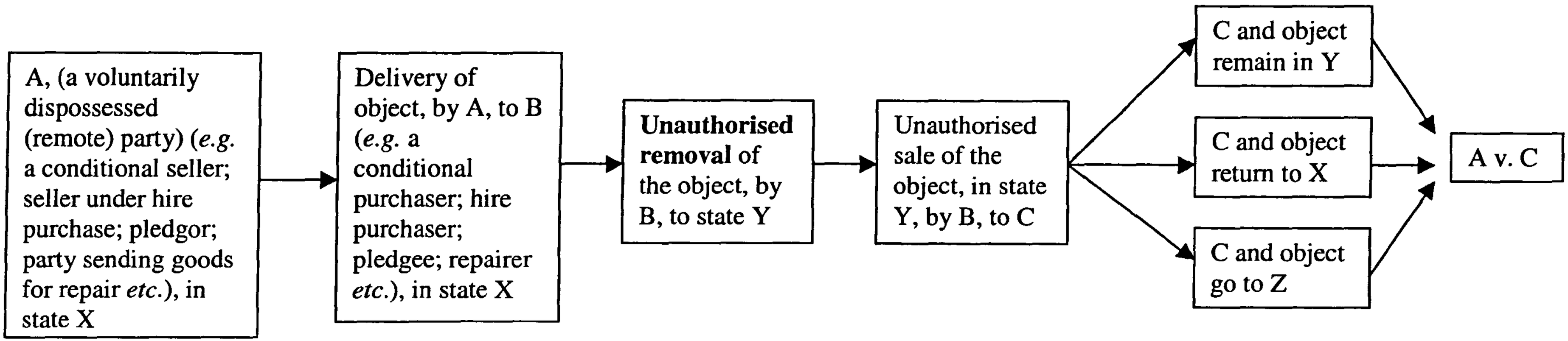


Validity of transaction A - B:	A and B are *original* parties	Original party transfers: apply paragraphs 12-16 (Appendix A)
Validity of transaction B - C:	B and C are *original* parties	
Claim A v. C:	A, the deprived party, is a *voluntarily dispossessed, remote* party	

- Any voluntarily dispossessed (remote) party who, by choice, sends the object abroad, acts '*suo periculo*'.
- A's rights in respect of the *res litigiosa* are limited to such rights as are protected by paragraph 19 (*i.e.* as are protected by operation of the mandatory rules of the *lex loci rei sitae* concerning inalienability).
- Otherwise, the conflicting claims of A (the deprived party), and C (the current possessor/ attaching creditor) are determined in accordance with paragraph 20.

CORPOREAL MOVEABLES: MODEL 1, PARAGRAPH 20 **APPENDIX D I**

'VOLUNTARILY' DISPOSSESSED REMOTE PARTY



Example: *Goetschuis v. Brightman* 245 N.Y. 186, 156 N.E. 660

O purchased car in California under conditional sale contract → Contractual term forbade removal of car from California →

O removed car to New York → O sold car, in New York, to B → Conditional seller's assignee claimed car in New York

Validity of transaction A - B: A and B are *original* parties

Validity of transaction B - C: B and C are *original* parties

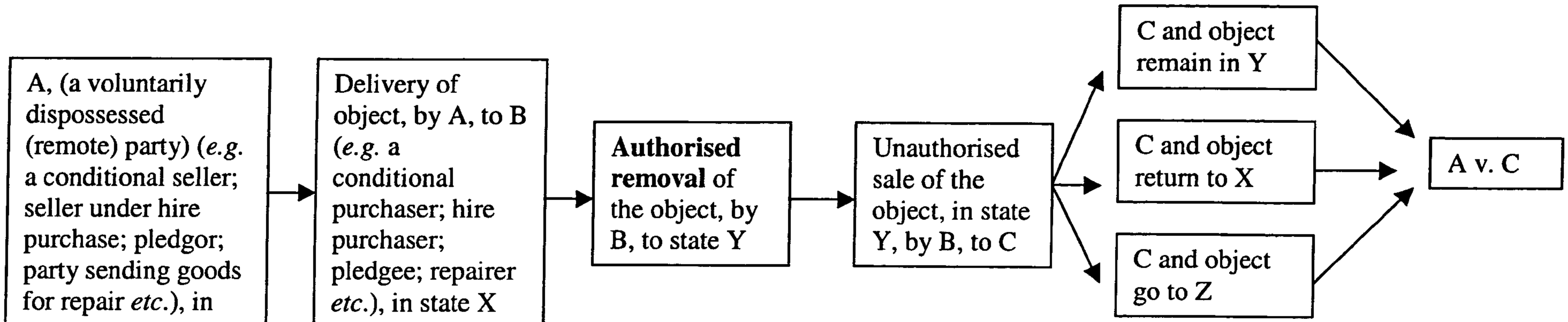
} Original party transfers: apply paragraphs 12-16 (Appendix A)

Claim A v. C: A, the deprived party, is a *remote* party

- Does A, who neither sends the object abroad, nor consents to its removal by B, into state Y, nevertheless act '*suo periculo*' merely by ceding control of the object to B in state X? The answer, it is submitted, is 'no'. While in *Goetschuis v. Brightman*, the terms of the contract were flouted, in the majority of cases, there will be no such prohibition on removal, with the result that the deprived owner, A, will generally be *voluntarily* dispossessed.

CORPOREAL MOVEABLES: MODEL 1, PARAGRAPH 20 **APPENDIX D II**

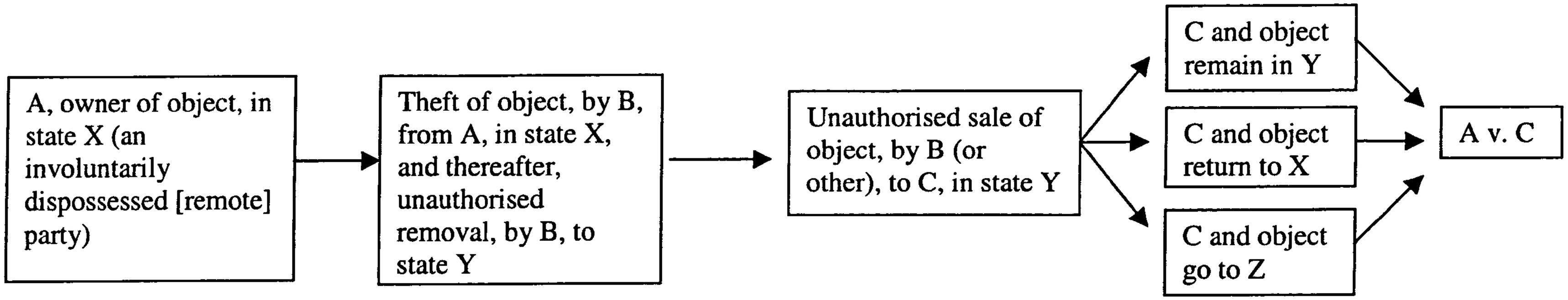
'VOLUNTARILY' DISPOSSESSED REMOTE PARTY



Validity of transaction A - B:	A and B are *original* parties	} Original party transfers: apply paragraphs 12-16 (Appendix A)
Validity of transaction B - C:	B and C are *original* parties	
Claim A v. C:	A, the deprived party, is a *remote* party	

- Voluntarily dispossessed (remote) party, A, who consents to removal of the object, by B, into state Y, acts '*suo periculo*'. (*Cf.* Appendix C)

INVOLUNTARILY DISPOSSESSED REMOTE PARTY: MODEL 1, PARAGRAPHS 21-23



Example: *Winkworth v. Christie, Manson & Woods* [1986] 1 Ch. 496

Owner - Winkworth in England → Theft from Winkworth in England → Removal of *netsuke* to Italy →

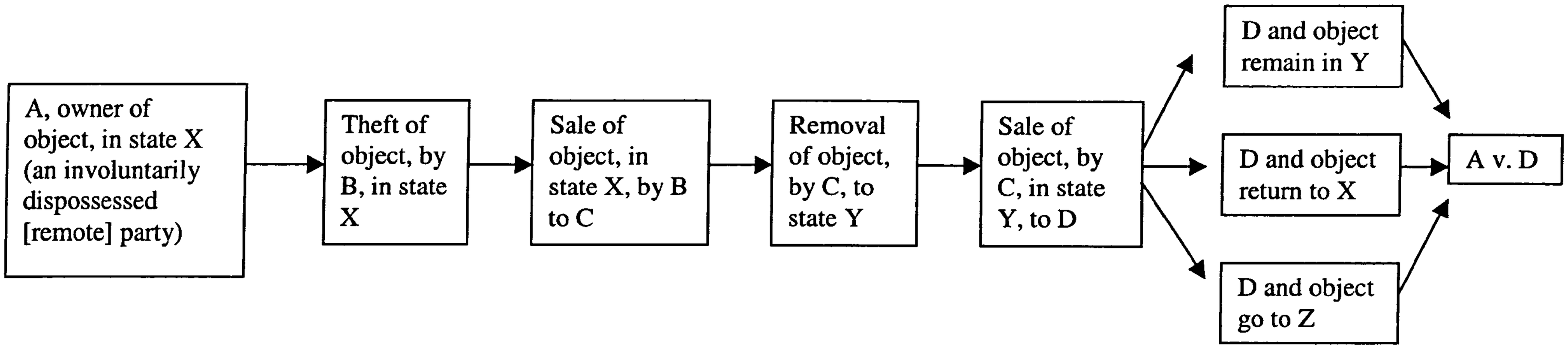
Sale in Italy to Dr D'Annone → *Netsuke* sent to England → *Netsuke* claimed in England

Validity of transaction B - C: B and C are *original* parties : Original party transfers: apply paragraphs 12-16 (Appendix A)

Claim by A v. C: A, the deprived party, is a *remote* party

- Involuntarily dispossessed (remote) party, A, does *not* act '*suo periculo*'

INVOLUNTARILY DISPOSSESSED REMOTE PARTY **APPENDIX F I**

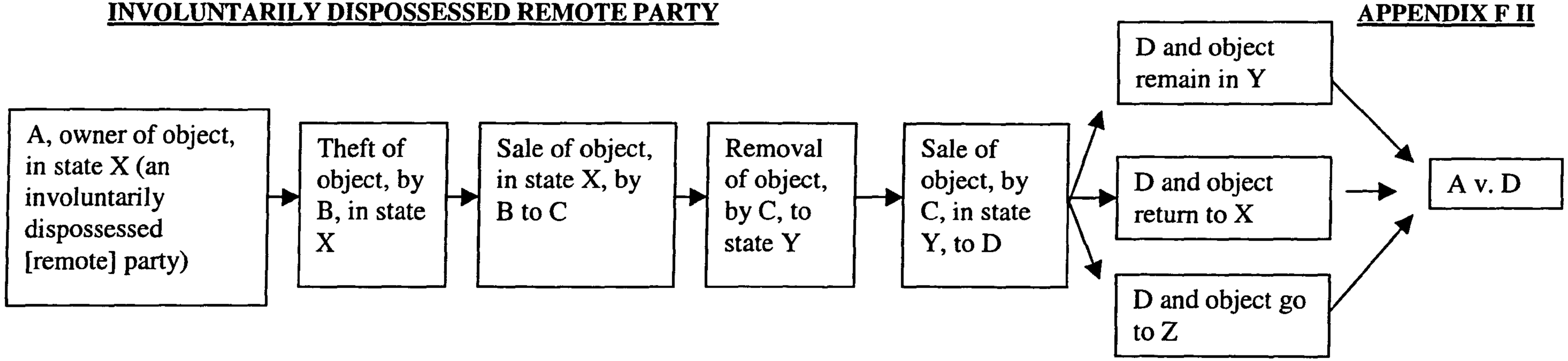


Validity of transaction B - C:	B and C are *original* parties	} Original party transfers: apply paragraphs 12-16 (Appendix A)
Validity of transaction C - D:	C and D are *original* parties	
Claim A v. D:-	A, the deprived party, is a remote party	

- Involuntarily dispossessed (remote) party, A, does *not* act '*suo periculo*'
- Sale in X, if *invalid* according to X (domestic) law, *is* a '*wrongful removal*', since it breaches A's proprietary rights according to X law

INVOLUNTARILY DISPOSSESSED REMOTE PARTY

APPENDIX F II



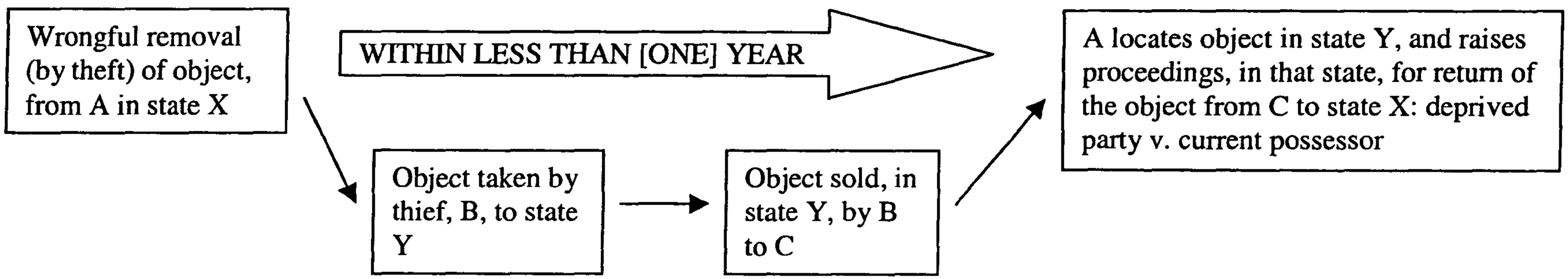
Example: *Todd v. Armour* (1882) 9 R. 901

Owner of horse - Farmer in Ireland → Theft of horse from Ireland → Sale of horse at Armagh Fair to C →

Removal of horse to Scotland → Sale of horse at Falkirk Horse Trials to D → Horse claimed from D in Scotland

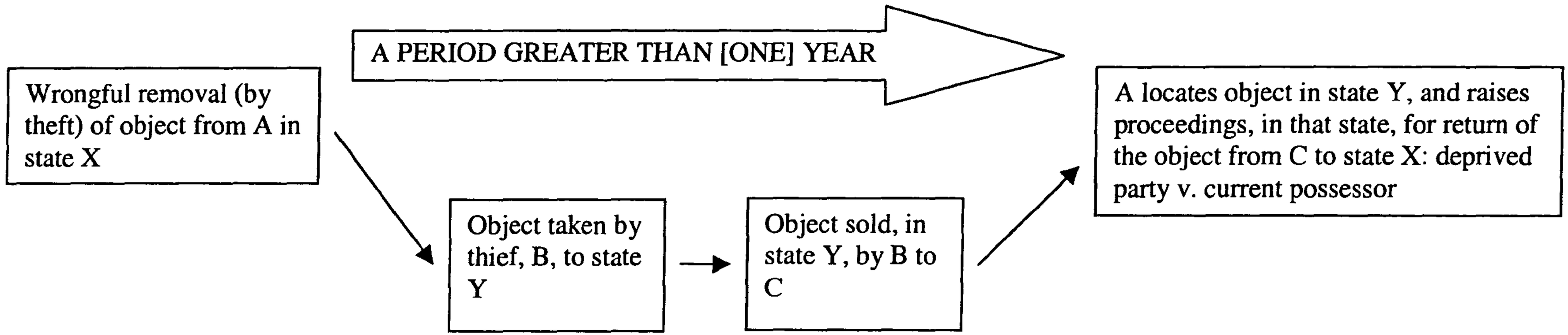
Validity of transaction B - C:	B and C are *original* parties	Original party transfers: apply paragraphs 12-16 (Appendix A)
Validity of transaction C - D:	C and D are *original* parties	
Claim A v. D:	A, the deprived party, is a *remote* party	

- Involuntarily dispossessed (remote) party, A, does *not* act '*suo periculo*'
- Sale in X, if *valid* according to X (domestic) law, is *not* a 'wrongful removal', since it does *not* breach A's proprietary rights according to X law. In such a case, A's rights in respect of the *res litigiosa* are limited to such rights as are protected by paragraph 19.



AIM: To restore the *status quo ante* (*i.e.* return the object to state X)

This aim can only be fulfilled if State Y is a party to the proposed Convention (*i.e.* State Y shall only order return of the object to State X, the *locus originis*, if State Y is bound by the Convention). If State Y is not a party to the Convention, the dispute shall be determined by the rules of international private law of State Y.



AIM: To restore the *status quo ante* (*i.e.* return the object to state X) UNLESS: -

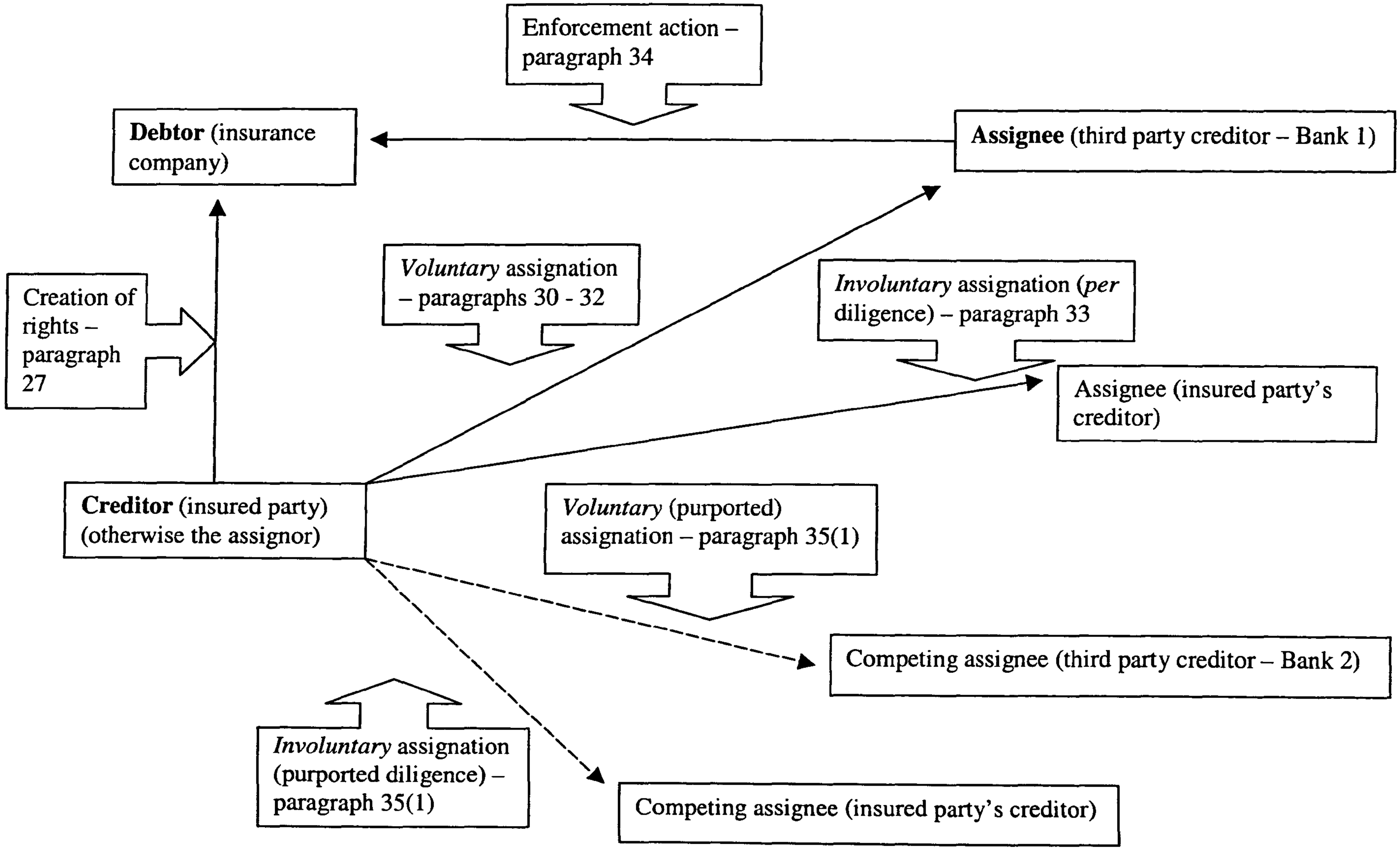
- One year has passed since the date when the deprived party knew or ought reasonably to have known the location of the object and/or the identity of the current possessor; or
- Twenty years have passed from the date of wrongful removal.

OPTIONAL CRITERIA: -

- Current possessor acquired object in good faith; and/or
- Deprived party failed to exercise due diligence; and/or
- *De minimis* monetary value

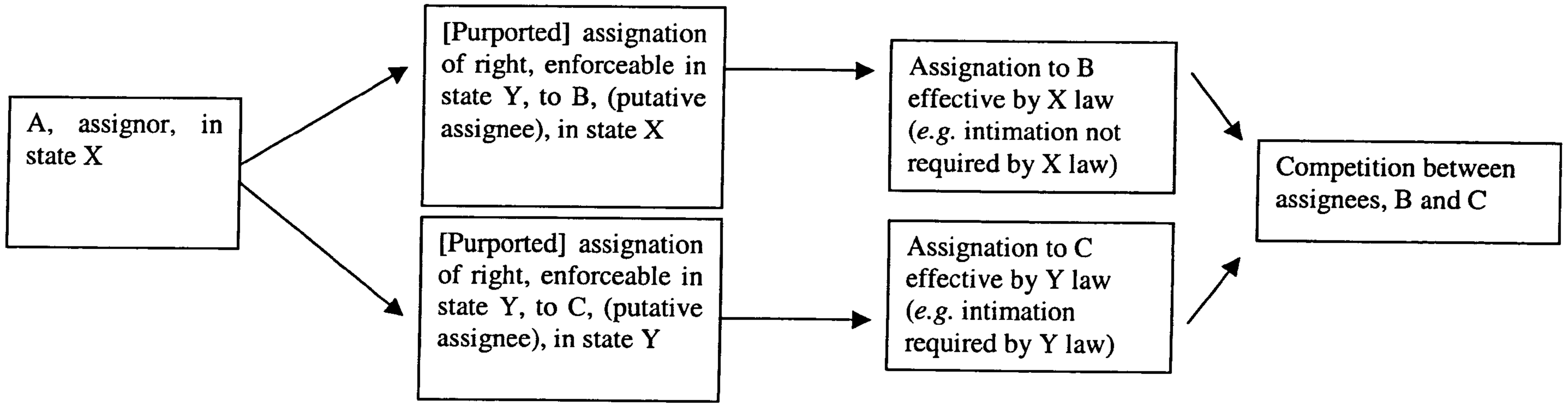
} The difficulties with these criteria are detailed at Model 1, note 109 *et seq.*

INCORPOREAL MOVEABLES: MODEL 1, PART V **APPENDIX I**



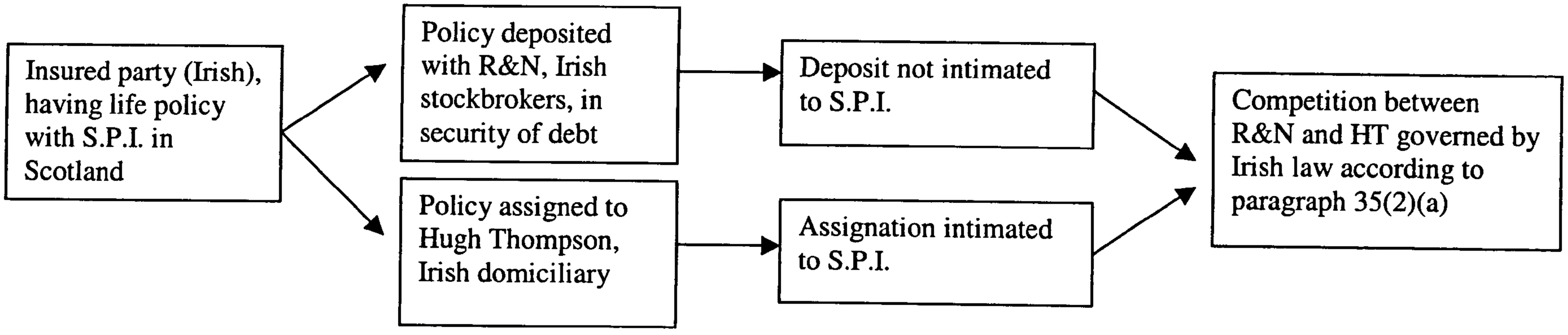
COMPETING ASSIGNEES: MODEL 1, PARAGRAPH 35

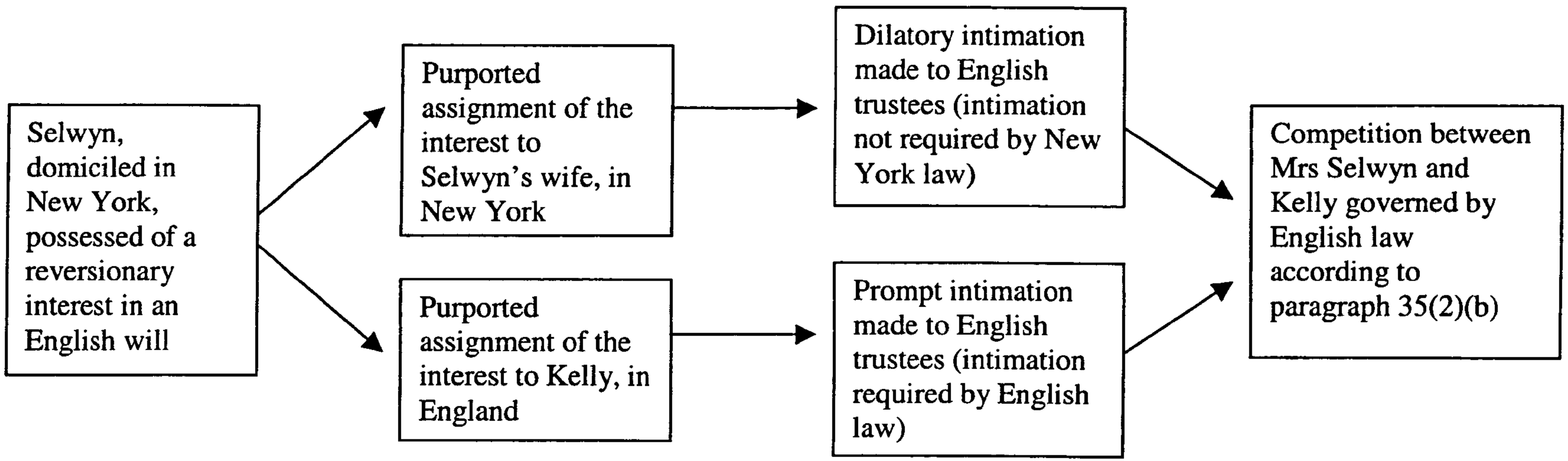
APPENDIX J I



Example: *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733

APPENDIX J II




Selwyn, domiciled in New York, possessed of a reversionary interest in an English will
Purported assignment of the interest to Selwyn's wife, in New York
Purported assignment of the interest to Kelly, in England
Dilatory intimation made to English trustees (intimation not required by New York law)
Prompt intimation made to English trustees (intimation required by English law)
Competition between Mrs Selwyn and Kelly governed by English law according to paragraph 35(2)(b)

INCORPOREAL MOVEABLES: MODEL 2, PART V

APPENDIX K