

CONFLICTS BETWEEN CHOICE OF LAW RULES
AND RECOGNITION OF JUDGMENTS RULES
IN PRIVATE INTERNATIONAL LAW
WITH PARTICULAR REFERENCE TO CASES
INVOLVING DETERMINATION OF STATUS

A thesis submitted for the degree of Doctor of
Philosophy at the London School of Economics,
University of London.

by

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ABSTRACT

This thesis presents a novel approach to part of the problem of the Incidental Question in the Conflict of Laws. Only cases where the answer to what has been called the main question depends on recognition of a foreign judgment (the so called incidental or preliminary question) are included. The problem is analysed as involving a conflict between two different types of conflicts rules i.e. choice of law rules and recognition rules.

The thesis examines whether this conflict can be satisfactorily solved by a global preference for either of these rules. Whilst many writers have considered the theoretical base for the conflict of laws, none has yet specifically compared the rationales for choice of law rules and recognition rules in order to determine whether as a matter of principle one type of rule should be preferred to the other rule. This requires a fresh perspective.

After rejecting the global solution, the thesis proceeds to examine how a result selecting approach might be applied to the present conflict of rules. After a brief survey of different result selecting approaches, it is concluded that the most appropriate approach in the present conflict of rules context is the construction of specific result orientated rules for each particular category of case. The desired result should be dictated by the policy of the forum, since in fact the conflict is between two conflict rules of the forum.

A number of specific topics (including validity of remarriage and matrimonial property rights) concerning recognition of status judgments are considered in depth. The methodology adopted is as follows:-

- a). The particular circumstances in which the 'conflict of rules' problem is likely to arise in relation to the particular issue is explained.
- b). The various possible 'choice of rule' rules which might be adopted for the particular issue are considered.
- c). The policy of English law in relation to the particular issue is ascertained and the 'choice of rule' rule which most closely gives effect to that policy recommended.

The thesis contributes to jurisprudence of Private International Law in three main ways:-

1. The understanding of conflicts between different types of conflict rules is of fundamental importance to the whole structure of Private International Law. This thesis shows that this problem is of more significance than previously thought.
2. Whilst writers have adopted a functional approach to the incidental question, none have attempted to construct a series of rules based on forum policy.
3. There has been no previous attempt to identify forum (here English) policy in relation to the particular issues chosen.

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PART I

BACKGROUND AND STRUCTURE OF THE THESIS

CHAPTER 1: PRELIMINARY ISSUES AND DEVELOPMENT OF THE THESIS

I. THE SCOPE OF THE PROBLEM OUTLINED

A. BASIC PRINCIPLES

According to orthodox theory, there are three separate questions which the Conflicts of Laws might be required to answer viz: jurisdiction, choice of law and recognition of foreign judgments. Whilst it is clear that the question of jurisdiction will arise together with either of the other two questions and must be decided first; it is less frequently recognised¹ that the latter two questions may arise together in relation to a particular set of facts and that the result may differ depending on whether the case is determined by application of the choice of law rule or the recognition of judgments rule². The Law Commission³ identify this problem in relation to remarriage after a foreign divorce or nullity decree and assert, without any real explanation, that the recognition rule should be favoured.

¹ See, however, L. Collins et. al., Dicey and Morris, The Conflict of Laws (1993) 12th. edn. (hereinafter Dicey and Morris) at p. 758; North and Fawcett, Cheshire and North's Private International Law (1987) 12th. edn. (hereinafter 'Cheshire and North') at p. 603 ; North, The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland (1977) pp. 224 - 5 and Law Com. 137 para 1.12. Gordon, Foreign Divorces: English Law and Practice (1988) at p. 150 refers to the conflict between recognition of marriage rules and recognition of divorce rules.

² Gottlieb (1955) 33 Can. Bar. R. 523 at p. 525 refers to "the conflict of conflicts rules governing the incidental question." However, he is not referring specifically to the situation where there is a conflict between two different types of conflicts rules. A different approach may be possible where the conflict is, and is perceived as being, between a choice rule and a recognition rule.

³ Law Com. No. 137 para 6.60.

B. DISTINGUISHING BETWEEN THE 'CONFLICT OF RULES' SITUATION AND THE 'PURE RECOGNITION' SITUATION

It is crucial at the outset to distinguish between:-

1. the 'conflict of rules' situation described above, which is usually regarded as part of the problem of the incidental question, and
2. the 'pure recognition' case,⁴ where the foreign judgment for which recognition and/or enforcement is sought is inconsistent with the decision which would have been reached by an English Court on the same facts applying English choice of law rules.

In the former, the actual issue before the Court has not itself been determined by a foreign Court, although its outcome depends on whether a foreign judgment is recognised. The issue can be decided either by reference to the recognition rules of the forum or by reference to the law chosen by the forum's choice of law rules. Whereas, in the second category of case, the situation is not perceived or treated as one involving conflict between the two types of rule. The Court is required to decide whether to recognise the foreign judgment by reference only to the recognition rules. Since it is not allowed to examine the merits of the case, the choice of law rules are not even called into play.⁵

⁴ Discussed further at Section VIII A infra.

⁵ Goddard v Grey (1870) L.R. 6 Q.B. 139. cf. In some jurisdictions, only those judgments which closely approximate to the results which would have been achieved by application of the forum's choice of law rules will be recognised (see Von Mehren v Trautman (1968) 81 Harv. L. R. 1601, 1605).

Once this distinction is grasped, it will be appreciated that without further analysis there should be no assumption that recognition rules should prevail in the 'conflict of rules' situation, with which this thesis is concerned. We will consider below⁶ the significance of the preference for the recognition rule in the pure recognition case and recent shifts in the balance between the choice rules and recognition rules in Private International Law which might suggest that recognition rules should be favoured.

C. DECISIONS AFFECTING STATUS.

This thesis will concentrate on situations where there is a dispute between the forum and the lex causae of the issue to be decided as to whether a foreign decision affecting status⁷ is effective. The reason is that it is in this area in which the problem has been identified by the Courts and where it is realised that solutions are required. Although this issue can arise in a number of different contexts, the following four have been selected for in depth examination: validity of a remarriage, succession⁸, matrimonial property relations and tort liability.⁹

⁶ At Section VIII infra.

⁷ i.e. an adoption order; divorce decree; decree of presumption of death and dissolution of marriage; legal separation and annulment, although the latter may be purely declaratory. Some examples of non-status situations will be given.

⁸ Following a disputed matrimonial decree or adoption order.

⁹ Between spouses where there is inter-spousal immunity and wrongful death claims by dependant spouses, children or parents.

There is some difficulty in determining to what extent the rules determining whether non-judicial changes of status should be recognised should be treated as recognition rules¹⁰. At first sight, it might seem that since we are concerned with the rules for recognition of **judgments**, the conflict of rules scenario cannot arise in relation to non-judicial changes of status. However, this approach ignores the fact that in some areas of law the very same rules govern the recognition of judicial and non-judicial changes of status. For example, overseas formal extra-judicial divorces are recognised on the same basis as judicial decrees and the rules in respect of informal divorces, although different, are contained in the same statutory section as those for recognition of formal decrees.¹¹ On the other hand, in other areas, such as legitimation, the rules for recognition are not treated like recognition of judgments rules and on the contrary are perceived as choice of law rules¹².

No doubt this apparently anomalous situation can be explained in practical terms. Where it is common for a particular status to be created or determined by judicial decree and the same or similar rules apply to non-judicial terminations, as with adoptions and divorces, the rules are treated as recognition of

¹⁰ This difficulty does not arise under the incidental question analysis (Section IV infra) because the concern is whether the incidental question should be governed by the **conflicts** rules, whether they be recognition of judgments rules or choice of law rules, of the forum or of the lex causae.

¹¹ See Section III B 2 and 3 infra.

¹² In the same way as the rules governing recognition of the validity of marriages.

judgments rules, even though there is no judgment. In any event, this is the distinction that will be adopted in deciding which rules are 'recognition rules'.

Thus, we will treat the rules for determining the validity of extra-judicial dissolutions, annulments and adoptions¹³ as 'recognition rules' and therefore within the scope of the 'conflict of rules' problem. It should be pointed, however, that whilst other non-judicial changes of status¹⁴ will not be included within the thesis, the methodology adopted in Part III of this thesis may be appropriate in order to resolve the conflict which may arise between the 'recognition of status' rules, however they are classified, and choice of law rules.

D. NOTATION AND TERMINOLOGY

The following notation and terminology will be adopted throughout the thesis:-

1. Where there is a dispute between the lex causae and lex fori concerning the validity of a decree or resulting status, this will be indicated by the use of single quotation marks e.g. 'divorce', 'spouse', 'adopter'.
2. While the spouse in relation to whom a 'divorce' or 'annulment' was obtained may not be the first spouse, s(he) will

¹³ Whilst the differentiation between adoption and legitimation may be thought unsatisfactory, the decreasing importance of the status of legitimacy means that recognition of legitimations is not of great practical significance today.

¹⁴ Although frequently the issue of recognition of a 'marriage' can be converted into a recognition of judgments question by obtaining a nullity decree in the jurisdiction which considers the marriage void.

be referred to as the first spouse¹⁵ to distinguish him/her from the subsequent spouse (who will be called the second spouse) where there has been a remarriage following the 'divorce' or 'annulment'.

3. For most purposes it will not matter whether the disputed decree is a divorce decree or a nullity decree. Thus, for convenience, unless stated to the contrary references to divorce will include annulments.

4. The rule which determines whether the choice of law rule or the recognition rule should prevail in a particular situation will be referred to as the preference rule¹⁶.

II. RECOGNITION RULES

In order to illustrate the 'conflict of rules' scenario, we need to understand the various recognition and choice rules which will produce the conflict. It will be convenient at this point to summarise briefly the rules for recognition of foreign judgments in personam and foreign matrimonial decrees.¹⁷ The relevant choice of law rules will be stated as and when required.

¹⁵ And the marriage will be referred to as the first marriage.

¹⁶ The expression 'choice of rule' rule is a more specific description but was felt to be too clumsy.

¹⁷ The rules for recognition of foreign adoptions will be discussed in Chapter 10.

A. IN ACTIONS IN PERSONAM¹⁸

There are now four main sets of recognition rules, three of which are statutory. The common law rules apply to any judgments which are not within the scope of any of the statutes.

1. The common law rules

At common law, a judgment can only be recognised if the Court granting it has jurisdictional competence either on the basis of:-

- (a) the defendant's residence¹⁹ or
- (b) submission to the foreign Court.

Other connections with the foreign Court, such as nationality or that the law of that country is the lex causae of the issue in dispute, are not sufficient. In order to qualify for recognition, the judgment must be for a fixed sum and must be final. A judgment which is prima facie entitled to recognition will not be recognised where the defendant successfully pleads one of the following defences²⁰:-

- (i) the foreign judgment was obtained by fraud;
- (ii) the foreign judgment is contrary to public policy;
- (iii) recognition would enforce directly or indirectly foreign revenue, penal or other public laws;

¹⁸ For detailed exposition see Cheshire and North (Chapter 1 n.1. supra), Chapters 15 and 16.

¹⁹ Recently, the Court of Appeal has stated that mere presence is sufficient, Adams v Cape Industries [1990] Ch. 433.

²⁰ This is the classification of defences adopted by Cheshire and North (Chapter 1, n.1 supra) pp. 377 et. seq.

- (iv) the foreign judgment comes within the Protection of Trading Interests Act 1980;²¹
- (v) the foreign judgment was obtained in proceedings which were contrary to natural justice;
- (vi) the foreign judgment is on a matter previously determined by an English Court;²²
- (vii) the foreign judgment was given in proceedings brought in breach of an agreement for settlement of disputes;²³

2. Under the Administration of Justice Act 1920

Judgments of the Commonwealth countries to whom this Act was extended²⁴ can be enforced through registration in the High Court. Registration may not be ordered if the foreign Court acted without jurisdiction²⁵ or one of a limited number of defences²⁶ is established by the defendant. In addition, where the Court

²¹ i.e. Judgments for multiple damages and specific judgments based on competition law.

²² This defence was established in the House of Lords decision of Vervaeke v Smith [1983] 1 AC 145 (discussed at Chapter 5 Section IIB infra) and applied in non-matrimonial cases, see E D & F Mann (Sugar) Ltd. v Yani Haryanto (No. 2) [1991] 1 Lloyd's Rep. 429.

²³ This defence was introduced by the Civil Jurisdiction and Judgments Act 1982 s.32

²⁴ Extension is by Order in Council in respect of countries with whom Her Majesty is satisfied that reciprocal arrangements exist for enforcement of UK judgments.

²⁵ There is no definition of this in the Act and therefore the common law rules must apply.

²⁶ These are (i) the foreign judgment was obtained by fraud; (ii) the defendant was not duly served with process and did not appear; (iii) there is an appeal pending and (iv) the judgment is in respect of a cause of action which could not have been entertained in the registering court for public policy or similar reasons (s.9(2)).

"in all the circumstances of the case.... thinks it just and convenient that the judgment should not be enforced in the United Kingdom, it has the discretion to refuse registration. The judgment creditor may choose whether to register under the Act or to seek enforcement at common law.

3. Under the Foreign Judgments (Reciprocal Enforcement) Act 1933

This Act extended the approach of the 1920 Act to non-Commonwealth countries²⁷. Where the 1933 Act applies, the judgment creditor cannot enforce at common law and the Court has no discretion to refuse registration where the requirements of the Act are satisfied.

The jurisdictional bases and defences are detailed more fully than under the 1920 Act. Registration must be set aside on the basis of lack of jurisdiction unless:-

- (a) the defendant was resident²⁸ in the foreign country;
- (b) submitted to the jurisdiction of the Court²⁹ or
- (c) had an office or place of business in the foreign country through which the transaction which is the subject of the present proceedings was effected.³⁰

Also, registration must be set aside where one of the following

²⁷ Commonwealth countries can also join and since 1933 the 1920 Act has not been extended to any more countries.

²⁸ In the case of a corporation the **principal** place of business must be in the foreign country, s.4(2)(a)(iv).

²⁹ s. 4(2). Submission may be by inclusion of a forum selection clause in a contract between the parties s.4(2)(a)(iii).

³⁰ s.4(2)(a)(v).

defences can be established:-

- (i) the judgment is incapable of registration (i.e. not a final judgment for a sum of money);
- (ii) the judgment debtor did not receive sufficient notice of the proceedings and did not appear in them;
- (iii) the judgment was obtained by fraud;
- (iv) enforcement would be contrary to public policy or the rights in the judgment were not vested in the person who registered it.
- (v) the foreign judgment was given in proceedings brought in breach of an agreement for settlement of disputes.³¹

4. Under the Civil Jurisdiction and Judgments Acts 1982 and 1991.

These Acts brought into force in England and Wales the Brussels and Lugano Conventions. The aim of these Conventions is to provide for 'free movement of judgments' throughout Europe.³² Thus, all judgments of Contracting States, which come within the scope of the Conventions³³ must be recognised without review of the merits and without review of whether the judgment granting Court had jurisdiction, subject to certain specific exceptions³⁴ There are five defences³⁵:-

- (i) Recognition/enforcement is contrary to requirements of

³¹ This defence was introduced by the Civil Jurisdiction and Judgments Act 1982 s.32

³² Both within the E.C. and EFTA areas.

³³ see art. 1

³⁴ See art. 28.

³⁵ arts. 27 and 28

English public policy.³⁶

(ii) The judgment was a default judgment and the defendant was not duly served with notice of the proceedings in time for him to prepare his defence.

(iii) The judgment is irreconcilable with a judgment given by an English court in a dispute between the same parties.

(iv) In order to arrive at the judgment, the court had decided a preliminary question as to status or legal capacity, matrimonial property, wills or succession in a way which conflicts with a rule of English private international law.³⁷

(v) The judgment conflicts with an earlier judgment in a non-member state on the same cause of action between the same parties and the earlier judgment is entitled to recognition/enforcement in England.

B. MATRIMONIAL DECREES

Recognition of divorces, annulments and legal separations (hereinafter referred to as divorces etc.) is now governed by the Family Law Act 1986 Part II, which (subject to saving provisions) supercedes the common law rules for recognition and the Recognition of Divorces and Legal Separations Act 1971. It is possible for marriages to be terminated by law without there being any divorce or annulment³⁸, in which case the common law

³⁶ This does not apply with respect to the jurisdiction of the foreign Court

³⁷ Unless the same result would be achieved under that rule. This defence is discussed at Section VIII A 3 infra.

³⁸ For example, a Court order of presumption of death and dissolution of marriage (as in Szemik v Gryla (1965) 109 S.J. 175).

rules would still apply.³⁹ For the purposes of the recognition rules, divorces etc. are divided into three categories:

1. Divorces granted in the British Isles.

Decrees obtained in a Court of civil jurisdiction in the British Isles are automatically recognised.⁴⁰ Section 44(2) states that "no divorce or annulment obtained in any part of the British Islands shall be regarded as effective in any part of the United Kingdom unless granted by a court of civil jurisdiction."

The predecessor to this provision⁴¹ reversed the position at common law.⁴² The position in relation to trans-national divorces is unclear and will be discussed below.

Recognition may be refused only on the basis of:-

- (i) res judicata⁴³ or
- (ii) that there was no subsisting marriage at the time of the decree.⁴⁴

³⁹ Viswallingham v Viswallingham [1980] 1 FLR 15, where according to the religious law, the marriage was terminated automatically by the conversion of one party to a different religion. The termination was not recognised on grounds of public policy

⁴⁰ Family Law Act 1986 s.44(1)

⁴¹ Domicile and Matrimonial Proceedings Act 1973 s.16(1).

⁴² See e.g. Qureshi v Qureshi [1972] Fam. 173.

⁴³ i.e. where the decree is irreconcilable with a previous decision given or entitled to recognition in England as to the subsistence or validity of the marriage, Family Law Act 1986 s.51(1).

⁴⁴ Family Law Act 1986 s.51(2). This defence is not available in respect of nullity decrees.

2. Overseas divorces etc obtained by means of judicial or other proceedings.⁴⁵

Such divorces etc. will be recognised if

- (a) they are effective in the country in which they are obtained
- and
- (b) one of the parties is either habitually resident in, domiciled⁴⁶ in or a national of the country in which the divorce is obtained.

Recognition may be refused on five grounds:-

- (i) res judicata;⁴⁷
- (ii) lack of subsisting marriage;⁴⁸
- (iii) insufficient steps were taken to give notice of the proceedings to one of the parties, having regard to the nature of the proceedings and all the circumstances;⁴⁹
- (iv) insufficient opportunity to take part in the proceedings was given, having regard to the nature of the proceedings and all the circumstances⁵⁰ or
- (v) recognition would be manifestly contrary to public policy.⁵¹

⁴⁵ See Family Law Act 1986 s.46(1).

⁴⁶ Either in the sense used in the foreign country or in the English sense (Family Law Act 1986 s.46(5)).

⁴⁷ See n.43 supra.

⁴⁸ See n.44 supra.

⁴⁹ Family Law Act 1986 s.51(3)(a)(i) For discussion of this provision see D v D (Recognition of Foreign Divorce) [1994] 1 FLR 38.

⁵⁰ Family Law Act 1986 s.51(3)(a)(ii).

⁵¹ Family Law Act 1986 s.51(3)(c).

The crucial distinction between divorces etc. which come within this category and those which fall within the third category is whether the divorce was obtained by means of judicial or other proceedings. There is no statutory definition of proceedings. There would not seem to be any problem in ascertaining whether there have been judicial proceedings. The difficulty arises in determining whether the steps involved in obtaining an extra-judicial divorce are sufficient to constitute proceedings.

The most helpful guidance to emerge from the caselaw can be found in the speech of Oliver LJ in Chaudhary v Chaudhary.⁵²

In the context... of a solemn change of status, [proceedings] must import a degree of formality and at least the involvement of some agency, whether lay or religious, of or recognised by the state having a function that is more than simply probative, although Quazi... clearly shows that it need have no power of veto."

Applying this definition⁵³, it is clear that a Pakistani Muslim Family Ordinance talaaq⁵⁴, a Jewish get⁵⁵ and a Ghanaian Customary Arbitration Tribunal divorce⁵⁶ are obtained by means of proceedings; whereas classical Muslim law 'bare' talaaqs⁵⁷, other non-judicial Muslim divorces and Thai consensual divorces are not obtained by means of proceedings. Which category Hindu and African and Asian customary divorces come in must be decided in

⁵² [1985] 3 All ER WLR 1017 at 1031.

⁵³ Gordon (chapter 1, n.1 supra) at p. 115 provides a helpful table with suggested classification of divorces.

⁵⁴ Quazi v Quazi [1980] A.C. 744.

⁵⁵ See Berkovits (1980) 104 LQR 60.

⁵⁶ D V D (Recognition of Foreign Divorce) [1994] 1 FLR 38.

⁵⁷ Chaudhary v Chaudhary [1984] 3 All ER 1017.

each case depending on whether there is involvement by a state recognised third party, such as a recognised panchayat or tribal elders.

For ease of exposition, divorces obtained by means of proceedings, which are governed by section 46(1), will be referred to as **formal** divorces. Those obtained otherwise than by means of proceedings, which are governed by section 46(2), will be referred to as **informal** divorces.

3. Overseas divorces etc. obtained otherwise than by means of proceedings.⁵⁸

Informal divorces etc. will be recognised if

- (a) they are effective in the country in which they are obtained **and**
- (b) they are obtained in the country of domicile of the spouses.

Where the spouses are domiciled in separate countries, it is sufficient if the divorce etc. is obtained in a country where one is domiciled provided that it is recognised by the domicile of the other **and**

- (a) **neither** party was habitually resident in the United Kingdom for one year before the divorce etc. was obtained.

The following defences are available:-

- (i) res judicata;⁵⁹

⁵⁸ See Family Law Act 1986 s.46(2).

⁵⁹ See n.43 supra.

- (ii) lack of subsisting marriage;⁶⁰
- (iii) absence of an official document certifying the effectiveness of the divorce in the country where it was obtained and, where appropriate, that it was recognised by the law of the domicile of the other spouse⁶¹ or
- (iv) recognition would be manifestly contrary to public policy.⁶²

Thus, it can be seen that recognition of informal divorces is more restrictive than that of formal divorces in three main ways. Firstly, there are less jurisdictional bases available.⁶³ Secondly, in relation to formal divorces there is no restriction on the connection of the parties with the U.K. Thirdly, informal divorces are more likely to be refused recognition on the basis of public policy⁶⁴.

4. Transnational Divorces

Transnational divorces are those obtained by means of steps taken in more than one country. In R v Secretary of State for the Home

⁶⁰ See n.44 supra.

⁶¹ Family Law Act 1986 s.51(3)(b).

⁶² See n.62 supra.

⁶³ For formal divorces there are upto 8 different countries (in the unlikely event that each party has habitual residence, domicile in the English sense, domicile in the foreign sense and nationality in different countries) where the divorce may be obtained and recognised. For informal divorces there are only four possibilities (domicile in both senses for each party).

⁶⁴ See derogatory comments of Cumming-Bruce LJ about bare talaqs in Chaudhary v Chaudhary [1984] 3 WLR 1017 at p. 1032.

Department ex p. Ghulam Fatima⁶⁵, the question arose whether a talaq obtained in accordance with the provisions of the Pakistani Muslim Family Law Ordinance could be recognised under the Recognition of Divorces and Legal Separations Act 1971, where the talaq itself was pronounced in England and all the subsequent steps took place in Pakistan. The House of Lords held that the divorce was not an overseas divorce because the wording of the statute⁶⁶ indicated that a divorce would only be treated as an overseas divorce where all proceedings took place in the same foreign jurisdiction. It seems, however, that the provisions of Family Law Act 1986 cannot be construed in this way⁶⁷. Thus, whilst there does not appear to have been any intention to overrule the Fatima decision⁶⁸, this is arguably the result of the change in the drafting.

However, it should be borne in mind that there are dicta in Fatima which suggest that even if the transnational talaq had fitted within the scheme of the 1971 Act, it would have been refused recognition on public policy grounds because it was effectively a 'mail order' extra-judicial divorce obtained in

⁶⁵ [1986] AC 527

⁶⁶ Recognition of Divorces and Legal Separations Act 1971 section 2.

⁶⁷ See Berkovits (1988) 104 LQR 60 79-80, Pilkington (1988) 37 ICLQ 131, 133-136 and Gordon (Chapter 1 n.1 supra) p. 103. p. 668 at n. 18.

⁶⁸ The Law Commission in Rept. No. 137 at para. 6.11 treat Fatima as having settled the law on transnational divorces. As Parliament took a harsher line than the Law Commission in respect of extra-judicial divorces, it seems unlikely that they intended to take a more benevolent view of transnational divorces.

England, which was contrary to the policy⁶⁹ of what is now s.44(2) Family Law Act 1986.⁷⁰ However, there is no reason why public policy should prevent recognition of a trans-national talag where the talag is pronounced in a third country, at least where the latter recognises such a divorce.

III. THE PROBLEM ILLUSTRATED

The examples given below, which are based on variations of the facts of decided cases, illustrate a wide range of situations where the conflict of rules scenario arises. In the first two examples, there is reference to a number of different problems which may arise. Thereafter, each example concentrates on one particular issue. Extensive reference to these problems will be made throughout the thesis. Whilst this will necessitate the reader in referring back to this section, it was decided that the scope of the problem could be better illustrated at this stage by setting out all the examples together.

Example M1⁷¹

Alexander and Natasha are Jews who were born and brought up in Russia, where they married. In 1991, they left Russia to emigrate to Israel. Whilst in a transit camp in Vienna, they got divorced by means of a Jewish get issued under the auspices of the Rabbinical Court in Vienna. The get is not recognised in Austria or Russia and so would not be recognised in England. In 1992, Alexander and Natasha arrived and acquired a domicile in Israel, where the Get is recognised. Alexander has now married Bella, an Israeli domiciliary, in Israel where they have set up their home.

⁶⁹ cf. Berkovits (1988) 104 LQR 60, 75 - 78.

⁷⁰ Previously Domicile and Matrimonial Proceedings Act 1973 s.16(1).

⁷¹ Based on Schwebel v Ungar (1963) 42 DLR (2d) 622 (discussed at Chapter 6 II A infra).

The following questions may arise:-

- (a) Is Alexander's marriage to Bella recognised in England?
- (b) On Alexander's death intestate can Natasha succeed to movable and immovable property of Alexander's situated in England?
- (c) What are Natasha's rights under the marriage settlement entered into between her and Alexander when they married?

In each situation if the **recognition rule** prevails Natasha is treated as still validly married to Alexander. If the **choice rule** prevails, the position will depend on which law governs the particular issue. Thus, in relation to issues governed by English law, such as succession to immovables in England, the first marriage is still valid. Whereas, in relation to issues governed by Israeli law, such as Alexander's capacity to remarry and intestate succession to movables, the first marriage will not be regarded as still subsisting.

Example M2⁷²

Pedro is a national of, domiciled and habitually resident in Brazil. He is married to Evita, who is a national of and domiciled in Argentina. When the marriage breaks down Evita becomes habitually resident in Mexico, where she later obtains a divorce from Pedro. This divorce is not recognised in Brazil or Argentina, but is effective under Mexican law and prima facie entitled to recognition under English law. Evita then marries Juan, an Argentinian domiciliary, in Mexico. They then return to live in Argentina.

- (a) Is Evita's marriage to Juan recognised in England?
- (b) On Evita's death intestate can Pedro succeed to property of

⁷² Based on Lawrence v Lawrence [1985] Fam. 106 (discussed in Chapter 6 II B infra).

Evita's situated in England?

(c) What are Evita's rights under the marriage settlement entered into between her and Pedro when they married?

If the recognition rules prevail then for all purposes Evita is considered as no longer married to Pedro, but instead validly married to Juan. If the choice rule prevails, then the marriage to Pedro still subsists in relation to all issues governed by Argentinian law and that to Juan is not recognised at all; whereas it does not subsist in relation to issues governed by Mexican or English law.

Example M3 (reverse of M1)

Assume that the get is obtained after Alexander and Natasha have become domiciled and habitually resident in Israel. After a short period of time, Alexander returns to Russia. He resumes his Russian domicile and marries Bella, a Russian domiciliary. Assume that the Israeli get is not recognised under Russian law, but is recognised under English law.

If the recognition rules apply, the first marriage no longer subsists and the second marriage will be valid for all purposes; whereas if the choice rules apply, the first marriage will be regarded as valid in relation to all matters governed by Russian law.

Example M4 (reverse of M2)

Assume that Evita does not become habitually resident in Mexico, but obtains the Mexican divorce by proxy⁷³ and so the divorce is not entitled to recognition in England. However, assume that it is entitled to recognition in Argentina by virtue of a bilateral treaty with Mexico.

⁷³ See Padolecchia v Padolecchia [1969] P. 314.

If the recognition rules apply, the first marriage will subsist for all purposes; whereas if the choice rules apply, the second marriage will be valid in relation to all issues governed by Argentinian law but the first marriage will subsist in relation to issues governed by English law.

Example M5⁷⁴

Maria, who is domiciled in and a national of Belgium marries Herbert, who is domiciled in Ontario. The marriage, which takes place in Ontario, is a marriage of convenience with the sole aim of enabling Maria, an illegal immigrant, to remain in Ontario. The parties have no intention of and do not in fact cohabit. The marriage is valid in Ontario. Later Maria obtains a nullity decree in Belgium on the basis that the marriage is a sham. Assume that this decree is entitled to recognition in England, but is refused recognition in Ontario on public policy grounds. Maria marries Andrew, a domiciliary of Ontario. Although the ceremony takes place in Belgium, the parties return to live in Ontario.

If the recognition rules are applied, the first marriage will have been annulled and the second will be valid for all purposes. If the choice of law rules are applied, then the first marriage still subsists in relation to all issues governed by Ontario law. Since the validity of the second marriage is governed by Ontario law⁷⁵ it will accordingly be void.

This example also involves the 'pure recognition' situation referred to above.⁷⁶ The result of the Belgium decision is inconsistent with that which would have been achieved in an

⁷⁴ Based on Vervaeke v Smith [1981] Fam. 77 (discussed at Chapter 5 II B infra).

⁷⁵ Either as the law of Andrew's domicile (which would prevent him from marrying a married woman) or as the law of the intended matrimonial home.

⁷⁶ Section I B supra.

English Court, in which Ontario law, as the lex loci celebrationis, would have been applied to determine whether the sham marriage was valid. Strictly speaking, this point should not be relevant when recognition of the decree is sought because it relates to the merits. However, the Courts may well be influenced by the point and would either refuse recognition on the ground of public policy⁷⁷ or else achieve the result of non-recognition by preferring the choice rules⁷⁸.

Example M6:⁷⁹

Don and Isabella are first cousins. They are both habitually resident and domiciled in New York, where they marry. Don is a U.S. national, but Isabella is a Portuguese national. The marriage is valid by the law of New York, but not by the law of Portugal which forbids marriages between first cousin. A few years after the marriage, Don travels to Portugal where he acquires a nullity decree on the basis that under Portuguese law capacity to marry is governed by the law of the nationality and that the marriage was void ab initio. The nullity decree is not recognised in New York. Don dies intestate domiciled in New York leaving movable property in England.

If the choice rule is applied to the question of whether Isabella

⁷⁷ As in Gray v Formosa [1963] P. 259 and per obiter dicta in Vervaeke v Smith [1983] AC 145 (both analysed in detail at Chapter 5 II B infra). However, in this example, there is little connection with England and thus English public policy may not be infringed.

⁷⁸ It is arguable that this is what happened in R v Brentwood Superintendant Registrar of Marriages ex p. Arias [1968] 2 QB 596 (discussed at Chapter 6 II A infra). The English court did not approve of the grant of a divorce decree in Switzerland which had the effective consequence that the wife could remarry and the husband could not (because the decree was not recognised by the law of his nationality). The English Court's decision not to allow the remarriage of the husband by applying choice of law rules resulted in effective non-recognition of the Swiss divorce. The difficulty with this approach is that the English decision continues the unfairness of the original Swiss decree.

⁷⁹ Based on facts of Sottomeyer v De Barros (1879) 5 P.D. 94.

is entitled to succeed as spouse, New York law will apply and she will be entitled. If the recognition rule is applied, the Portugese decree is entitled to recognition under the Family Law Act 1986 by virtue of the wife's Portugese nationality. Thus, she would not be entitled.

Example M7

Ahmed divorces his wife Bina by bare talaq in India. At the time, Ahmed is domiciled in Saudi Arabia and Bina is domiciled in Dubai. The talaq is recognised by both countries of domicile. Ahmed subsequently marries Hussana in England. Bina has married Mohammed in India. Since neither of the parties is domiciled in India, where the divorce is obtained, the talaq will not be recognised in England. However, the remarriages are valid by the law of the parties' domiciles.

If the recognition rule is applied, the second marriages will not be valid; whereas if the choice rule is applied, they will be valid.

Example M8

Shimon and Talia are domiciliaries and nationals of Israel. After they separated, Shimon came to live in England. He instituted proceedings to divorce his wife by Jewish get in the Court of the Chief Rabbi in London. The get was handed to Talia in Haifa by an agent. The get is recognised in Israel. Shimon has now married Rina in Israel. Assume that the transnational get will not be recognised in England.⁸⁰

If the recognition rule prevails, Shimon is still treated as married to Talia and the second marriage is invalid; whereas if the choice rule prevails the second marriage is valid.

⁸⁰ See II B 4 supra

Example M9⁸¹

Anthony, who is a domiciliary and national of Malta, married Susan, an English domiciliary and national in an English register office. A few years later, Anthony obtains a nullity decree in Malta on the basis that the marriage was not celebrated in Church. Anthony subsequently marries Rosa, a Maltese domiciliary and national, in a church ceremony in Malta. Assume that the Maltese nullity decree is not recognised in England on public policy grounds.⁸² Anthony dies intestate leaving property in England.

If the recognition rule prevails then the first marriage is still valid and Susan may claim as Anthony's widow. If the choice rule prevails then the second marriage is valid and Rosa may claim as Anthony's widow.

Example M.10

John and Theresa are domiciled in Puerto Rica and are nationals of the USA. John owns substantial assets in England. They travel to the Dominican Republic for the weekend, where they obtain a divorce. Assume that the divorce is recognised in Puerto Rica⁸³, but not in England. The parties' matrimonial property is subject to a community regime.

If the choice rule prevails, the parties shares in the assets in England are calculated and may be claimed from the date of the divorce. If the recognition rule prevails, the parties are still regarded as married and the community still continues.⁸⁴

⁸¹ Based on Grey v Formosa [1963] P. 259, Lepre v Lepre [1965] P. 52 and Papadopoulos v Papadopoulos [1930] P. 55.

⁸² The cases of Grey v Formosa *ibid* and Lepre v Lepre *ibid* (discussed at Chapter 5 II B *infra*) were decided under the common law rules. However, although they have been criticised, it seems likely that the same result would be achieved using the statutory public policy defence in Family Law Act 1986 s.51(3).

⁸³ See Chapter 6 I B 2 *infra*.

⁸⁴ See Chapter 8 I 2 (b) *infra*.

Example T1

Jane and Kevin were domiciled in Florida. Jane is a U.S. citizen, but Kevin is a national of Haiti, although he has never had any real connection with that country. When their marriage broke down, Kevin returned to Haiti and obtained an ex parte divorce there. Assume that this divorce is recognised in England, but not in the USA. Kevin now lives in England, but on a recent trip to Florida, Kevin negligently injures Jane. Under the law of Florida, there is inter-spousal immunity in tort. Assume that this immunity continues after separation of the spouses until divorce.

The question to be answered is whether Jane is "single" or still married for the purposes of suing Kevin in tort. If the recognition rule is applied she is no longer married to Kevin and thus the immunity does not apply. If the choice rule applies, the problem is complicated by the double-barrelled nature of the choice rule in English law. Jane is single according to the lex fori and married according to the lex loci delicti. This problem will be discussed further in Chapter 9.

Example T2⁸⁵

Lily and Michael, who are domiciled in New York, obtained a 'weekend' inter partes divorce in Haiti. Michael is subsequently killed in New Jersey by the negligence of Norman, who is resident in England. Assume that the divorce is recognised in New Jersey⁸⁶, but not in England.

If the recognition rule is applied, Lilly is eligible for wrongful death compensation because she is still married to Michael. Again the position under the choice rule is not straightforward, because whilst she is entitled under the lex fori, she is no longer the wife under the New Jersey lex loci

⁸⁵ Based on U.S. case of Meisenholder v Chicago and N.W. Ry 213. N.W. 32 (1927) and see Harper (1959) 59 Col. L. R. 440, 456.

⁸⁶ See Chapter 6 I B 2 infra.

delicti.

Example A1⁸⁷

Dorothy was at all material times before and at her death domiciled in Zimbabwe. In her will she made a bequest of movables in favour of the issue of Alistair, her son. Alistair and his wife, who were at all material times domiciled in Zimbabwe, adopted two children in South Africa. Assume that the adoption is not recognised by the law of Zimbabwe, but is recognised as an 'overseas' adoption by English law.⁸⁸

If the choice rule prevails, the children will not be able to take under Dorothy's will. However, if the recognition rule prevails they can take as the children of Alistair.

Example A2 (reverse of A1)

Assume that Dorothy was at all material times and at her death domiciled in South Africa and that the adoptions were valid by the law of South Africa but are not recognised in Zimbabwe or in England.

If the choice rule prevails, the children can take, as the adoption is recognised in South Africa; whereas, if the recognition rule is applied, they will not succeed.

Example P1⁸⁹

A painting is stolen from Winkworth's house in England. It is taken to Italy where it is sold in market overt to Yves - who is resident in Ruritania. Yves acquires good title under Italian law. This title is recognised under English choice of law rules. Suppose that in an action between Winkworth and Yves in Ruritania, the Ruritanian Court decides that the valuable painting is owned by Winkworth. This judgment is entitled to

⁸⁷ Based on Re Valentine's Settlement [1965] Ch. 831.

⁸⁸ See Chapter 10 I B 4 infra.

⁸⁹ Based on Winkworth v Christie, Manson and Woods Ltd. [1980] Ch. 496.

recognition in England⁹⁰. However, Yves ignores the judgment and brings the painting from Italy to England, where Winkworth seeks return of the painting.

If the English Court applies its recognition rule, Winkworth will succeed; whereas if it applies its choice of law rule, Yves will succeed.

Example P2:

Assume the same facts as in example P1 except that Yves hands the painting over to Winkworth in Ruritania. Winkworth then takes the painting back to Italy where he sells it to Zeldon. Zeldon brings it to England and Yves claims the painting from him. Applying English choice of law rules, whether Zeldon acquires good title is governed by the law of the situs, which is Italian law. Assume that under Italian law, a transferee cannot obtain better title than the transferor (unless he buys in market overt) and that the Ruritanian judgment is not recognised in Italy.

Thus, again if the English Court applies its recognition rule, Zeldon (Winkworth's assignee) will succeed; whereas if it applies its choice rule Yves will succeed.

Example P3: (variation of example P2)

Assume that in P2 above, the Ruritanian judgement is not entitled to recognition in England.

If we apply the recognition rule, then since the Ruritanian judgment is not recognised, Winkworth never acquires title. Thus, Yves who acquired good title in Italy, still owns the painting. Whereas, if we apply the choice of law rule Winkworth obtains title by virtue of the judgment of the Ruritanian

⁹⁰ For a discussion of the issues which may arise in this sort of situation where the judgment is not recognised in England, see Chapter 3 III B infra.

Court⁹¹ while the painting is in Ruritania. He can therefore pass on good title when he sells the painting to Zeldon in Ruritania.

Example P4 (Variation of P3)

Suppose that Yves does not hand over the painting to Winkworth in accordance with the judgment, but sells it to Zeldon in Ruritania and Zeldon brings it to England.

If we apply the lex situs choice rule, then it appears that Zeldon cannot acquire good title from Yves because the effect of the Ruritanian judgment is to vest title in Winkworth. If we apply the recognition rule, Zeldon acquires good title from Yves because the judgment is of no effect.

IV THE DIFFERENCE BETWEEN THE TRADITIONAL ANALYSIS AND THE CONFLICT OF RULES ANALYSIS

A. THE TRADITIONAL ANALYSIS⁹²

The traditional analysis of the cases involving matrimonial decrees has been to treat them as examples of the incidental question⁹³. The question to be decided is whether the validity of the divorce (the incidental or preliminary question) should be determined by the conflicts rules of the law governing the

⁹¹ It is assumed that the Ruritanian judgment is not merely declaratory but actually has the effect in Ruritanian law of vesting title in Winkworth.

⁹² For a very thorough analysis of all aspects of the incidental question, see Gottlieb (1977) 26 ICLQ 734 and Wengler, International Encyclopedia of Comparative Law, Vol. III Chapter 7.

⁹³ Although Levontin, "Choice of Law and Conflict of Laws" (1976) at p. 106 maintains that there is no incidental question in the 'remarriage' cases.

validity of the second marriage, the succession, matrimonial property relations or tort as the case may be (the main question)⁹⁴ or by the conflicts rules of the forum.⁹⁵ Thus, the conflict is perceived as a conflict between the recognition rules of the lex causae and the recognition rules of the forum.

The incidental question is, of course, much wider than the problem raised here because it can arise in many ways which do not involve the question of recognition of a foreign judgment or decree. For example, the validity of the second marriage may depend on the validity of a first marriage which has never been purported to be annulled⁹⁶. In such cases the conflict is between the **choice rules of the forum** and the **choice rules of the lex causae**.

There is comparatively little caselaw authority⁹⁷ on the incidental question and in some cases, the existence of the

⁹⁴ This is sometimes called 'dependent application' (Ehrenzweig and Jayme, Private International Law Vol 1 (1967) (hereinafter Ehrenzweig) at p. 170) or the 'wide reference' approach (Hartley (1967) 16 ICLQ 680 at p. 682) and those supporting it are sometimes called 'lex causards' (Gottlieb (1977) 26 ICLQ 734 at p. 752).

⁹⁵ The corresponding terminology to that in n.94 supra is 'independent determination'; the 'narrow reference' approach and 'lex foristes'.

⁹⁶ Although, of course, the incidental question is not restricted to questions of validity of second marriages or even to family law.

⁹⁷ Gottlieb (1977) 26 ICLQ 734 analyses the Commonwealth authority. Ehrenzweig (n. 94 supra) at p. 171 claims that there are very few pertinent American cases. See also Robertson (1939) 55 LQR 565 at p. 577.

problem is not recognised⁹⁸. It is not possible to elicit any simple rule in favour of the lex fori or the lex causae from the cases⁹⁹. There is a wealth of academic literature on the topic, which is summarised by Gottlieb¹⁰⁰. He divides the writers into three groups. The first is those who support the application of the lex fori; the second is those who support the application of the lex causae and the third is those who believe that no general rule is applicable.

Earlier writers were more prepared to commit themselves to the lex fori or lex causae approaches. For example, Robertson¹⁰¹ concluded that,

"the preliminary question should be determined by the conflicts rules of that system of law which is selected as appropriate to determine the principal question. The reason for this is..... that this is the only way of respecting the determination already made that the selected proper law is to govern the question in dispute."

Later writers have been more reluctant to support either approach¹⁰². For example, Ehrenzweig, like others, points out that the lex foristes give priority to "conformity of decision"

⁹⁸ For example, Perrini v Perrini [1979] Fam. 84.

⁹⁹ For example, Lawrence v Lawrence [1985] Fam. 106 and Perrini v Perrini [1979] Fam. 84 are irreconcilable with R v Brentwood Marriage Registrar ex p. Arias [1968] 2 QB 956 (see discussion below at Chapter 6 II A infra).

¹⁰⁰ (1977) 26 ICLQ 734 at pp.751 et. seq.

¹⁰¹ (1939) 55 LQR 565 at pp. 583-4.

¹⁰² See, for example, the change in approach between the earlier editions of Dicey and Morris (e.g. 6th edn. 1949, the first in which the problem was discussed, at p. 76) and the later editions (e.g. 12th. edn. 1993 at p.55).

in the forum¹⁰³ whilst the lex causae give priority to "uniformity of decision" among different fora¹⁰⁴. He claims that there can be no general rule favouring one of the above stances, but

"Rather, the answer must hinge on the interpretation of the rule of decision, be it that of the forum or a foreign country, as to whether it gives priority to 'conformity' within its own legal system.. or to any international uniformity in the decision of the particular issue."¹⁰⁵

Gottlieb¹⁰⁶ himself points out that where total renvoi¹⁰⁷ is adopted, then the incidental question must be decided by the lex causae. This does not help at all in cases where renvoi would not be applied. He declines to give any overall solution to the Incidental Question on the basis that

"there is really no problem of 'the incidental question', but as many problems as there are cases in which the incidental question may arise"¹⁰⁸.

In his first article on the subject he concluded that,

"In each case the acceptance or rejection of the renvoi, the general purpose behind each choice-of-law rule, the factors of consistency of decision and the public policy of the forum may all be important to consider.....I have attempted not so much to provide solutions to all the problems discussed as to suggest methods by which

¹⁰³ This is often referred to as "internal harmony" or "internal consistency." See, for example, Khan-Freund, Problems in Private International Law (1977) at p. 291.

¹⁰⁴ Often referred to as "international harmony" (ibid.).

¹⁰⁵ Ehrenzweig (supra n.94) at p. 170, para. 92. See also Khan Freund, The Growth of Internationalism in Private International Law (1960) at pp.9 et. seq. who sees this dichotomy as a pervasive one in the Conflict of Laws.

¹⁰⁶ (1955) 33 Can. Bar. R. 523 at p. 547.

¹⁰⁷ See Section VII infra.

¹⁰⁸ Gottlieb (1955) 33 Can.Bar Rev. 523 at p. 555.

reasonably satisfactory results may be achieved."¹⁰⁹

His second article, whilst providing an excellent analysis of the caselaw and literature on the subject and, demonstrating a methodology, does not purport to formulate any solution to the incidental question.

It is submitted that despite the quantity of writing on the subject, the present state of the jurisprudence in relation to the incidental question is unsatisfactory. The lack of clear caselaw or academic support for any single approach results in almost complete uncertainty as to how a Court, faced with an incidental question, would decide the case. It is submitted that this flaw is particularly serious in relation to questions of status because parties and administrative officials may need to be able to ascertain the status of individuals¹¹⁰ without resort to Court. Thus, there is a need for a novel approach to these problems which is both theoretically sound and suitable for practical application. The purpose of this thesis is to seek such an approach.

B. THE 'CONFLICT OF RULES' ANALYSIS

In the 'conflict of rules'¹¹¹ analysis, the focus is on a single question. For example, in relation to validity of marriage, the

¹⁰⁹ Ibid.

¹¹⁰ See Law Com. W.P. No. 89 para. 2.35.

¹¹¹ We must distinguish Khan-Freund's use of this term (n. 103, supra at p. 285) to refer to the renvoi situation where the lex fori's choice rule is different from the lex causae's.

question would be whether the party remarrying is "single"¹¹² for the purposes of entering the second marriage? In relation to succession, the question would be whether the first spouse is still married for the purposes of succession as spouse¹¹³. An appropriate question can be formulated for each situation. In each case, the question can be answered either by applying the relevant **choice of law rules** or by using the **recognition rules** to determine the validity of the divorce or nullity decree.

It is submitted that the 'conflict of rules' approach holds two advantages over the incidental question approach.

(a). The conflict will be perceived as one between the choice of law rules and the recognition rules of the forum rather than as between the recognition rules of the forum and those of the lex causae. This may appear to be pure semantics since it is clear that application of the forum's choice rules results in application of the recognition rules of the lex causae. However, it is suggested that the difference in analysis is significant. Firstly, if the conflict is seen as being between two different types of domestic rules of the forum, the use of forum policy¹¹⁴

¹¹² See Levontin (n. 93 supra) at p. 106. His view is that no incidental question arises in this situation because the only question is whether the particular party is single and free to remarry. Previous events including obtaining a divorce or nullity decree in respect of a prior marriage are "ingredients that 'feed' the answer to this question" rather than being a question in their own right.

¹¹³ According to Levontin (ibid), this does raise a true incidental question because "the question whether the woman claimant was widow of the deceased was raised to 'serve' a question (that of the succession) beyond itself."

¹¹⁴ See Ehrenzweig (n. 94 supra) at p. 170.

to solve the conflict is easily justified. Secondly, the approach should avoid the forum's recognition rules being preferred for purely parochial reasons¹¹⁵.

(b) Where the question is framed as a single question, it will be easier to adopt a 'separate issue' approach¹¹⁶ and to identify the relevant policy considerations.

V SOLUTIONS TO THE 'CONFLICT OF RULES' PROBLEM

Adopting the 'conflict of rules' analysis, two categories of solution to the problem can be identified. Firstly, a **global** rule could provide that a particular type of rule **always** prevails. Secondly, **specific** rules could be formulated to provide the desired result in each particular type of case.

Three possible global rules are:

1. Always prefer the recognition rule
2. Always prefer the choice of law rule
3. Always prefer the rule which is statutory.

In Part II (Chapters 2,3 and 4) we will examine each of these preference rules in turn to see if adequate theoretical foundation can be found to support any of them.

Part III of the thesis is based on the hypothesis that no

¹¹⁵ Kahn-Freund (n. 103 supra) at p. 321 refers to the "homeward trend."

¹¹⁶ Rees (1977) 26 ICLQ 954 advocates a 'separate issue' approach for cases where the 'incidental question' is the validity of the marriage i.e. there is no recognition rule involved.

theoretical justification can be found for any of the global rules discussed in Part II and that choosing one of them over the others would be quite arbitrary. Instead, the 'conflict of rules' problem must be solved by specific rules designed to produce the result which is consistent with the domestic policy of the forum¹¹⁷ in relation to each issue. Sometimes, one of the global rules may be the most appropriate preference rule. In such a case, it is advocated as a specific rule because it will produce the desired outcome in relation to the particular issue, rather than because of the intrinsic merit of the rule.

The aim in Part III is to construct appropriate specific rules in relation to a number of chosen issues using a result-selecting approach. In Chapter 5, the precise methodology to be employed is developed against the background of a critical analysis of result-selecting techniques.

VI FORUM DECREES

A problem similar to the 'conflict of rules' dilemma may arise where a decree of the forum is not recognised by the lex causae of the issue in question. In relation to issues governed by the domicile¹¹⁸, this problem can only arise where:-

(a) there has been a change of domicile between decree and the

¹¹⁷ Von Mehren and Trautman, The Law of Multistate Problems (1965) at p. 495 suggest that the "special policies and purposes" of the lex causae and possibly also the forum should be taken into account.

¹¹⁸ For example, capacity to remarry (but see Chapter 6 I C infra), succession to movables.

relevant event¹¹⁹ or

(b) (i) jurisdiction is taken on grounds other than the domicile of both parties and

(ii) the choice of law rule for granting the decree is other than the lex domicilii¹²⁰ of both parties¹²¹.

Requirement (a) is purely factual. However, the two requirements necessary to satisfy (b) are legal and merit further examination.

(i) Until 1937, English Courts only had jurisdiction in matrimonial cases where the parties were domiciled in England.

¹¹⁹ For example, remarriage or death.

¹²⁰ In some European countries, the law of the nationality is still used to govern divorce. In its unmodified form, this principle requires that a decree not be granted unless both parties are entitled to a decree under the law of their nationality. Alternatively, whilst a decree is granted on the basis of the national law of one, it is only considered effective in relation to that party and the other spouse is still considered as married. This used to be the case in France (see Hartley (1967) 16 ICLQ 680 at p. 688). Under these theories, there can be no conflict between the choice rule and the forum decree. In practice, however, many countries have modified the exclusive application of the law of the nationality (see Palsson, International Encyclopedia of Comparative Law, Vol III Chpt. 16 paras. 129 et seq.).

¹²¹ Where the divorce is governed by the personal law of one spouse only, there may be a conflict where the decree is not recognised by the personal law of the other. See examples in relation to German law given by Palsson, Marriage in Comparative Conflict of Laws: Substantive Conditions (1971) pp. 229 - 232 and 244 - 250. The German choice of law rule in divorce has now been reformed (see Dickson (1985) 34 ICLQ 231) and it is now more likely that the divorce will be governed by a law which is not the national law of one or both parties (where there has not been a common nationality retained by one spouse, the divorce will be governed by the last common habitual residence, provided that this is retained by one and otherwise by the law with which the spouses are together most closely connected).

However, jurisdiction was gradually widened by statute¹²² and today English courts can entertain applications for matrimonial decrees where either party is domiciled or has been habitually resident in the jurisdiction for one year¹²³. Thus, there are many decrees granted in England to parties of whom at least one is not domiciled in the forum.

(ii) In England and Wales, the choice of law rule for divorce is the lex fori¹²⁴. The position in nullity is more complicated¹²⁵. Whilst the orthodox approach is that the dual domicile test applies to most issues, the position in relation to non-consummation¹²⁶ has never been clear. Also, there are now some indications that at least in circumstances, capacity is governed by the intended matrimonial home or real and substantial connection test.¹²⁷ Even where domicile is the relevant connecting factor, it is domicile at the date of the first

¹²² It will be remembered that until 1973 a married woman's domicile was dependent on her husband's. Thus a wife could only petition for divorce if her husband was domiciled in England. The hardship caused by this state of affairs was mitigated by two provisions. The Matrimonial Causes Act 1937 s.13 provided for jurisdiction in a divorce case at the petition of the wife if she had been deserted by her husband or he had been deported and immediately prior to that he had been domiciled in England. The Law Reform (Miscellaneous Provisions) Act 1949 provided for jurisdiction where the wife had been ordinarily resident for three years in England and her husband was not domiciled in the United Kingdom, Channel Islands or Isle of Man.

¹²³ Domicile and Matrimonial Proceedings Act 1973 s. 5.

¹²⁴ Zanelli v Zanelli (1948) 64 TLR 556.

¹²⁵ See Law Commission W.P. No. 89, Part V.

¹²⁶ see Bishop (1978) 41 MLR 512.

¹²⁷ See Chapter 6 I C infra.

marriage which is relevant in determining whether a nullity decree should be granted. Whereas the question of capacity to enter into the second marriage is governed by the law of the domicile at the date of that second marriage.

In relation to issues governed by other laws, the problem can arise whenever the forum decree is not recognised by the lex causae.¹²⁸ It might be surprising therefore that there is no reported case¹²⁹ in which an English¹³⁰ Court has had to face this conflict between its own decree and its own choice rules. Whilst section 50 Family Law Act 1986 now provides for a re-marriage of either party to a forum decree to be recognised, the problem may still arise in relation to other issues such as succession.

It should be noted that this situation differs from the case of a foreign decree because the forum decree has validity by virtue of domestic law rather than conflicts recognition rules¹³¹. In other words, the conflict is between domestic rules and conflict

¹²⁸ e.g. The lex situs in relation to intestate succession to immovables.

¹²⁹ The conflict would have arisen in Breen v Breen [1964] P. 144 if the English decree had not been recognised in Ireland and one of the parties was now domiciled in Ireland. The very fact that the question of recognition by Irish law was raised might be interpreted as an indication that the choice rule would apply in such a situation.

¹³⁰ But there are a number of cases on the Continent of Europe in which the problem has had to be decided directly, see Palsson (n.121 supra.), pp. 229 et seq.

¹³¹ According to the Austinian conception of status (as explained by Engdahl (1969) 55 Iowa L. Rev. 56, 57 et seq.) this distinction is fundamental.

choice rules rather than between conflict recognition rules and conflict choice rules. If, as a matter of policy the forum decree always prevails¹³², the discussion in this thesis is irrelevant. However, if there is no such global preference for the forum decree, it is suggested that the approach advocated to the 'conflict of rules' situation in Part III is equally appropriate to solve the conflict between the forum decree and the choice of law rules.

VII THE APPLICATION OF THE CHOICE RULE AND RENVOI

We have seen that under the conflict of rules analysis, application of the choice rule¹³³ results in application of the recognition rules of the lex causae. This might be seen as an application of the doctrine of renvoi because application of the lex causae to the problem means application of the 'whole' lex causae, including its conflicts' rules¹³⁴. Here it is the type of conflicts rules, known as recognition rules, which are to be

¹³² It seems implicit from the judgments in Breen v Breen [1964] P. 144 that this is not the case as the Court would apparently have been prepared to refuse to recognise the second marriage if the English divorce decree had not been recognised in Ireland, even though the only connection that Ireland had with the case was that it was the lex loci celebrationis.

¹³³ Under the traditional analysis the same would be true of the application of the lex causae.

¹³⁴ It is suggested that the essence of the problem of renvoi is whether application of the lex causae requires application of only internal law or also its conflicts rules (i.e. the whole of the lex causae). This is what Robertson (1939) 55 LQR 565 at p. 571 calls 'renvoi in the wider sense'. Thus, the issue of remission/transmission is not the central issue, although application of the whole of the lex causae **may result** in a transmission or remission to the law of another country. This seems to be what Robertson refers to as 'renvoi in the narrower sense'.



applied.

Writers have commented on the interrelationship between renvoi and the incidental question. Ehrenzweig¹³⁵ states that the incidental question is "closely related to that of renvoi." ¹³⁶

Gottlieb¹³⁷ suggests that renvoi relates to the "qualitative meaning of the word 'law', whilst the incidental question relates to the "quantitative interpretation of the word 'law' ". However, he claims that whilst the two concepts bear similarities, they must be distinguished by their "relationship in time."¹³⁸ Thus, renvoi concerns the determination of the law which is to govern the issue. Where renvoi applies, there is a remission or transmission from the initial lex causae either back to the forum or to a third country, which becomes the real lex causae. Thus, renvoi deals with the selection of the law governing the main question.¹³⁹ Whereas, the incidental question applies **after** the selection of the law governing the main question.¹⁴⁰

It is suggested that this distinction is inappropriate under the conflict of rules analysis. Since the focus is on a single

¹³⁵ Op. cit. n. 94 supra at p. 170.

¹³⁶ See also Robertson (1939) 55 LQR 565 at p. 568.

¹³⁷ (1955)33 Can. B.R. 523 at p. 543.

¹³⁸ Gottlieb (1977) 26 ICLQ 734 at p. 750.

¹³⁹ See Gottlieb (1977) 26 ICLQ 734 at p. 750.

¹⁴⁰ Ibid and Robertson (1939) 55 LQR 565 at p. 567 and Khan-Freund (n. 103 supra) at p. 291.

question, if that question is to be governed by the forum's conflict rule as opposed to its recognition rule, then where the lex causae selected by the choice rule itself refers to its conflict rules (including its recognition rules) in order to answer the question, this is an application of the doctrine of renvoi. For example, assume that in the Schwebel situation (example M1¹⁴¹), the forum refers to Israeli law to determine whether Natasha is single. This question must be answered by Israeli recognition rules, which will have to determine whether the get obtained in Austria can be recognised.

The doctrine of renvoi has been subject to considerable academic controversy¹⁴². Thus, it is appropriate to examine the criticisms which have been levelled at the doctrine generally and to analyse whether they are equally pertinent to the use of the doctrine in the conflict of rules scenario with which we are concerned.¹⁴³

1. Renvoi causes unnecessary complication.

Renvoi has generally been used where there is a conflict between the choice rule of the forum and the choice rule of the lex causae. The forum has two options before it:-

¹⁴¹ Section III supra.

¹⁴² See, for example, Cheshire and North (n.1 supra) pp. 62-67; McClean, Morris: The Conflict of Laws (4th. edn.) 1993 (hereinafter 'Morris') at pp.478-80 and Collier, Conflict of Laws (1994) 2nd. edn. pp. 24 - 28.

¹⁴³ Although it should be borne in mind that most authors seem to have been primarily concerned with renvoi in the narrow sense.

(i) to apply the internal law of the lex causae ignoring completely that this is not the law which would be applied by the lex causae to such a case because of the foreign element involved.

(ii) to apply the choice rule of the lex causae and thus decide the case according to the internal law of the country directed by that choice rule.

If the Court fails to perceive the problem of the conflict between the two choice rules, it will simply choose the first option and thus the doctrine of renvoi is not applied, by default¹⁴⁴. The advantage of this is simplicity.

In our situation, the problem cannot so simply be ignored. In order to determine the outcome of the case it is necessary to decide whether the relevant foreign judgment should be recognised. Thus, a Court cannot really ignore the problem, unless it simply applies the recognition rule without making any reference to the choice of law issue.¹⁴⁵ The very fact that we have a 'conflict of rules' situation means that we have complexity. Using renvoi does not substantially add to this complexity.

¹⁴⁴ Cheshire and North (n.1 supra) at p. 60 cite a few decisions where the first option was chosen, but claim that it has been "unconsciously adopted in a multitude of decisions."

¹⁴⁵ This is what happened in Perrini v Perrini [1979] Fam. 84.

2. The doctrine does not produce uniformity of result unless it is applied in one of the countries concerned and not the other.¹⁴⁶

Where we have a 'conflict of rules' situation, it is inevitable that there will be some lack of uniformity between the position in different countries.¹⁴⁷ Thus, application of renvoi here is not primarily designed to achieve uniformity of result.

3. The doctrine¹⁴⁸ involves surrendering English conflicts' rules to foreign ones.

We saw above that this argument was used in relation to the incidental question to justify referring the incidental question to the lex fori rather than the lex causae. The need to avoid treating English conflicts rules as subservient to foreign rules may appear to be a valid reason for preferring the recognition rule to the choice rule where there is a conflict of rules.

It is suggested, however, that this reasoning can be easily countered. English choice rules direct that the law of another jurisdiction should apply because¹⁴⁹ of the quality and degree of connection between the issues in the case and that

¹⁴⁶ Indeed with total renvoi it is impossible to reach any decision if both countries accept the doctrine. This is the so called circulus inextricabilis. This problem might be largely academic since most civil law countries do not have renvoi and most common law countries use the same connecting factors as each other.

¹⁴⁷ See Chapter 6 II B 3 infra.

¹⁴⁸ At least the doctrine of total renvoi.

¹⁴⁹ For more detailed discussion of why there are choice, rules see Chapter 2 infra.

jurisdiction. Once the forum law has chosen the lex causae, it has fulfilled its function. Thus, applying the recognition rules of the

lex causae in the 'conflict of rules' situation is not an abrogation of our own choice rules. On the contrary, it is taking the application of those rules to their logical conclusion¹⁵⁰.

4. The doctrine is difficult to apply

There are two reasons for this. Firstly, it¹⁵¹ may involve determining whether the lex causae accepts the doctrine of renvoi¹⁵². Secondly, some foreign connecting factors may be problematic to apply. For example, it is not clear which domestic law represents the 'law of the nationality' of a British subject¹⁵³. Neither of these difficulties arises in our situation because we are primarily concerned with the recognition rules of the lex causae.

5. Renvoi is inappropriate in some areas of law

It has been judicially stated that renvoi should not apply in the law of contract¹⁵⁴ or tort¹⁵⁵. It is of interest that it has

¹⁵⁰ As Collier (n. 142 supra at p. 25) says, "This process is undertaken only because our Courts wish to undertake it."

¹⁵¹ Only the doctrine of total renvoi.

¹⁵² See Re Duke of Wellington [1947] Ch. 506, 515. Collier (n. 142 supra) at p. 25 argues that this objection is "either misguided or exaggerated"

¹⁵³ See Re O'Keefe [1940] Ch. 124.

¹⁵⁴ Re United Railways of Havana and Regla Warehouses Ltd. [1960] Ch. 52 and Amin Rasheed Shipping Corp. v Kuwait Insurance Co. [1984] AC 50.

¹⁵⁵ McElroy v McAllister (1949) S.C. 110.

been mainly used in relation to succession, property and marriage. It is precisely these areas in which the 'conflict of rules' is most likely to arise.

Thus, it can be seen that the criticisms of the use of renvoi generally do not apply to its use in the 'conflict of rules' scenario. Analysis of the caselaw shows that the doctrine of renvoi has usually been invoked in order to produce the desired result. We shall suggest below that the choice between the choice rule and the recognition rule should be made expressly in order to achieve the result which is consistent with the policy of the forum. It is submitted that the use of renvoi, where it is required for this purpose, would be appropriate and in keeping with the development of that doctrine¹⁵⁶.

VIII BIAS IN FAVOUR OF RECOGNITION RULES?

We may subconsciously favour application of the recognition rule in the 'conflict of rules' situation for two reasons. Firstly, in 'pure recognition cases' recognition rules take precedence without question.¹⁵⁷ Secondly, in recent years there seems to have been a shift in the focus of Private International Law, in which jurisdiction and recognition rules have become more

¹⁵⁶ Gottlieb (1955) 33 Can. B.Rev. 523 at p. 543 concludes that in relation to both renvoi and the incidental question, "All mechanical solutions of the problem must fail, simply because they will not serve the function of helping to fulfil the purpose of each rule. Only individualization of each rule will bring to light what we are trying to achieve by its application."

¹⁵⁷ See Section I B supra.

prominent at the expense of choice of law rules. We will consider these two phenomena in turn.

A. 'PURE RECOGNITION CASES'

There are three situations in which recognition will be refused where the foreign judgment is inconsistent with the choice rule. We shall examine whether these exceptions in fact derogate from the principle of the prevalence of the recognition rule over the choice rule.

1. Foreign judgments will not be recognised where there is already an inconsistent English decision of the matter.¹⁵⁸ The effect of this exception is to uphold the forum's choice of law rules, as applied in the original decision. However, the stated rationale is not one of preference for choice rules, but rather one of preference for a prior judgment.¹⁵⁹

2. Recognition ~~may~~ be refused where the fact that the foreign judgment is inconsistent with forum choice rules makes recognition contrary to public policy.¹⁶⁰ However, this exception is limited to those cases where the result of the application of different choice rules by the foreign court is

¹⁵⁸ Vervaeke v Smith [1983] 1 AC 145 (discussed in Chapter 5 at II B infra). See also now Family Law Act s.51(1) and Brussels Convention art.27(3).

¹⁵⁹ On the basis of the principle of res judicata. See Vervaeke v Smith ibid.

¹⁶⁰ See Gray v Formosa [1963] P. 259, Lepre v Lepre [1969] P. 52 and Vervaeke v Smith [1983] AC 145. These three cases are analysed in detail below in Chapter 5 at II B infra.

offensive to the forum.¹⁶¹ Thus it cannot be said to be based on preference for the choice rules themselves.

(c) Under article 27(4) of the Brussels Convention, the Court does not have to recognise or enforce a judgment of another Contracting State where that judgment depends on a decision as to a "preliminary question" concerning inter alia the status of natural persons

"in a way that conflicts with the private international law rules of State in which recognition is sought unless the same result would have been reached by the application of the rules of private international law of that State."¹⁶²

It has been pointed out¹⁶³ that the implication of this exception is that in all other cases it is no defence that the judgment for which recognition is sought is inconsistent with the choice of law rules of the recognising court. It might appear that the exception might indicate a general policy that whilst recognition rules are generally given precedence, in relation to certain matters, including status, choice rules should prevail. However, it is suggested that the defence simply reflects the fact that status judgments themselves do not fall within the Convention. To require a Court to recognise a decision based on

¹⁶¹ For example, recognition of French nullity decrees was not refused in Galene v Galene [1939] P. 237 and De Massa v De Massa (1931) reported in [1939] 2 All ER 150n, even though they were based on the formal invalidity of marriages (on the basis of lack of parental consent) between parties which were valid by the English lex loci celebrationis. It is significant that the parties were both French and that the requirement of parental consent exists in English law, although it is of more limited scope and effect than its French counterpart.

¹⁶² Unless the same result would have been reached under those rules.

¹⁶³ Jenard Report (OJ 1979 C59) p. 46.

such a judgment would be indirectly extending the scope of the Convention.

Thus, the exceptions do little to undermine the principle of preference for recognition rules in pure recognition cases. To what extent this preference can justify a global preference for recognition rules in the 'conflict of rules' situation depends on the reason for this preference. Since the 'pure recognition case' is not perceived as a conflict situation, there has been no need to articulate the rationale for the preference. It is suggested that the prevalence of the recognition rule is simply a corollary of the principle that judgments are recognised without examining their merits. We will be considering the basis of this principle in Chapter 3 below.

B. RECENT TRENDS IN PRIVATE INTERNATIONAL LAW

In recent years, there has been an increased emphasis in Private International Law on jurisdiction and recognition rules for inter alia the following reasons.

1. The free market philosophy of the EC has placed great emphasis on the free flow of judgments within Europe. This has required a totally new approach to the recognition of judgments in English Private International Law under which judgments of Member States must be recognised and enforced without review of jurisdiction and subject to only limited defences.¹⁶⁴

¹⁶⁴ See Section II A 4 supra.

2. Partly as a result of 2. above, most recent legislation in relation to Private International Law has been concerned with recognition.¹⁶⁵ Law Commission recommendations¹⁶⁶ and Hague Conventions¹⁶⁷ on choice of law issues have not generally found their way onto the Statute book.

3. The emergence of the doctrine of forum non conveniens has reduced the likelihood that cases will be heard in England which require application of choice of law rules¹⁶⁸ to determine the governing law.

4. In relation to contract, questions concerning the governing law frequently arise in relation to jurisdiction¹⁶⁹ and recognition/enforcement¹⁷⁰ rather than in a pure choice of law context

¹⁶⁵ See Table 1.

¹⁶⁶ See, for example, in relation to choice of law in tort, Law Com. No. 193.

¹⁶⁷ See, for example, Conventions on Succession to the Estates of Deceased Persons (1988) and Celebration of Marriage (1978).

¹⁶⁸ Cf. where foreign law must be applied because the parties have expressly chosen a foreign law to govern their contract.

¹⁶⁹ Before the enactment of the Contract (Applicable) Law Act 1991, most of the reported cases concerning which law governs the contract arose in relation to application to serve notice of the writ abroad under R.S.C. Ord. 11 r. 1 (d) (iii) (e.g. Amin Rasheed Shipping Corp v Kuwait Insurance Co. [1984] AC 50; Armar Shipping v Caisse Algerienne [1981] 1 WLR 207 and Attock Cement Co. Ltd. v Romanian Bank for Foreign Trade [1989] 1 WLR 1147) or whether proceedings should be stayed (e.g. The Hollandia [1983] AC 165).

¹⁷⁰ e.g. Tracom SA v Sudan Oil Seeds Co. Ltd. (Nos. 1 and 2) [1983] 1 WLR 1026.

5. In the non-commercial sphere, matters in which the lex fori applies (for example in relation to divorce and child custody) are nowadays more frequently litigated than matters where the choice of law rule may refer to a foreign law (such as validity of marriage, rights of succession).

6. In some areas, the choice of law rule is so uncertain (e.g. tort¹⁷¹) that parties are deterred from taking cases to Court or simply plead English law.

Thus, we can see that the reasons for the shift in the balance in favour of jurisdiction and recognition rules largely reflect practical and commercial realities rather than any perception that such rules have intrinsically greater merit or weight than choice of law rules. Therefore, in seeking a global solution, we should resist any subconscious bias in favour of recognition rules resulting from recent trends and rely on a proper analysis of the theoretical basis for each type of rule.

¹⁷¹ All the reported cases concerning the problem of identifying the place of the tort arose in relation to applications to serve out of the jurisdiction. In the older cases it was necessary to decide whether the claim was founded on an act committed within the jurisdiction in order to come within the old wording of the relevant head of Order 11 r.1 (see, for example, Distillers v Thompson [1971] AC 458 and Castree v Squib [1980] 2 All ER 589). However, even in Metall und Rohstoff AG v Donaldson, Lufkin and Jenrette Inc. [1990] 1 QB 39, where it was clear that the requirements of the new Order 11 r.1(1)(f) were satisfied, it was still necessary to decide what was the lex loci delicti in order to decide if there was a good arguable case before the application could be granted.

PART II

GLOBAL SOLUTIONS

CHAPTER 2: GIVING PREFERENCE TO CHOICE OF LAW RULES

I. INTRODUCTION

In this Chapter we shall be seeking justification for a global preference for the choice of law rule, where the result of its application conflicts with the recognition rule. Such justification can only be found by examining the rationale behind choice rules. Since we are primarily concerned with the 'conflict of rules' situation in English law and English choice rules are still basically jurisdiction selecting, we shall only be concerned with theories which explain such traditional rules.¹

Generally the proponents of the theories do not distinguish clearly between choice rules and recognition rules, although there tends to be more emphasis² on the application of foreign laws than on the recognition of foreign judgments. The purpose of our examination of the theories is to assess whether any of them can support giving precedence to choice rules over recognition rules as a matter of principle.

II: THE THEORIES

When considering each theory it should be borne in mind that the theories appear to have been expected to perform two, arguably distinct, functions. Firstly, they should explain why we have

¹ There will be some discussion of result-selecting approaches at Chapter 5 III infra.

² This is probably because the emphasis in the study of Private International Law was until recently on choice of law rather than recognition and enforcement of judgments. (See Chapter 1 at VIII B supra).

conflicts rules at all. Secondly, the theories should be able to be applied in order to construct the choice of law rules.³ It will be seen that most of the theories 'fall down' on the second function. This might be because the original proponents only had the first function in mind. In other words, they were only seeking to explain existing choice of law rules and not to formulate principles upon which choice of law rules could be constructed where they did not already exist or to replace existing unsatisfactory rules.

For our purposes, the first function seems sufficient. By discovering why we have choice of law rules and recognition rules respectively, we might be able to determine which type of rule should take priority where there is a conflict between the two. It is suggested that this perspective is too simplistic. The basis on which the rules are constructed are also relevant in determining the comparative importance to be attached to each category of rule. For example, if we were to find that the doctrine of vested rights were a compelling reason for applying choice rules in preference to recognition rules, but that in practice vested rights had proved to be an inadequate basis for constructing choice rules, our previous finding in favour of choice rules would be substantially undermined.

Thus, it is submitted, that it is necessary to analyse the success of each theory in performing both the functions outlined above.

³ Carswell (1959) 8 ICLQ 268 at p. 288.

A. COMITY

The doctrine of comity dates back to Huber and was adopted by Story.

The latter wrote,

"The true foundation on which the subject rests is that rules which are to govern are those which arise from mutual interest and utility; from the sense of the inconveniences which would arise from a contrary doctrine; and from a sort of moral necessity to do justice in order that justice may be done to us in return."⁴

It can be seen that Story's concept of comity includes a number of different elements. It is therefore not surprising that the notion of comity has been understood differently by different writers and judges.⁵ It is submitted that the label 'comity' has been applied to cover three distinct doctrines, which can be called reciprocity, judicial courtesy and business efficacy respectively. Each of these will be examined in turn.

1. Reciprocity

In the choice of law context, the theory of reciprocity would state that an English Court applies foreign laws in cases with a foreign element **so that** foreign Courts will apply English law in cases involving English parties or other English connections.

It is quite clear that the court's willingness to apply a foreign rule does not in any way depend on any evidence that there would be reciprocity by the Courts of that foreign country. Thus, whilst

⁴ Story, Commentaries on the Conflicts of Law (1834) s.35.

⁵ See the judgment of La Forest J. in Morguard Investments Ltd. v De Savoye (1990) 76 DLR (4th.) 256, 262 et. seq. Although he is primarily concerned with recognition of judgments, much of what he says and the sources quoted are equally relevant to choice of law.

in a general sense there may be some hope that if English Courts adopt the 'international' approach of applying foreign laws in appropriate cases, other Courts will do the same, this is far too vague a premise on which to base the whole system of choice of law rules⁶. In other words, the notion of reciprocity might perform the first function in explaining why we have choice of law rules at all, but it could not perform the second function of providing a basis for constructing those rules.⁷ We will find below⁸ that the notion of reciprocity is of much more importance in the field of recognition of foreign judgments.

2. Judicial Courtesy

It seems that this is the sense in which the word comity was originally used⁹ when justifying the application of foreign law. In other words, foreign laws are applied in order to show courtesy to other sovereign States.¹⁰

Comity in this sense has been severely criticised, largely because it appears to leave the application of foreign law entirely to

⁶ Although this theory might explain the application of foreign law in some particular instances. See Jaffey (1982) 2 OJLS 368, 372.

⁷ Khan-Freund, (chapter 1, n. 105 supra) at p. 8 says, "...comity supplies a legislative motive rather than a legislative content."

⁸ Chapter 3 at B 1 infra.

⁹ See, for example, Hughes v Cornelius (1680) 2 Shaw 232 and Dicey's Conflict of Laws (4th. edn., 1927) at p. 9. Llewelyn Davies (1937) 18 BYBIL 49 at p. 57 alleges that 'courtesy' is a misunderstanding of Huber's use of the term 'comity'.

¹⁰ Cheshire and North (Chapter 1 n.1 supra) at p.5 point out that this theory can hardly explain the readiness of the English courts to apply enemy law in time of war.

the discretion of the courts.¹¹ Again, this suggests that while 'courtesy' may explain why we have choice of law rules at all, it is so imprecise a doctrine that it does not appear to give us sufficient guidance to construct the rules. For example, courtesy does not tell us what degree of connection a party must have with a foreign country in order for the law of that country to govern the validity of his/her marriage or his/her liability in tort.

Taken to its extreme, courtesy might require that we should simply see whether the foreign country itself would apply its laws to the case in question and if so, follow suit.¹² There are a number of problems with this approach. Firstly, we would be subordinating our own views as to the relevance of foreign law entirely to the views of foreign states. Secondly, we would have a problem if the laws of more than one foreign state 'wanted' to apply to the situation. In this case, 'courtesy' could not tell us which to apply. Thirdly, the approach can only work if other countries have conflicts rules¹³ stating when their own law should apply. Fourthly, we would end up with different results in similar cases

¹¹ Cheshire and North (Chapter 1, n.1 supra) at p. 4 claim that courtesy is a matter for sovereigns and not judges who are required to decide a case according to the rights of the parties.

¹² Arguably, this is what happens when double renvoi is applied (for discussion of renvoi in relation to the subject of this thesis, see Chapter 1 VIII supra).

¹³ It could be argued that a rule stating when a domestic law is applicable is part of the domestic law itself and not a conflict rule. Only when there is no provision in domestic law as to whether it should apply does the court have to consider the application of foreign laws. The contrary argument is that a rule stating that a domestic law applies when a particular factor connecting the case with the forum is present can be seen as a conflicts rule because it provides which law is to apply in a case which involves foreign elements.

depending on the view of the foreign Court in question.

We need some other principle to guide us. However, once we have determined what is the appropriate degree of connection, it would seem correct to say that at least one of the **reasons** that we are applying foreign law is out of courtesy to the foreign sovereign state.¹⁴

3. Business Efficacy

Huber wrote,

"Although the laws of one country can have no direct force in another country, yet nothing could be more inconvenient to the commerce and general intercourse of nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in the law."¹⁵

Recently, a Canadian Judge has described the doctrine of comity in modern times as follows:-

"[T]he rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner."¹⁶

Thus, comity is understood as meaning protecting the interest of

¹⁴ See Jaffey (1982) 2 OJLS 368 at p. 372, where he claims (at n. 9) that the reference to "the needs of interstate and international systems" in the American Law Institute's Restatement (Conflict of Laws) (2d) at s.6 is really "comity".

¹⁵ De Conflictu Legum. See translation in Llewellyn Davies (1937) 18 BYBIL 49, 65.

¹⁶ In Morguard Investments Ltd. v Savoye (1990) 76 DLR (4th.) 256 at p. 269 per La Forest J. In support he cites inter alia the following quotation from Yntema (1957) 35 Can. Bar. Rev. "...the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce..."

the commercial world . The role of choice of law rules is to promote certainty. Thus, when people are involved in transactions, which they reasonably expect to be governed by the law of a particular country, they should be able to rely on the fact that the law of that country will be applied throughout the world.

Whilst this idea may be viewed as part of the doctrine of comity¹⁷ in the rather loose sense that the aim is to protect the international community as a whole, it is suggested that the need to protect the parties' expectations is more appropriately understood as part of the theory of 'justice'¹⁸ for two reasons. Firstly, the doctrine of comity is concerned with the interests of nations; whereas 'justice' emphasises the interests of the parties.¹⁹ The latter is more appropriate since we are essentially concerned with private law, which is designed to protect the interests of individuals. Secondly, the business efficacy concept can only apply in the commercial context; whereas 'justice' is equally relevant in the non-commercial context.

4. Conclusion About Comity

We may conclude from our review that the first two meanings of comity do not provide an adequate basis for constructing choice

¹⁷ cf. The comment of Meredith C.J.C.P. that "it is not the comity of nations, it is the needs of mercantile and other intercourses the world over that must govern" in Maguire v Maguire (1921) 50 Ont. L. R. 100 at p. 111

¹⁸ See at C infra.

¹⁹ See Jaffey (1982) 2 OJLS 368.

of law rules, although they may explain the reason for at least some of the rules, and that comity in the third sense is better understood as part of a separate theory. In any event, we must appreciate that to the extent that comity is a satisfactory explanation of choice rules, it is an equally satisfactory explanation of recognition rules. In fact, we shall see in Chapter 3 below that whichever meaning of comity is chosen, the theory would tend to support giving preference to recognition as opposed to choice rules.

B. VESTED RIGHTS

Under this theory,²⁰ which was espoused by Dicey in England and Beale in the USA,²¹ the purpose of the conflict of laws is to recognise and enforce rights which have been duly acquired in foreign countries. It assumes that only one law has 'jurisdiction'²² to determine what legal consequences attach to a given situation.

Where this law confers rights upon a person, that person should not be deprived of those rights simply because (s)he moves to another country. Thus, the validity of properly created vested rights should not be called into question anywhere. Conversely rights conferred

²⁰ For brief history of the doctrine see Kegel, International Encyclopedia of Comparative Law, Vol. III, Chapter 3 at pp.9-10. For judicial approval in England see Re Askew [1930] 2 Ch. 259, 267.

²¹ Who made it the basis of the First Restatement of the Conflict of Laws, American Law Institute, of which he was the Reporter.

²² 'Jurisdiction' is not used here in its usual meaning of having the right to hear a case.

by laws other than that with 'jurisdiction' are not recognised or enforced.

If the vested rights theory were universally recognised, then all countries would decide all conflict cases in the same way. In which case, it would be theoretically impossible for there to be a conflict between choice rules and recognition rules. Clearly this is not the case and, as we have seen, such conflicts do arise. The vested rights theory would seem to require that where there is such a conflict, preference should always be given to the choice of law rule, which gives effect to vested rights, because ex hypothesi the foreign judgment must have been wrong in giving effect to rights which were not properly created or refusing recognition to rights which were properly created.

It may therefore seem somewhat surprising that some writers²³ have regarded the theory of vested rights as being the basis of the doctrine of 'obligation'²⁴ which has been used to justify the recognition of foreign judgments. Other writers, however, strongly deny that there is any connection between the two doctrines.²⁵

However, whether one accepts that there is any common philosophy behind the two doctrines, it is quite clear that for our purposes they are incompatible. As stated above, the vested rights theory

²³ See, for example, Collier (Chapter 1, n.142 supra) at p. 380.

²⁴ Discussed in Chapter 3 at II C infra.

²⁵ See, for example, Morris (Chapter 1, n.142 supra) at p. 105.

would accord precedence to the choice of law rule, whereas the doctrine of obligation, which will be examined in more detail below, gives precedence to the recognition rule. For our purposes, though, the incompatibility between the two doctrines need not cause us any difficulty because the vested rights theory has now been effectively discredited²⁶ by nearly every academic conflicts lawyer²⁷ who has written on the subject. On the other hand, the doctrine of obligation still seems to be 'alive and well'.²⁸ To what extent it can support a preference for the recognition rule will be considered below.

C. JUSTICE TO THE PARTIES

1. What do we mean by justice?

This theory rests on the premise that it is often not just to the parties to apply the lex fori to cases with a foreign element²⁹ and that the purpose of choice of law rules, like that of domestic rules should be to do justice to the parties.³⁰

Cheshire and North³¹ write,

"..[W]hen the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient and more in accord with the expectations of the

²⁶ Morris ibid at p. 510 says, "We may as well admit it: the vested rights theory is dead."

²⁷ See references in Kegel (n. 20 supra) at p.10, footnotes 69, 72 and 76 and references at Chapter 3 n. 73 infra.

²⁸ see Morris (chapter 1, n. 142 supra) p. 107 and Cheshire and North (chapter 1, n.1 supra) p. 346.

²⁹ See Wolff , Private International Law (2nd. edn., 1950) pp. 1-2 and Carswell (1959) 8 ICLQ 268 at 277.

³⁰ Jaffey (1982) 2 OJLS 368, 377.

³¹ Cheshire and North (chapter 1, n.1 supra) at p. 39.

parties than the internal law of England, the English judge does not hesitate to give effect to the foreign rules."

Jaffey³² claims,

"The most important factor underlying choice of law rules must be the desire to achieve justice between the parties."

McLeod³³ opines,

"[A] theory of relative justice which attempts to balance the expectations of the individuals and the interests of the country and the administration of justice provides the best vehicle for the development of positive law."

Graveson³⁴ seeks to maintain that

"[T]he basis and the guiding principle on which conflict of laws in the common law is being built up is that of doing justice in cases involving a foreign element, in which the court would fall short of achieving justice if it were to ignore the significance of such foreign elements in the case before it as are relevant."

Some writers³⁵ have distinguished between the justice of substantive law (referred to as 'substantive justice') and justice in determining which system of law should determine the outcome of a case (referred to as 'conflicts justice'). Others have written about justice as a basis for the Conflict of Laws without making this distinction.³⁶ It is suggested that a general concept of justice is less likely to be able to serve as a basis for the construction of traditional choice of law rules than the notion of 'conflicts justice'. This can be seen from a comparison of the approaches of Von Mehren

³² Jaffey, Introduction to the Conflict of Laws (1988) p. 275.

³³ McLeod, The Conflict of Laws" (1983) at p. 21 approved in Vladi v Vladi (1987) 39 DLR 4th. 563, 570.

³⁴ Graveson, "Judicial Justice as a Contemporary Basis of the English Conflict of Laws," in Graveson (ed.), Comparative Conflict of Laws, Volume I (1977) at p. 51.

³⁵ See Kegel (n. 20 supra) at pp.15 and 44 and Cavers, The Choice of Law Process (1965) at pp. 130 et seq.

³⁶ See Graveson (n. 34 supra) and Von Mehren (1977) 41 Law and Contemporary Problems 27.

and Jaffey.

Von Mehren³⁷ suggests that the two main principles of justice (in the 'substantive' sense) are that like cases should be treated alike and that rules of law should advance and express values and purposes accepted by society. He points out that these two principles often conflict in multi-state cases, but rarely in domestic cases. His conclusion is that traditional jurisdiction selecting choice rules cannot guarantee the achievement of either principle.

In contrast, Jaffey who uses justice in the 'conflicts' sense formulates a number of principles of justice, which can be used to construct choice of law rules. With respect to other writers, it is submitted that Jaffey's work is the most successful attempt at practical application of the 'justice' theory to choice of law. Thus, further discussion of this theory will be on the basis of Jaffey's principles.

2. Jaffey and the Principle of 'Reasonable Expectations'

Jaffey's principles are³⁸:-

- i. In favorem validitatis - implementing the parties' wish that their transaction or relationship should be legally effective.
- ii. Justice is done to a party if the law of his own country is applied

³⁷ (1977) 41 Law and Contemporary Problems 27.

³⁸ The principles are formulated slightly differently in his book (n. 32 supra) at pp. 275-8 and in his article at (1982) 2 OJLS 368. The article deals with the topic more fully and the principles quoted here are based on the article.

- iii. Where both parties belong to the same country, the law of that country will usually be the appropriate law.
- iv. Where one party in his own country acts or participates in a transaction or event that is entirely domestic to his country, except for the fact that the other party is (without his knowledge or without his choice) a foreigner, the first party should be able to rely on his own law.
- v. A party should not be held liable to a greater extent than he is liable by the law of the country where he acted.
- vi. Choice of law rules should be certain and predictable.
- vii. There should be uniformity between the choice rules of different countries.
- viii. The governing law should be a convenient one.
- ix. No foreign law should be applied which grossly offends the standards of the forum.

Whilst Jaffey's principles may be quite workable in this form, for our purposes of assessing whether the justice theory can support a global rule in favour of choice rules, we need to be able to refer to a single principle which reflects the justice theory. Can such a principle be distilled from Jaffey's formulation?

It is suggested, that with the exception of the last principle (which can be seen as an exception to the principles of conflicts justice), all these principles are to a large extent manifestations of the concept of giving effect to the reasonable expectations³⁹

³⁹ Sometimes also referred to as legitimate or justified expectations.

of the parties.⁴⁰ Jaffey⁴¹ recognises that expectation is relevant to a number of the principles, although he maintains that it does not fully explain them.

A number of arguments may be put forward which might tend to refute the reasonable expectation principle.

(a) It may be argued that to attempt to construct rules from parties' expectations will result in circular reasoning because to a large extent parties' expectations are influenced by what the law is. For example, because domicile is the relevant connecting factor in English law, parties may expect that it will govern their personal status. But how did domicile, as opposed to say nationality or residence become the connecting factor?

Whilst it is difficult to counter this argument by logic, it is suggested that it does not present any practical difficulties for two reasons. Firstly, in relation to many less legalistic connecting factors, such as the place where a tort took place or a contract is to be performed or even habitual residence, it is possible to discern reasonable expectations without reference to the existing

⁴⁰ The 'reasonable expectation' principle is part of most modern approaches to choice of law. For example, it is one of the Restatement Second's choice-influencing factors. The same basic concept has been expressed slightly differently by some writers. For example, Shapira, *The Interest Approach to Choice of Law* (1970), Chapter 3 refers to the question of whether or not a party has fair notice of the applicability of a particular law. The principle is also consistent with the theory of justice propounded by philosopher Rawls and quoted in Cavers (n. 35 supra) at p. 130. However, no Judge or writer seems to have suggested that the 'reasonable expectation' principle by itself can serve as the rationale and basis for construction of choice of law rules.

⁴¹ Op. cit. (n.20 supra) at p. 276.

law. Secondly, we are not trying to construct choice of law rules in a vacuum. The present rules must serve as the point of departure of any reform or development of existing rules. Thus, it can simply be accepted as a 'fact of life' that in common law countries people naturally expect domicile, albeit shorn of some of its artificial aspects, to govern and that on the Continent they reasonably expect the law of their nationality to be applied.

(b) It may be supposed that a difficulty may arise where the parties quite legitimately have different expectations.

However, in practice this situation is unlikely to arise. Take, for example, the facts of Sottemeyer v De Barros (No. 2).⁴² At first sight it might seem that the Portugese domiciled cousin would legitimately expect Portugese law to govern his capacity to enter into the marriage; whilst the English domiciled cousin would expect that English law should govern because the marriage took place in England and it is not reasonable for English domiciliaries to take into account foreign incapacities.⁴³ However, as with most marriages, surely both parties when entering into the marriage assumed that it would be valid. Thus, this is simply an example of how the first of Jaffey's principles accords with the reasonable expectation principle.

We might be more likely to find an example of a divergence between

⁴² (1879) 5 PD 94.

⁴³ This seems to be the basis of the reasoning of the Court in formulating the exception to the dual domicile rule in Sottomeyer v De Barros (No. 2) (1879) 5 PD 94.

parties' expectations in tort, where there is generally no intentional transaction between the parties. Assume that A. in country X writes a statement about B. in a newspaper in country X, which would not be defamatory by the law of country X. The newspaper is, unknown to A, published in country Y, where B lives. In country Y, the statement is defamatory. Here, it might be argued that as A is acting in X, where he is not liable, he will reasonably expect that he should not be liable.⁴⁴ On the other hand, B, who is injured in his own country Y would reasonably expect to be able to hold A. liable.⁴⁵

In such a situation, it is suggested that it is simply necessary to make a decision as to which expectation should prevail. Here we might decide that the reasonable expectation of not being held liable should take priority over a reasonable expectation of being able to hold someone else liable. The justification for this is that the 'tortfeasor' should be able to rely on his reasonable expectations in deciding how to behave. Whereas, the injured party has no choice in the matter and thus his expectations only come into play after the alleged tort has been committed.

Thus, even where the parties have different reasonable expectations, it should be possible to determine which expectation should be accorded greater weight.

⁴⁴ This is Jaffey's principle (v) above.

⁴⁵ This is a slight modification of Jaffey's principle (iv) above.

(c) Whilst we might accept that reasonable expectation is the basis of justice and that justice **ought** to be the basis of choice of law rules, in fact this is not the case. The traditional mechanical choice of law rules do not always produce a result which is consonant with justice, as interpreted here. For example, it is difficult to believe that the parties in McElroy v McAllister⁴⁶ expected that Scottish law and English law would be applied together with the result that only the funeral expenses could be recovered, even though substantial additional compensation would have been available under either system in a purely domestic case.

The answer to this criticism must be that the Conflict of Laws is a constantly evolving area of law. As the justice theory becomes more accepted, we will find that more choice of law rules are consistent with it. Recent caselaw shows that the Courts now acknowledge the need to give effect to the parties' expectations⁴⁷ and are prepared to mould choice of law rules to achieve the just result. In particular,⁴⁸ it is clear that following Boys v Chaplin⁴⁹, the decision in McElroy v McAllister⁵⁰ would be different

⁴⁶ [1949] SC 110.

⁴⁷ For example, the court invoked the party's expectations to support the result that it had reached by application of the choice of law rule in Johnston v Coventry Churchill [1992] 3 All ER 14 at p. 25. See also the leading Canadian tort case of Grimes v Cloutier (1989) 61 DLR (4th) 505 at p. 524.

⁴⁸ The application of the intended matrimonial home test in Radwan v Radwan No. 2 [1973] Fam. 35 and of the 'real and substantial connection' test at first instance in Lawrence v Lawrence [1985] Fam. 106. are other examples.

⁴⁹ [1971] AC 356.

⁵⁰ [1949] SC 110.

today. One of the bases for invoking the exception to the double actionability rule in Phillips v Eyre⁵¹ would be the parties' reasonable expectations that Scottish law should apply to determine the heads of damages available.⁵²

(d) There are some choice of law rules which appear by their nature not to be consistent with the parties' expectations. For example, it may be argued that parties will not expect their contract to be held void because performance is illegal. Indeed Jaffey's first principle is to uphold the parties' wishes that their transaction be legally effective.

However, it is suggested that parties' **reasonable expectations** may not always accord with their **wishes**. In the domestic context, two English parties making a contract in England must realise that it will be invalid if it is illegal according to English domestic law even if they want it to be valid. Similarly, in the international context the parties should anticipate that their contract will not be enforced if it is illegal according to a system which they can reasonably expect to apply. Thus, the choice rules for illegality of contract will be consistent with the reasonable expectation principle if effect is only given to invalidating rules of systems which the parties can reasonably expect to apply.

It is submitted that none of the above objections prevent us from

⁵¹ (1870) L.R. 6 Q.B. 1.

⁵² See Johnson v Coventry Churchill [1992] 3 All ER 14 at p. 25.

concluding that the principle of reasonable expectation is the single principle which most accurately reflects the justice theory and can therefore be used as the basis for an examination of whether the principle of justice can support a global preference for choice rules.

3. Can 'Justice' Support A Global Preference for Choice Rules?

In favour of choice of law rules, it can be argued that, assuming that such rules are carefully designed to do justice by protecting the reasonable expectations of the parties, then they should take precedence over recognition rules which simply require that a foreign judgment be applied 'blindly' without examining the merits and checking that the judgment has done justice in the above sense.

The argument in favour of recognition rules is that where parties have gone to the trouble and expense of litigating in a forum which has jurisdiction in the international sense, they should reasonably expect that the judgment will be recognised and enforced in other countries, even where its result is different from that which would have been obtained had the case been decided in those other countries.

The conflicting arguments can best be illustrated by referring to example M6 above.⁵³ Up until the time of the nullity proceedings in Portugal, the parties' reasonable expectations would have been that the validity and continued subsistence of their marriage should be determined by New York law because all the connections deemed

⁵³ At Chapter 1 III supra.

relevant to validity of marriage both by New York law and by English law were with New York. However, once the decree has been pronounced, it can be argued that the parties should now reasonably expect that a decree pronounced by a Court of competent jurisdiction⁵⁴ is to be recognised throughout the world, even though it is not recognised by the law of their domicile. Does justice require that the 'new' expectations arising out of the Portuguese proceedings override the original expectations?

One of the criticisms of excessive reliance on the parties' expectations has been that often parties do not actually address their minds to the question of which law governs the transaction or relationship into which they are entering. Thus, the law simply imputes expectations to them. It might be argued that where parties have gone to the trouble to litigate, they are more likely to have thought about and relied upon the fact that the judgment will be recognised in other countries. Thus, greater weight should be accorded to their expectations.

However, it is suggested that it is impossible to generalise about parties' actual expectations either in connection with the applicability of a particular law or the recognition of a judgment abroad. Sometimes parties give very careful thought to the legal consequences of their actions. This thought must be based on an expectation that a particular legal system is to govern. Conversely, when commencing litigation there may be no reason to think about

⁵⁴ This assumes that competence is looked at through the eyes of English law.

recognition/enforcement abroad because at that time they are only concerned with recognition/enforcement in the forum where they are litigating. Only because of later unforeseen events does recognition/ enforcement abroad become an issue.

Thus, whether parties' expectations about the applicability of the choice rule or their expectations over the enforcability of a judgment should prevail would have to be decided in each case or at least in each category of case.

III: CONCLUSION FROM THE THEORIES

We have seen that none of the theories which have been put forward to justify choice of law rules, whether they still command general acceptance or not, can adequately support a global rule giving precedence to choice of law rules over recognition rules. The theory of justice, which is the most convincing contemporary rationale for choice of law rules, can equally be used to justify application of choice of law rules and recognition rules.

CHAPTER 3: GIVING PREFERENCE TO RECOGNITION RULES

I. INTRODUCTION

In this Chapter we shall be seeking justification for preferring the recognition rule where the result of recognising the foreign judgment conflicts with the result of applying the choice of law rule. The approach taken will be the same as that taken in Chapter 2 in respect of choice of law rules. Thus, we shall be examining the various theories put forward to explain recognition rules and analyse whether any theory can adequately support a global preference for recognition rules. The Court of Appeal has recently stated that the "cases give virtually no guidance on this essential issue."¹

In making the comparison with choice of law rules, it will be assumed, as concluded in Chapter 2, that the best theory to support choice of law rules is 'justice' in the conflicts sense and that this concept is most accurately represented by the 'reasonable expectation' principle. Thus, in order to come to the conclusion that one of the rationales for recognising judgments does justify a global preference in favour of recognition rules, we would have to find that that rationale prevails over 'justice' as defined above.

When discussing the rationale behind choice of law rules it was not necessary to distinguish between different areas of law. However, in relation to recognition of judgments, matrimonial

¹ Cape v Adams Industries [1991] 1 All ER 929, 1037.

causes must be distinguished from in personam judgments² inter alia for the following reasons:-

- (i) Business efficacy is not relevant.
- (ii) Such decrees operate as in rem judgments and may be challenged by third parties.³
- (iii) Non-judicial divorces and annulments may be recognised.
- (iv) A matrimonial decree does not require a sum of money to be paid.

Thus, specific reference⁴ will be made as to the applicability of each theory to matrimonial causes and one theory advanced which is only applicable to matrimonial causes.⁵

Consideration of the theories behind recognition rules usually concentrate on the reasons why certain judgments **should** be recognised. However, in dealing with the conflict of rules scenario, we also need to consider the situation where the recognition rules do **not** provide for recognition (to be referred to as non-recognition rules), but application of the choice of law rule would produce the same result as recognition. In order to decide if there is any justification for a global preference for the non-recognition rule, we need to understand the bases and

² We will not be dealing with non-matrimonial judgments in rem.

³ See, for example, Pemberton v Hughes [1899] 1 Ch. 781 and Powell v Cockburn (1976) 68 DLR (3d) 700.

⁴ See n. 10, text accompanying 27 and text accompanying n.71 infra.

⁵ See II E infra.

reasons for non-recognition.

II THE THEORIES⁶

A. ESTOPPEL PER REM JUDICATAM⁷

This is a rule of evidence which has been summarised as follows:-

"Where a final judicial decision has been pronounced by either an English or (with certain exceptions) a foreign tribunal of competent jurisdiction over the parties to, and the subject matter of the litigation any party or parties to such litigation, as against any other party or privy thereto and in the case of decisions in rem, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits."⁸

It is now beyond doubt that this doctrine, which is frequently referred to as res judicata⁹, applies to foreign judgments.¹⁰

⁶ Whilst Von Mehren and Trautman (1968) 81 Harv. L. R. 1601 at p. 1603 claim that traditional theories "contribute little to any real understanding" of recognition practice, English and Commonwealth courts and writers still rely on them. In fact, Von Mehren's five policies and the principle of justice which they advocate (ibid) are all embodied in the theories discussed. There does not seem to be academic agreement as to which theories are separate. For example, Patchett, Recognition of Commercial Judgments and Awards in the Commonwealth (1984) treats reciprocity as separate from comity.

⁷ See Spencer Bower and Turner, The Doctrine of Res Judicata (2nd. edn, 1969), Chapter 1.

⁸ Ibid at p. 9. This definition (which was contained in the first edition of Spencer Bower) was cited with approval in Carl Zeiss Stiftung v Rayner and Keeler Ltd. (No. 2), [1967] 1 AC 853, 933.

⁹ This covers both cause of action and issue estoppel.

¹⁰ See House of Lords decisions in Carl Zeiss Stiftung v Rayner and Keeler Ltd. (No. 2) [1967] 1 AC 853 and The Sennar (No. 2) [1985] 1 WLR 490. Whilst the doctrine of res judicata may be used in respect of matrimonial decrees (see Vervaeke v Smith [1983] 1 AC 145 and Family Law Act 1986 s.51(1)), it does not help much in the conflict of rules context since it begs the question as to whether recognition of the change in matrimonial status, which is the res judicata of the foreign decree, necessarily requires recognition of resulting changes in rights and obligations. See at Section II B 1 in each of Chapters 6, 7 and 8 infra.

However, the doctrine of res judicata does not itself provide a **reason** for recognising foreign judgments. Rather it would seem that the effect of the recognition rules is to apply this domestic doctrine to those foreign judgments which are required to be recognised.¹¹ Therefore, we need to identify one or more modern rationale(s) of the res judicata rule to see if it/they can equally support recognition of foreign judgments.

1. Finality of Litigation

There is said to be a general community interest in the termination of disputes and in the finality and conclusiveness of judicial decisions.¹² This requires that parties should not be allowed to litigate in this country a dispute which has been decided by judicial decision elsewhere.

Can this interest supercede the interest in 'justice'? In the domestic context, once a party's rights of appeal are exhausted then it is assumed that justice has been done.¹³ Thus, there can

¹¹ Von Mehren and Trautman (1968) 81 Harv. L.Rev. 1601 at p. 1606 suggest that "treating recognition problems as an aspect of res judicata tends to lead to a confusion of concepts which should be kept separate" because of differences between the policies relating to domestic and foreign judgments.

¹² Spencer Bower and Turner (n. 7 supra) at p. 10 and Reed, Recognition and Enforcement of Foreign Judgments (1938) pp. 111 - 122. The finality point is summed up by the Latin phrase, 'interest rei publicae ut sit finis litum.'

¹³ Unless public policy requires otherwise. In the case of Man (Sugar) v Haryanto [1991] 1 Lloyds 429 at 436, an English decision upholding the contract was followed by an Indonesian decision declaring it unenforcable for illegality. The Court asked whether "as a matter of English law the public policy in favour of finality is overridden by some more important public policy based on the unenforcability of illegal contracts?" In this case, the answer was in the negative.

be no conflict between the requirements of justice and that of finality. In the conflict of laws' context, this is not the case. The foreign decision may not be in conformity with 'conflicts justice' and/or 'substantive justice'. To allow review of the merits of foreign decisions to test for 'substantive' justice would completely undermine the idea of finality of judicial decisions in the international context.

However, it is suggested that to allow review of the 'conflicts' justice' of foreign decisions in the few cases where the result of recognition is incompatible with the application of forum's choice of law rules could be allowed as an exception without detracting from the finality objective to any great extent¹⁴. Thus, it is submitted that finality cannot justify giving precedence to the recognition rule in the 'conflict of rules' scenario.

2. Protection of Individuals

There is said to be a right for an individual to be protected from vexatious multiplication of suits¹⁵. Without this protection, a party who has greater resources is given an unfair advantage. A financially weaker party may be unable to afford to defend numerous actions on the same issue that he has already won

¹⁴ It will be suggested below that this is in fact already done under the guise of public policy. See discussion of Gray v Formosa [1963] P. 259 and Vervaeke v Smith [1983] 1 AC 145 at Chapter 5 II B infra.

¹⁵ Spencer Bower and Turner (n. 7 supra) at p. 10. Von Mehren and Trautman (1968) 81 Harv. L.Rev. 1061 refer to protection against harassing or evasive tactics.

in another court.

It is suggested that this rationale is part of the 'justice' theory elaborated in Chapter 2¹⁶. Thus, it can be understood in terms of fulfilling the parties' reasonable expectations, which are assumed to be that the decision of a competent court is binding and cannot be challenged in other jurisdictions. However, as explained there, these reasonable expectations have to be weighed against reasonable expectations of having a particular law applied, where these exist and there can be no single definitive rule as to which of these expectations should prevail. The requirements of 'conflicts justice' will have to be determined in each case or category of case.

B. COMITY

Early judicial pronouncements¹⁷ on the question of recognition of foreign judgments clearly based such recognition on 'comity'. Comity is still mentioned loosely by Judges in relation to the recognition of foreign judgments¹⁸. In order to ascertain whether comity could be used as a basis of supporting a global preference, we must again specify which meaning of comity we are

¹⁶ At Section II C.

¹⁷ See cases quoted by Patchett (n.6 supra) p. 47 and by Piggott, *Foreign Judgments* (1908) Part i at p. 11.

¹⁸ See, for example, Macaulay v Macaulay [1991] 1 FLR 235 at p. 241 and Wood v Wood [1954] P. 254, where the Court of Appeal suggested that comity did not require giving exaggerated respect to the judgments of other States.

using¹⁹.

1. Reciprocity

The concept of reciprocity in relation to the regulation of foreign judgements itself is used in different senses in the caselaw and literature. Firstly, it means that a Court will recognise a foreign judgment provided that the Courts of that foreign country would recognise such a decision of the forum. Reciprocity in this sense either requires a bilateral or multilateral treaty in which both countries agree to recognise judgments of the other on certain conditions or evidence of the practice of the foreign Court in relation to judgments of the forum.

Secondly, reciprocity may mean that the forum will recognise a foreign judgment if there exists in relation to the foreign court a connection²⁰ which would have given the forum jurisdiction mutatis mutandis. It is reciprocity in this second sense which

¹⁹ The fact that comity has different meanings has been recognised by judges in connection with recognition of foreign judgments. In Wood v Wood [1957] P. 254, Evershed M.R. said that "questions of reciprocity must always be relevant upon the matter of comity." This suggests that reciprocity is just one element of comity. He does not specify what the other elements are. For a detailed judicial analysis of the history and meaning of the concept of comity in relation to the recognition of foreign judgments, see Morguard Investments Ltd. v De Savoye (1990) 76 DLR (4th.) p. 256, per La Forest J. at p. 262 et. seq. See also Cape v Adams Industries [1991] 1 All ER 929 at p. 1037.

²⁰ Whether or not this is actually the jurisdictional base relied on by the foreign court, Robinson-Scott v Robinson-Scott [1957] 3 All ER 473. cf. Under some Commonwealth statutes, such as New Zealand Family Proceedings Act 1980, the foreign Courts must **actually have exercised jurisdiction** on one of the bases on which the forum would take jurisdiction.

was used in the case of Travers v Holley²¹. McClean²² points out that the rule does not strictly involve reciprocity at all because it is not necessary to establish that the foreign country has a rule corresponding to that in Travers v Holley.

Patchett²³ calls the second category 'judicially determined reciprocity' and contrasts this with 'legislatively determined reciprocity'. It is suggested that this division is **theoretically** unsound because it confuses two issues. The real distinction is between **reciprocity in relation to recognition of judgments** ('recognition reciprocity') and **reciprocity founded on jurisdictional bases** ('jurisdictional reciprocity'). 'Recognition reciprocity' could be determined legislatively or judicially²⁴. However, in fact, in England²⁵ there is no judicial determination of reciprocity in this sense. Thus, for **practical** purposes, Patchett's labelling is accurate.

²¹ [1953] P.246.

²² McClean, Recognition of Family Judgments in the Commonwealth (1983) at p. 40. Von Mehren and Trautman (1968) 81 Harv. L.Rev. 1601 at 1617 n.53 suggest that the term 'equivalence' is preferable to avoid confusion with reciprocity in the first sense.

²³ Op. cit. (n.6 supra) at p. 52. See also Khan-Freund (Chapter 1, n.105 supra) at p. 29 and Russell (1952) 1 ICLQ p. 181.

²⁴ Khan Freund ibid at p. 23 points out that the significance of this distinction is that legislation determines ex ante whether there is reciprocity; whereas Courts can only decide ex post.

²⁵ cf. in the U. S. Hilton v Guyot (1895) 159 US 113.

In England²⁶ 'jurisdictional reciprocity' cannot be considered as a basis for recognising foreign judgments. The rule in Travers v Holley has been held to be "limited to a judgment in rem in a matter affecting matrimonial status"²⁷ and was repealed in relation to divorces and legal separations by the Recognition of Divorces and Legal Separation Act 1971 and in relation to nullity decrees by the Family Law Act 1986. Thus, we shall be using reciprocity exclusively in the 'recognition reciprocity' sense.

Whilst the common law rules for recognition of foreign judgments do not involve any requirement of reciprocity²⁸, it has been suggested²⁹ that the real reason that judges enforce foreign judgments is the hope that their judgments would be recognised and enforced abroad³⁰. This 'self-interest'³¹ theory might be seen to be borne out by the fact that most of the later statutory recognition rules do require reciprocity. Thus, the Administration of Justice Act 1920 and the Foreign Judgments

²⁶ cf. In Canada, following the decision of the Supreme Court of Canada in Morguard Investments Ltd. v De Savoye (1990) 76 DLR (4th.) 256, jurisdictional reciprocity is now a basis of recognition of in personam judgments, at least in relation to judgments of sister provinces.

²⁷ Re Trepca Mines [1960] 1 WLR 1273, 1280-2 per Hodson L.J.

²⁸ See, for example, Adams v Cape Industries [1991] 1 All ER 929 at p. 1037.

²⁹ See, for example Patchett (n.6 supra) at p. 41.

³⁰ See, e.g., per L. Hardwick in Omychund v Barker (1777) 1 Ak 21, 50; 26 E.R. 15, 33.

³¹ This term is used by Patchett (n.6. supra).

(Reciprocal Enforcement) Act 1933³² both provide for registration of foreign judgments only where there is reciprocity³³. However, Khan-Freund³⁴ points out that here reciprocity is a condition for the use of a simplified enforcement procedure rather than for enforcement per se.

More recent developments would seem further to endorse the reciprocity theory. The whole basis of the Brussels and Lugano Conventions³⁵, which provide for virtually automatic recognition of judgments, is that of reciprocity between member states. Thus, States are prepared to increase their obligation to recognise foreign judgments³⁶ in return for the same treatment for their own judgments.

Nonetheless, so long as a good many judgments³⁷ are still recognised or refused recognition without any regard to

³² See Chapter 1 II A 2 and 3 supra.

³³ An Order in Council is required to extend the Act to a particular country. Such an Order may only be made where there are reciprocal provisions for recognition of U.K. judgments by that country. See 1920 Act s.14 (as amended by the Civil Jurisdiction and Judgments Act 1982 s.35(3)) and Foreign Judgments (Reciprocal Enforcement) Act 1933 s. 1 (as amended by the Civil Jurisdiction and Judgments Act 1982 s.35(1) and Sched. 10).

³⁴ Khan-Freund (Chapter 1 n.105 supra) at p. 24.

³⁵ Discussed at Chapter 1 II A 4 supra. See also the Maintenance Orders (Reciprocal Enforcement) Act 1972.

³⁶ For example, the defences available against recognition are narrower under the Brussels and Lugano Conventions than at common law.

³⁷ i.e. All judgments of States which are not parties to a multilateral or bilateral recognition treaty with the U.K.

reciprocity, this cannot be a complete explanation. In particular, it is worth noting that the rules for recognising matrimonial decrees³⁸, whilst originally enacted³⁹ in pursuance of membership of the Hague Convention on Recognition of Divorces and Legal Separations do not involve any element of reciprocity.

It is suggested that the importance of legislatively determined reciprocity is that it may allow the recognition of judgments which would not otherwise be recognised.⁴⁰ Thus, whatever we decide is the rationale for recognition of judgments (which we will call the 'common law rationale') will have to be supplemented by legislatively determined reciprocity. This is significant for our purposes of weighing up the rationale for choice of law rules against the rationale for recognition rules. In those cases where there is recognition **only**⁴¹ because one of the Conventions applies, then reciprocity is the basis for recognition and we must decide whether reciprocity can support

³⁸ See Chapter 1 II B supra.

³⁹ In the Recognition of Divorces and Legal Separations Act 1971.

⁴⁰ Although not matrimonial decrees as "status and legal capacity of natural persons" are expressly excluded from the scope of the Brussels and Lugano Conventions (Art. 1) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 seems not to apply to matrimonial decrees, (see Maples v Maples [1988] Fam. 14 and Vervaeke v Smith [1981] 1 All ER 55 at p.90 per Cumming-Bruce and Everleigh J., but cf. per Arnold P. at p. 87 and Law Com. No. 137 at para. 2.31).

⁴¹ This cannot apply to recognition of judgments under the Foreign Judgments (Reciprocal Enforcement) Act 1933 Act since the Act primarily affected the **method** of recognition and made no fundamental change to **entitlement** thereto (although it has been held not to have been purely a codification of the common law - Societe Cooperative Sidmetal v Titan International Ltd. [1966] 1 QB 828).

the automatic preference of the recognition rule.

It is suggested that the decisive factor here is that the conflict of laws is essentially concerned with the private law rights of individuals⁴². Legislatively determined reciprocity is based on the State's political and economic considerations. Thus, in so far as recognition rules are based on reciprocity they should not take precedence over choice rules which we are assuming to be based on 'justice' between the parties.

2. Judicial Courtesy

Again, comity in this sense would seem to have more force in relation to recognition of foreign judgments than in relation to choice of law rules. It is understandable that judges should wish to respect the decisions of other judges⁴³ and that states will show respect "to the actions of a state legitimately taken within its territory."⁴⁴ Many of the problems raised in relation to the applicability of this theory to choice of law rules do not apply to recognition⁴⁵, for example:

(i) There are less likely to be conflicting foreign judgments

⁴² Patchett (n.6 supra) at p. 61 expresses this idea as, "[T]he res litigiosa being considered by the enforcing forum is a matter of private dispute rather than being a matter of international casus belli."

⁴³ See Re E [1967] Ch. 287, 301 where Cross J. said that he was sending a copy of his judgment to the American Judge whose child custody order, he was not following.

⁴⁴ Morguard Investments Ltd. v De Savoye (1990) 76 DLR 256 per La Forest J. at p. 268.

⁴⁵ See Chapter 2 II A 2 supra.

than conflicting foreign laws.⁴⁶

(ii) The theory does not depend on other countries having conflicts rules.

(iii) Inconsistency of forum judicial decisions is not an issue.

However Piggott⁴⁷ argues that under the doctrine of comity it is difficult to explain the defences to recognition/enforcement.

Moreover the fundamental problem that recognition would be based on judicial discretion⁴⁸ as opposed to rights of the parties remains.

3. Business Efficacy

The idea that certainty in international commerce requires recognition of foreign judgments is summed up by Jones LJ. in Re Davidson's S.T.s⁴⁹

"It would be impossible to carry on the business of the world if Courts refused to act upon what had been done by other Courts of competent jurisdiction."

More recently, Slade LJ's 'working of the society of nations' ⁵⁰

⁴⁶ cf. The recent case of Showlag v Mansour [1994] 2 All ER 129, where the Privy Council stated that as a general rule the first judgment in time should take precedence. See also Brussels Convention art. 27(5).

⁴⁷ Op. cit. (n. 16 supra) at p. 16.

⁴⁸ Patchett (n. 6 supra) at p. 50 suggests that the uncertainty and vagueness of the doctrine of comity was part of its strength because it enabled changes to be made in the light of socio-economic development.

⁴⁹ (1873) 15 Eq. 383. See also Patchett (n.6 supra) at p.48.

⁵⁰ Adams v Cape Industries [1991] 1 All ER 929, 1037. Slade L.J. says that the principle of recognition of foreign judgments "...must stem from an acknowledgment that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which

must be referring mainly to the functioning of international trade and commerce. However, as his Lordship recognises, this reasoning "tells one nothing of practical value about how to identify" which foreign judgments should be recognised.⁵¹

It was argued above, in relation to choice of law, that the 'business efficacy' sense of comity should be better understood as part of the theory of 'justice'. This is equally applicable in the recognition context, in which the purpose is to protect the needs of commercial parties to be able to rely on the enforcement of judgments in other jurisdictions⁵². Under this approach, those judgments which the parties would reasonably expect⁵³ to have effect in the requested state, should be recognised.

We have already⁵⁴ discussed the potential conflict between fulfilling parties' reasonable expectations about applicable law and their expectations about the enforceability of judgments and

may be directly enforced in countries where the defendant or his assets are to be found."

⁵¹ Ibid.

⁵² See Von Mehren and Trautman, (1968) 81 Harv. L. Rev. 1601 at p. 1603.

⁵³ The Court of Appeal in Adams v Cape Industries [1991] 1 All ER 929 at p. 1050 rejected using legitimate expectation as a test for determining whether the Court's method of assessment of damages was in breach of natural justice. This does not in any way undermine the idea that reasonable or legitimate expectation forms or should form the conceptual basis of recognition of judgment rules.

⁵⁴ At Section A 2 of this Chapter and Section II C of Chapter 2 supra.

concluded that therefore 'conflicts justice' cannot support a global preference for either type of rule. Rather the requirements of 'conflicts justice' have to be determined in each category of case.

Thus, we can conclude that none of the versions of the theory of comity can support a global preference in favour of recognition rules. Bearing in mind that the doctrine has been widely discredited, the only two senses of comity which would still seem to be supportable⁵⁵ are that of legislatively determined reciprocity and business efficacy. It has been submitted that the first should not take precedence over 'justice' between the parties and that the second should not really be treated as an aspect of comity at all, but rather as an aspect of 'conflicts justice'.

C. THE DOCTRINE OF OBLIGATION

1. Acceptance of the Doctrine

This doctrine, which can be traced back⁵⁶ to the 1830s was summed up in the classic words of Blackburn J. in Schisby v

⁵⁵ La Forest J., in Morguard Investments Ltd. v De Savoye (1990) 76 DLR (4th.) 256 at p. 269, suggests that "the content of comity must be adjusted in the light of a changing world order."

⁵⁶ See Warrender v Warrender (1835) 2 Cl. and Fin. 401, when Lord Brougham suggested that foreign judgments were not recognised ex comitatae but rather ex debito justitiae and the more explicit enunciation of the doctrine by Parke B. in Russell v Smyth (1842) 9 M & W 810 and Williams v Jones (1845) 13 M & W 628.

Westenholz⁵⁷

"The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce."

There are a number of reasons why the doctrine of obligation was enthusiastically espoused⁵⁸ in the common law world.

(i) It fit in with the form of action⁵⁹ by which foreign judgments were from the beginning enforced.⁶⁰

(ii) It fit in with the finality requirement⁶¹.

(iii) It was consistent with the conclusiveness rule. The Court has to enforce a judgment even if it is wrong⁶² because what is being enforced is not the prior legal obligation, but the fresh obligation created by the judgment itself.

(iv) It was a method⁶³ of achieving the aims of res judicata⁶⁴, which was not previously thought to apply to foreign judgments.

⁵⁷ (1870) LR 6 QB 155, 159. See also Goddard v Gray (1870) 27 LR 6 Q.B. 139.

⁵⁸ The only opponent seems to be Piggott (n.17 supra) at p.13. His argument that the obligation arising from a judgment is only enforceable in the state which calls it into being is unconvincing. If this were correct then we would not enforce any foreign created rights and conflict of laws would not exist. Piggott does not explain why what he calls inchoate obligations arising abroad should be recognised and choses jugees should not.

⁵⁹ i.e. assumpsit. See explanation by Patchett (n.6 supra) at p. 42.

⁶⁰ See Blackburn J. in Goddard v Gray (1870) LR 6 QB 139 at p.150.

⁶¹ See per Lord Weston in HL in Nouvion v Freeman (1889) 15 App. Cas. 1 at p. 13 and Read, Recognition and Enforcement of Foreign Judgments (1938) at pp. 84-5.

⁶² See Goddard v Grey (1870) LR 6QB 139.

⁶³ See Patchett (n.6 supra) at p.61.

⁶⁴ See sub-section A. supra.

(v) It was consistent with the defences, which were said to negative the existence or excuse the performance of the obligation⁶⁵.

The main difficulty⁶⁶ was that the doctrine of obligation was inconsistent with the non-merger rule. The latter was extensively criticised⁶⁷ and has now been overruled by section 34 of the Civil Jurisdiction and Judgments Act 1982.⁶⁸

The doctrine of obligation has recently been reiterated in modern terms by the House of Lords.

"A foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court."⁶⁹

Moreover, the Court of Appeal in Adams v Cape Industries⁷⁰ has sought to explain the doctrine in relationship to the foreign

⁶⁵ See Piggott (n.17 supra) p. 12 and Cheshire and North (Chapter 1, n.1 supra) at p. 346.

⁶⁶ Although this seems to have been explained away as an historical anomaly - see Piggott (n.17 supra) at pp. 17-18 and Cheshire and North (Chapter 1, n.1. supra) at p. 105 - and does not seem to have prevented general acceptance of the doctrine.

⁶⁷ See, for example, Morris, *The Conflict of Laws* (2nd. edn.) at p. 405 and per Lord Wilberforce in Carl Zeiss Stiftung v Rayner & Keeler (No. 2) [1967] AC 1 853, 966.

⁶⁸ For application of this provision see Black v Yates [1991] 4 All ER 722 and The Indian Grace [1992] 1 Lloyd's Rep. 124.

⁶⁹ Owens Bank Ltd. v Bracco [1992] 2 WLR 621 per L. Bridge at p. 627.

⁷⁰ [1991] 1 All ER 929 at pp. 1038 - 1041.

Court's territorial jurisdiction on the basis of the presence of the defendant as follows,

"...[B]y making himself present he contracts-in to a network of obligations created by the local law and the local courts."

It should be noted that the doctrine is inapplicable to matrimonial decrees because there is no obligation to pay any sum of money.⁷¹

2. Basis of the Doctrine

In order to assess whether the doctrine of obligation can justify a global preference for the recognition rule, we must examine its basis. As mentioned above⁷², there is a view that the doctrine of obligation is based on the vested rights theory. If this is correct, then we might ask why was the vested rights theory itself not used to explain recognition of foreign judgments? Why was it necessary to create a new doctrine?

The first answer which suggests itself is that the vested rights theory was not adopted in relation to recognition of foreign judgments for the same reasons that it was discredited in relation to choice of law. However, most of the objections⁷³ to the theory in the choice of law context do not apply in respect

⁷¹ See n.4 and accompanying text supra.

⁷² At chapter 2 II B supra.

⁷³ See generally Morris (chapter 1, n. 142 supra) at pp. 443-444; Collier (chapter 1 n.142 supra) at pp. 380-382; Wolff, Private International Law, 2nd. edn (1950) at p. 3; Cook, The Logical and Legal Bases of the Conflict of Laws (1942) Chapter 1 and Llewellyn Davies (1957) 18 BYBIL 49.

of recognition of foreign judgments.⁷⁴ Thus, this explanation is not adequate.

The real difficulty, it is suggested, is that under the doctrine of vested rights itself, it is theoretically indefensible to distinguish between foreign laws and foreign judgments. It has been pointed out⁷⁵ that to recognise a foreign judgment is in fact to recognise the law⁷⁶ of the foreign country. Therefore, the vested rights doctrine cannot logically support the enforcement of rights acquired under the law applied by a foreign Court in preference to vested rights acquired under other relevant laws.⁷⁷

Thus, it was necessary for a different doctrine to be developed which would only apply to foreign judgments. The doctrine of obligation met this need. Yet, it must be recognised that this doctrine is in fact merely a corollary⁷⁸ of the vested rights

⁷⁴ For example (i) There **are** rules telling us which Courts have jurisdiction to decide cases (cf. there are no rules telling us which country has 'jurisdiction' to vest particular types of rights. (ii) The problem of renvoi does not arise in relation to recognition of judgments because it is clear how the foreign Court has decided the case. (iii) There is no need to provide for cases dealing with capacities and disabilities since a judgment ex hypothesi creates rights.

⁷⁵ See Patchett (n.6 supra) at p. 54 and Slade LJ, who refers to the "obligations created by the local **law** and by the local courts" (my emphasis) in Cape v Adams Industries [1991] 1 All ER 929, 1038.

⁷⁶ "i.e. the 'law' as represented in the document called the judgment in which the foreign country has set out the respective rights of the parties involved in the dispute." (Patchett ibid).

⁷⁷ Or vice versa, see Chapter 2 II B supra.

⁷⁸ See Read (n. 12 supra) at pp. 84-5.

doctrine. Instead of focussing on the right of the judgment creditor created by the judgment, this doctrine focusses on the obligation or duty of the judgment debtor. The question of applying the doctrine to enforce rights which have not yet crystallised into a judgment debt does not arise. By creating a new doctrine, the unjustifiable preference for the law of the judgment-giving state over the laws of other relevant states seems to have been legitimised.

Once it is appreciated that the doctrine of obligation is merely a selective application of the doctrine of vested rights to certain types of vested rights (i.e. those that have been confirmed by a judgment), it will be seen that this doctrine cannot be used to support a global preference for recognition rules over choice of law rules.

Even if the view⁷⁹ that the two doctrines are quite independent is accepted, there is no escape from the fact that conceptually the two doctrines are simply different manifestations of a single jurisprudential principle that rights created by jurisdictionally competent laws or courts will be enforced.⁸⁰ To reiterate the

⁷⁹ See, for example, Morris (chapter 1, n.142 supra) at p. 105.

⁸⁰ This can be seen more clearly when the theories are described as follows. The theory of vested rights states that an English Court must recognise rights created by foreign law where English law considers that the foreign law in question has 'jurisdiction' to vest those rights. The doctrine of obligation states that an English Court must recognise the rights of the judgment creditor as adjudged by a foreign Court where English law considers that the foreign Court has jurisdiction to decide the case.

point made by Patchett⁸¹, recognition of a foreign judgment is in fact recognition of the law of the country of the Court rendering that judgment. Thus, it is submitted that the conclusion that the doctrine of obligation is merely a selective application of the theory of vested rights is equally forceful even if it is accepted that the two doctrines arose independently.

D. IMPLIED CONTRACT

It has been suggested that the basis of recognition of foreign judgments is that there has been an implied contract by the judgment debtor to pay the sum of money which the Court has decided is due⁸². In Grant v Easton⁸³, Lord Esher said that,

"the liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment."

Read⁸⁴, however, claims that implied contract is not a separate theory from the doctrine of obligation. He postulates that the implied contract theory was created so that the action of assumpsit, which was only available in relation to a contractual debt, could be used to enforce foreign judgments. Accordingly, he explains the words of Lord Esher and Brett M.R. in Grant v Easton⁸⁵ as meaning that for procedural purposes the Court must

⁸¹ See n. 73 supra.

⁸² Read (n. 12 supra) at p. 112. See also Halsburys, Laws of England, 4th edn (1975), vol 8 (Conflict of Laws), section 715.

⁸³ (1883) 13 QBD 302.

⁸⁴ Read (n. 59 supra) at pp. 112 - 113.

⁸⁵ (1883) L.R. 13 Q.B.D. 302 at p. 303.

treat a foreign judgment as though it were enforcing an implied contract. This point has been illustrated⁸⁶ by the fact that the creditor's action on a foreign judgment is barred after six years like contract claims; whereas a claim on an English judgment is only barred after twelve years.

If 'implied contract' were a separate theory, could it support a preference for the recognition rule? The theory is based on the enforcement of foreign contractual rights. Yet it provides for the selective enforcement of one particular type of contractual right i.e. the right to have the judgment satisfied. Surely, it would be anomalous to recognise a right based on an implied contract to satisfy the foreign judgment in preference to a right based on an express contract which had not yet been litigated. Thus, it is submitted that the implied contract theory cannot support giving precedence to recognition rules.

E. AVOIDANCE OF LIMPING MARRIAGES⁸⁷

It is clear from perusal of the legislative history of the rules governing recognition of foreign matrimonial decrees that the main rationale behind those rules is to avoid limping marriages⁸⁸. In order to achieve this aim, the traditional

⁸⁶ Cheshire and North (chapter 1 n.1 supra) at p. 346.

⁸⁷ Jaffey calls this 'uniformity of status in different countries', (1982) 2 OJLS 368, 369.

⁸⁸ See e.g. 315 HL Debs (16.2.71) at cols 483-486 per Lord Hailsham; Law Com. 34; Bellet and Goldman's Explanatory Document, Actes et Documents De La Haye, Onzieme Tome (translation at (1971) 5 Fam. LQ. 303, 321-367) paras. 9, 47 and 48 and Anton (1969) 18 ICLQ 61.

jurisdictional links were widened.

However, it is crucial to appreciate that preference for the recognition rule may not necessarily prevent limping marriages where there is a third country involved which does not recognise the decree.⁸⁹ Thus, whilst this may be the rationale for liberal recognition rules, it cannot support a global preference for the recognition rule in the 'conflict of rules' situation.⁹⁰

III: 'NON-RECOGNITION RULES'

A. INTRODUCTION

A judgment may be refused recognition because of lack of jurisdiction or because one of the defences applies. In both situations, the rule which bars recognition will be referred to as a 'non-recognition rule'. In the first type, the 'non-recognition rule' is simply the reverse of part of the recognition rule. i.e. the judgment is not recognised because there is no recognised jurisdictional link. In the second type, the defences act as 'non-recognition rules'. The orthodox approach is to treat jurisdictional requirements as recognition rules rather than 'non-recognition rules'⁹¹ and thus the two

⁸⁹ See Chapter 6 II B 3 infra.

⁹⁰ It should also be pointed out that avoidance of limping marriages requires recognition of a change in status, but does not necessarily require acknowledgment of consequences of that change other than the right to remarry.

⁹¹ Jurisdiction is generally treated as different from defences in the textbooks, but cf. the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 Act where lack of jurisdiction is listed together with defences as grounds for non-registration (see chapter 1, II A 2 and 3 supra).

types of rules now under consideration are treated as conceptually different and not categorised together as 'non-recognition rules'. The justification for this approach is presumably that if the foreign Court does not have jurisdiction, the judgment is seen to be made without competent authority and thus there is no basis on which to recognise it. In contrast, the defences are literally reasons not to recognise a judgment which has been made by a competent tribunal and appears to be prima facie effective.

However, it is suggested that as both types of rule reflect a policy reason for non-recognition of the judgment, they should be considered together in examining the conflict between 'non-recognition rules' and choice of law rules. We will have to consider the various policy reasons behind the different rules in more depth before determining whether or not a global preference in favour of the 'non-recognition rule' is appropriate in the case of either or both types of 'non-recognition rule'.

In most situations, non-recognition of a foreign judgment means that the issue can be litigated ab initio in the English Court and the English Court is free to apply its own choice of law rules. These may happen to produce the same result as the foreign judgment, but since the foreign judgment is not effective there is no actual conflict between the 'non-recognition rule' and the choice of law rules. However, there are a few situations in which, although a foreign judgment is not entitled to recognition, **application of choice of law rules to a subsequent**

transaction has the result of giving effect to the foreign judgment⁹² and thus is inconsistent with the 'non-recognition rule'. We will examine whether 'non-recognition rules' in such cases should take precedence over choice of law rules.

The 'non-recognition rules', like the recognition rules, are different in the case of matrimonial decrees. In particular, the defences in the case of matrimonial decrees, which are now statutory, are discretionary whereas in non-matrimonial cases the defences are mandatory⁹³. Thus, it will be appropriate to look at the two categories separately.

B. NON-MATRIMONIAL CASES

1. The Problem Explained

The problem can be illustrated by examples P3 and P4⁹⁴. In the former, if we recognise Zeldon's title in accordance with the choice rule we are indirectly recognising the Ruritanian judgment, which is not entitled to recognition. In the latter, if we refuse to recognise Zeldon's title we are indirectly enforcing the judgment of the Ruritanian Court. Without this judgment⁹⁵, title would remain in Yves who would be able to pass it on to Zeldon.

⁹² This may be referred to as 'incidental recognition', see Gordon (chapter 1, n.1 supra) chapter 9.

⁹³ Because they negative the existence of the obligation for which recognition/enforcement is sought. See text at n.65 supra.

⁹⁴ Chapter 1 III supra.

⁹⁵ Since nothing else happens in Ruritania to divest Yves of the title he had acquired while the painting was in Italy, prior to its entry into Ruritania.

The crucial point in both situations is that the judgment of the Ruritanian Court changes the title while the painting is physically in Ruritania. If this change in title is recognised in accordance with the situs rule, then indirectly the judgment is being recognised and the choice rule prevails. If, however, the 'non-recognition rule' prevails, it would have to be held that no effect can be given to the vesting of title in Winkworth by that judgment. This could perhaps be done by way of public policy exception to the lex situs rule⁹⁶.

2. Rationale for the 'Non-Recognition Rules

In order to decide whether there should be a global preference for the 'non-recognition rule' we need to consider the possible bases for non-recognition and the rationale for each basis. Before looking at each basis individually, we will consider the theory that all defences are simply circumstances which negative the obligation. It is suggested that absence of obligation alone cannot provide a good reason to override the choice of law rule. Although no obligation is created by English law which necessitates direct recognition or enforcement of the judgment, this does not mean that the judgment should not give rise to rights and obligations in Ruritanian law, which would be given effect to by application of our choice of law rules.

Thus, we can only justify giving preference to 'non-recognition rules' if there is some stronger policy reason for non-

⁹⁶ See the 'third exception' referred to by Slade J. in Winkworth v Christie [1980] Ch. 496 at p. 501.

recognition than simply negating the obligation which would otherwise be created. We will consider the policy behind the common law defences to recognition of a foreign judgment⁹⁷ with reference to example P3⁹⁸:-

(a) **Fraud**

Assume that Winkworth brings fraudulent evidence to show that Yves did not buy in market overt in Italy.

The application of the fraud defence so as to allow the English Court to rehear the issue of fraud⁹⁹ even where there is no new evidence has been criticised by academics¹⁰⁰. The House of Lords in the recent decision of Owens v Bracco¹⁰¹ also indicated that the rule may not be defensible. However, they were unable to change it in that case because they were dealing with a the Administration of Justice Act 1920 and thus had to construe the fraud defence contained therein on the basis of the common law in 1920.

⁹⁷ Listed in chapter 1, II A 1 supra.

⁹⁸ Chapter 1 III supra.

⁹⁹ See Abuloff v Oppenheimer (1882) 10 QBD 295; Vadala v Lawes (1890) 25 QBD 310 and Jet Holdings v Patel [1990] 1 QB 355.

¹⁰⁰ See, for example, Cheshire and North (chapter 1, n.1 supra) p. 380; Collier [1992] CLJ 439 and Read (n. 12 supra) at p. 279. Von Mehren and Trautman (1968) 81 Harv. L.R. 1601 at 1667 claim that the English approach is out of line with international practice and it has recently been rejected in Australia (see Sykes and Pryles, chapter 5 n.22 infra, at p. ix of the preface).

¹⁰¹ [1992] 2 All ER 193.

It is suggested that the reason that courts have been prepared to make what seems to be an anomalous exception in the case of fraud is because of the fundamental nature of fraud.¹⁰² Where a judgment has been obtained by fraud it is considered to be contrary to basic standards of justice to recognise or enforce it. Thus, even where the question of fraud has been considered and rejected by a foreign Court, an English Court will not ignore a plea of fraud. **The policy seems to be that the risk of allowing multiplication of suits and preventing finality of litigation is less serious than the risk of enforcing a judgment obtained by fraud.**¹⁰³

Given this approach to fraud, which it is submitted is correct, no rights should be recognised which were obtained by virtue of the fraudulent Ruritanian judgment. It would not, it is suggested, be difficult to apply the public policy exception to the situs rule where the lex situs gives effect to a fraudulent judgment.

¹⁰² Levontin (1967) 2 Isr. L. Rev. 197 at p. 207 suggests that it is the domestic rule not allowing review where fraud is alleged which is anomalous, but required for reasons of 'sovereignty'; whereas "our treatment of foreign judgments fraudulently obtained is unmarred by considerations of respect for authority and is therefore more consonant with the dictates of pure justice and with the animus of the common law against fraud."

¹⁰³ cf. the dictum of Beatty C.J. in the Californian case of Pico v Cohn (1891) 25 P. 970 at 971 that "Endless litigation, in which nothing was ever finally determined...would be worse than the occasional miscarriage of justice."

(b) Breach of natural justice

Assume that Yves was not given notice or the opportunity to be heard and so cannot bring evidence of the Italian market overt rule.

Breach of natural justice has in the past been limited to cases of lack of notice or lack of opportunity to be heard and these criteria were strictly interpreted¹⁰⁴. In Jet Holdings Inc v Patel¹⁰⁵, the Court of Appeal suggested that just as with fraud, so with breach of natural justice it should not be necessary to have raised the defence in the foreign proceedings. It is suggested that the analogy between the two defences can be extended for our purposes. Thus, breach of natural justice should be considered fundamental in the same way as fraud and there should be no recognition of any change in title based on a judgment, which has been obtained in breach of the rules of natural justice, even where choice of law rules would normally require this.

This suggestion can more easily be accepted if the defence of natural justice is kept within strict limits. However, the recent case of Adams v Cape Industries¹⁰⁶ seems to have opened up the definition of this defence to include matters other than lack of notice or opportunity to be heard. With respect, Cheshire and

¹⁰⁴ e.g. Jacobson v Frachon (1928) 138 LT 386, where a biased expert's report was not sufficient to make out the defence because the Court was not bound to accept the report and the parties had availed themselves of the opportunity to attack the report in Court.

¹⁰⁵ [1990] 1 QB 335, 345.

¹⁰⁶ [1990] Ch. 433.

North's suggestion¹⁰⁷ that cases of other kinds of procedural unfairness should be dealt with under public policy is to be preferred.

(c) Contrary to Public Policy

The public policy defence has been so limited that it is difficult to construct a potential public policy defence in the context of the example being used here. For completeness, the situation will be examined, even though it is unlikely to arise.

The main difference between the public policy defence and the two defences already discussed is that the public policy defence will not succeed where the defence was available to the defendant in the foreign proceedings but was not raised there¹⁰⁸. However, where this hurdle is overcome and the defence is made out, it seems almost obvious that no title derived from such a judgment should be recognised and that therefore the 'non-recognition rule' should prevail. Again, there would be no difficulty in achieving such a result by use of the public policy exception to the lex situs rule.

(d) Want of Jurisdiction

Assume, for example, that Yves is not resident in Ruritania and does not submit to the Ruritanian Court.

The policy basis of the jurisdictional requirements in relation

¹⁰⁷ Op. cit. (chapter 1, n.1. supra) at p. 386.

¹⁰⁸ See Israel Discount Bank v Hadjipateras [1984] 1 WLR 137 and discussion in Cheshire and North (chapter 1, n.1 supra) at pp.371-2 and p.381 and Collier [1984] CLJ 47.

to recognition of in personam judgments is that it is not fair for the defendant to be bound by a decision of a foreign court unless he is either resident in the foreign jurisdiction or submits. The question arises whether this policy is sufficiently fundamental to override the choice of law rules where the effect of the application of these would be indirectly to recognise the foreign judgment.

Whilst there is no clear answer to this question as a whole, it is difficult to see how the policy of the 'non-recognition rule' can be considered fundamental in any situation where an English Court could have taken jurisdiction mutatis mutandis.¹⁰⁹ Thus, without further discussion, we can conclude that an automatic preference for the lack of jurisdiction rule cannot be supported.

This means that a global preference for 'non-recognition rules' in non-matrimonial cases cannot be justified. Perhaps, though, a global rule in favour of the second type of non-recognition rule (i.e. the defences) could be supported.

It is suggested that the above conclusions can also be supported by an analysis based on 'conflicts justice'. The parties should reasonably expect that a judgment obtained by fraud or in breach of natural justice¹¹⁰ should not be either directly or

¹⁰⁹ On the facts of example P3, the English Court would have discretion to take jurisdiction under RSC Order 11 r. 1(1)(i).

¹¹⁰ Although the parties' expectations about the procedure alleged to be in breach of natural justice is not conclusive as to whether there has been such a breach or not, Adams v Cape Industries [1991] 1 All ER 929, 1050.

indirectly recognised in other places. However, they might also reasonably expect that a judgment should be recognised if there is some real and substantial connection between the issue to be tried and the Court, even if that connection does not satisfy the relatively narrow English rules for determining the international jurisdiction of foreign tribunals.

C. MATRIMONIAL CAUSES

1. The Problem Explained

The question as to whether 'non recognition rules' should take precedence arises in the classic Schwebel v Ungar 'incidental question' situation, illustrated by example M1¹¹¹. If the 'non recognition rule' takes precedence, the remarriage will not be recognised and the first wife will retain all marital rights. Some commentators take the view that the 'non-recognition rule' should always take precedence as a matter of common sense¹¹² or because it is based on public policy.¹¹³ There have also been suggestions¹¹⁴ that a distinction might be drawn between non-recognition for want jurisdiction and non-recognition because one of the defences is successfully invoked. In order to determine whether either of these approaches can be supported, we need to

¹¹¹ Chapter 1 III supra.

¹¹² See Law Commission Consultation Paper on "Recognition of Foreign Nullity Decrees and Related Matters" (1983) at para 6.50. This Consultation Paper was not published (for explanation see Law Com. No. 137 at para. 1.8), but a copy is available from the Commission on request.

¹¹³ For example, Gordon (chapter 1, n.1 supra) at p. 151.

¹¹⁴ By consultees of the Law Commission (see Law Com. No. 137 at para. 6.60).

consider the policy behind the various 'non-recognition rules' and to analyse whether all or any of these policies require an automatic preference for the 'non-recognition rule'.

2. Rationale for the 'Non-Recognition Rules'

When we examine each 'non-recognition rule' in turn, we will find that one of the rationales for a number of the rules is protection of the Respondent. Thus, it will be helpful at the outset to consider whether this policy requires giving precedence to the 'non-recognition rule'. The first question to ask is how non-recognition of the divorce protects the Respondent who is usually the wife. Non-recognition cannot force her husband to return to her and indeed where the divorce is a religious one, she will be considered by her community as divorced.

Perusal of the Parliamentary debates suggests that it is primarily financial protection which is envisaged.¹¹⁵ However, this seems to ignore the fact that since 1984, the English Court has jurisdiction to make an order for financial provision following a recognised **formal** divorce on the same basis as after an English divorce.¹¹⁶ The reason that the wife who is divorced informally may be in need of financial protection if the divorce were recognised is that Parliament has decided to deny her the opportunity to claim financial relief. In any event, not all

¹¹⁵ See, for example, per the Lord Chancellor at 473 HL Debs col. 1082 (22.4.86). See also per Lord Simon at 343 HL Debs col. 320 (8.6.73) in a debate on s.16 of the Domicile and Matrimonial Proceedings Act 1973, which instituted the restrictions, which were extended by the Family Law Act 1986.

¹¹⁶ Under Matrimonial and Family Proceedings Act 1984 Part III.

wives need financial protection. In some cases, the husband has no available assets and in others the wife has more assets than the husband.

Even more crucially, the non-recognition rule far from protecting the Respondent, may actually be prejudicial to the him/her¹¹⁷, if (s)he wishes to remarry.¹¹⁸

Thus, we may conclude that the policy of protecting the Respondent cannot justify an automatic preference for the non-recognition rule. We will now examine the various non-recognition rules, which will be illustrated by reference to the examples set out in Chapter 1 above¹¹⁹, to discover whether they are based on any other policies which can support such a preference.

(a) Not Effective Under the Law of the Country where obtained

In example M1, assume that Natasha and Alexander were in Vienna long enough to acquire a habitual residence there. The get would still not be recognised because it was not effective under the law of Austria, even if was recognised by the law of the Russian domicile.

It may seem obvious that a judgment should not be given greater

¹¹⁷ This situation is only likely to arise where there is want of jurisdiction because the defences are discretionary.

¹¹⁸ See comment of Anton in relation to informal divorces in the Hague Conference Proceedings, Actes et Documents De La Haye, Onzieme Tome, p. 100.

¹¹⁹ At section III.

effect abroad than it has in the jurisdiction in which it was granted¹²⁰. However, at common law, a divorce could be recognised, even though it was of no effect whatsoever in the country where it was obtained, provided that it was recognised by the law of the domicile of the parties under the rule in Armitage v Attorney-General.¹²¹

In addition, a foreign decree could be recognised even though, because of procedural irregularities¹²², it was a "mere scrap of paper"¹²³ in the country where it was given¹²⁴. Levontin explains this apparent paradox on the basis that

It is no concern of ours to discipline the officers, judicial or others, of foreign States, to make them abide within the limits of their respective stations. It is certainly not our concern to the extent of making us sacrifice substantive justice."¹²⁵

So, why was the requirement of effectiveness introduced? Under the Recognition of Legal Divorces and Separations Act 1971, the requirement of effectiveness applied only to 'overseas divorces' recognised under section 2. Thus, whilst the rule on procedural

¹²⁰ See Levontin (1967) 2 Isr L.R. 197 at pp. 201-202.

¹²¹ [1906] P. 135.

¹²² cf. Internal incompetence by the municipal law of the judgment granting state will prevent its recognition, see Adams v Adams [1971] P. 206 and Papadopoulos v Papadopoulos [1930] P 55.

¹²³ Levontin, (1967) 2 Isr. L.R. 197 at p. 203.

¹²⁴ Pemberton v Hughes [1899] 1 Ch. 781, Merker v Merker. [1962] 3 All ER 928 and Vanquelin v Bouard (1863) 15 CBNS 341.

¹²⁵ (1967) 2 Isr. L.R. 197 at p. 298. This rationale seems wide enough to cover cases of lack of internal competence, but see n. 118 supra.

irregularities was probably reversed¹²⁶, the rule in Armitage v Attorney- General was saved by section 6 of the Act. There was no discussion by the Law Commission or in Parliament about the effectiveness requirement. It appears that the wording simply followed that of the Hague Convention¹²⁷ which was being implemented¹²⁸, although it was clearly not necessary to adopt this restriction¹²⁹.

In 1984, the Law Commission¹³⁰ recommended extending the effectiveness requirement to divorces and annulments obtained on the basis of domicile. In their view, the statutory reversal of a few decisions is "a small price to pay" for the increased simplicity and certainty which will result from having uniform requirements for all the jurisdictional bases of recognition. With respect, this approach evades the real issue as to why it is not sufficient that the divorce is recognised by the law of

¹²⁶ Cheshire and North (chapter 1, n.1 supra) at p. 660 n.8 suggest that in the case of procedural irregularities, the decree should be recognised if it is effective in the country unless and until it is set aside.

¹²⁷ Article 1 specifies that the Convention applies to divorces "...which follow judicial or other proceedings officially recognised in that State and which **are legally effective there**" (emphasis supplied). The effectiveness requirement was not in the preliminary draft. Goldman and Bellet (n. 88 supra) suggest that the requirement was probably already implicit from the word 'obtained', but "it seemed preferable to spell it out in some many words." There is no discussion of the rationale behind the requirement.

¹²⁸ Law Com. No. 137 (1984) at para. 6.12.

¹²⁹ The Convention provides the minimum requirements for recognition and Contracting States are allowed to be more generous (art. 17).

¹³⁰ Law Com. No. 137 paras. 6.13 et seq.

the domicile, when this had been sufficient since 1906. There is no discussion of the policy basis of the requirement of effectiveness.¹³¹

Moreover, the uniformity argument put forward by the Commission is not convincing. The distinction between domicile and the other jurisdictional bases can be justified both on historical¹³² and rational grounds¹³³. If uniformity is so precious, it could equally have been achieved by extending the other jurisdictional bases to include decrees recognised by the law of the nationality and the law of the habitual residence.¹³⁴ Furthermore, whilst the Law Commission's approach might have been justifiable in the context of their proposals under which there would only be one set of jurisdictional bases, it cannot be supported in the context of the actual legislation which retained the differential jurisdictional bases.¹³⁵

Thus, so far we have not discovered the rationale behind the effectiveness requirement. Two suggested explanations are (i) that

¹³¹ Von Mehren and Trautman (1968) 81 Harv. L.R. 1601 do present such a discussion and conclude at p.1660 that "there are situations in which a judgment void where rendered can properly be treated as valid, particularly, when it becomes incidentally relevant in litigation in another jurisdiction."

¹³² That domicile has traditionally governed matters of personal status at common law.

¹³³ Since capacity to remarry is governed by the law of the domicile, the 'conflict of rules' problem will be less likely to arise if recognition by the law of the domicile is sufficient. This argument is restricted to domicile in the English sense.

¹³⁴ As in Australia, see Family Law Act 1975 s. 104(8).

¹³⁵ See Chapter 1, II B 2 and 3 supra.

the requirement is based on respect for the policy of the state where the divorce or annulment is obtained, which may be seen as an aspect of comity¹³⁶ and (ii) that the requirement is designed to reduce limping marriages.

In relation to the former, we have already seen that comity cannot support a preference for recognition rules¹³⁷ and there seems to be no reason why this conclusion should not apply equally to 'non-recognition' rules. In respect of the latter, if the decree is recognised by a third jurisdiction, there will in any event be a limping marriage.¹³⁸

(b) Lack of jurisdiction (judicial divorces)

Assume the facts of example M4. The Mexican divorce is not recognised because neither party has a relevant connection with Mexico.

Two reasons may be identified for requiring a relevant jurisdictional link. Firstly, it is unfair to the Respondent to allow the Petitioner to litigate in a forum with which neither

¹³⁶ cf. Levontin (1967) 2 Isr. L. R. 197, who claims that comity does not generally extend to "enforcing administrative or public or fiscal laws of other countries" and thus substantive justice should not be sacrificed in order to enforce internal regulation of the administration of justice in a foreign State. Although the reference is to procedural irregularities, this point might equally apply to the foreign's country's insistence that divorces etcetera take place in a civil Court.

¹³⁷ Section II B supra.

¹³⁸ See at II E supra.

spouse has any real connection¹³⁹. Secondly, parties should not be allowed to evade the law of the countries to which they belong. It is suggested that the second reason is weak because there is no general concept of 'fraud a la loi' in English law¹⁴⁰ and because the wide jurisdictional requirements themselves allow evasion¹⁴¹. In any event, the forum only has a real interest in preventing evasion of its own law. Thus, protection of the Respondent can be seen as the main purpose.

(c) Lack of notice or opportunity to participate

Assume that in Example M4 above, Evita is a citizen of Mexico and thus the divorce is prima facie entitled to recognition under s.46(1). However, assume that no notice is given to Pedro of the divorce hearing or that he is not afforded an opportunity to take part in the proceedings.

The English Court has discretion to refuse recognition under Family Law Act 1986 s.51(3)(a). Caselaw¹⁴² shows that

¹³⁹ The concept of requiring a real connection was made explicit in the common law rules, see Indyka v Indyka [1969] 1 A.C. 33 (which was followed in relation to nullity decrees in Law v Gustin [1976] Fam. 155). The Law Commission has expressed the view that the policy behind the statutory bases of recognition contained in the Recognition of Legal Divorces and Separations Act 1971 "is very close to Indyka v Indyka, though stated with the greater precision of a statute." (Law Com. No. 137 at para 5.14). It should be noted that whilst this comment might hold true of the Family Law Act 1986 in relation to formal divorces, it does not hold true in relation to informal divorces.

¹⁴⁰ See Kahn-Freud (chapter 1, n. 103 supra) at p. 284.

¹⁴¹ For example, where one party obtains a divorce in the country of his/her nationality, with which (s)he retains a purely nominal link and the other spouse has no connection at all or where one party obtains a 'domicile' in a country like Nevada after a very short period of residence (as, for example, in Lawrence v Lawrence [1985] Fam. 106).

¹⁴² e.g. Newmarch v Newmarch [1978] Fam. 79 and see Dickson (1979) 28 ICLQ 132.

recognition is usually only refused where it would cause hardship to the Respondent¹⁴³. Thus, the policy behind this 'non-recognition rule' is also primarily to protect the Respondent.

(d) Lack of jurisdiction in informal divorces (the domicile requirement)

Assume the facts of M7.

It appears that the considerably more restrictive jurisdictional requirements in relation to informal divorces reflect a policy of minimising the recognition of such divorces because of their 'uncivilised' nature¹⁴⁴ and because they discriminate against¹⁴⁵ and do insufficient to protect women¹⁴⁶. There also seems to be an element of protection of the taxpayer because if the divorced wife is not provided for by her husband, the State will have to support her.¹⁴⁷ However, again it seems that the

¹⁴³ As in Joyce v Joyce [1979] Fam. 93. The enactment of Part III of the Matrimonial and Family Proceedings Act 1984, which allows financial provision to be awarded by an English Court after an overseas divorce has been granted, reduces the likelihood of recognition causing hardship. See the recent Scottish case of Tahir v Tahir [1993] SLT 194.

¹⁴⁴ See per Lord Hailsham in 473 HL Debs Cols 1081-1082 (22.4.86) and per Cumming-Bruce LJ in Chaudhary [1985] 2 WLR 350 at 359 F-G.

¹⁴⁵ If this policy was taken to its logical conclusion no unilateral divorce would be recognised, whether formal or informal, if that form of divorce was only available to men.

¹⁴⁶ See per Lord Hailsham at n. 144 supra and 102 H.C. Debs., Family Law Bill 24/10/86 per Mr. Brown at at col. 1443 and per Solicitor-General at col. 1444. cf. Young [1987] LS 78 at 82, who points out that certain types of formal divorces may be just as prejudicial to women and that in some societies women may be protected by community practice rather than legal provisions.

¹⁴⁷ See per Lord Simon 343 HL Debs col. 320 (8.6.73). See also text accompanying n. 116 supra.

element of protecting the wife is dominant¹⁴⁸.

(e) Lack of jurisdiction in informal divorces (habitual residence in England).

Assume in example M7 that both parties are domiciled in India and that the talaq is recognised in India. However, at the relevant time, Ahmed has been habitually resident in England for more than 12 months.

Again the 'jurisdictional requirements' in s.46(2) Family Law Act 1986 are not met and the talaq will not be recognised. Whilst, the habitual residence provision may be understood as part of the policy of minimising recognition of informal divorces, it is more difficult to explain the actual restriction itself in terms of protection of the wife, especially where the wife has remained resident in India throughout. Why should the wife need more protection just because the husband has been living in England?¹⁴⁹

At least one of the rationales for the requirement appears to be to prevent 'evasion' of the English divorce law, which can be resorted to wherever one party has been habitually resident in England for one year immediately preceding institution of the

¹⁴⁸ i.e. the reason that the divorces are regarded as uncivilised and that their discriminatory nature is disliked is because they appear to prejudice the wife.

¹⁴⁹ Lord Hailsham in 473 HL Debs col. 1082 (22.4.86) said that the aim was to give greater protection to wives resident in the UK because it would be wrong to deny a wife living here the protection of our Courts. Whilst this may have been a sound explanation of the position between 1974 and 1986, where a foreign informal divorce was only refused recognition where **both** parties had been habitually resident in England (see per Lord Simon 343 HL Debs col. 321 (8.6.73)) it does not explain the increased restrictiveness of the 1986 Act.

proceedings.

Does this selective application of an anti-evasion policy¹⁵⁰ justify a global preference for the non-recognition rule? Two questions must be considered. Firstly, is it in fact evasion to obtain a divorce in the country of domicile rather than in place of the habitual residence?¹⁵¹ Secondly, how does non-recognition further the anti-evasion policy? As we have seen¹⁵², the main concern in Parliament seems to have been about evasion of financial obligations. Non-recognition might be a deterrent. It is not worthwhile for the English domiciled Indian Muslim to go back to India to divorce his wife by talaq because he will still be bound to support her in England and the new wife he marries in India will not be able to enter the country.¹⁵³ However, the deterrent argument is not applicable if it is the wife who wishes to remarry. Thus, at least in this situation, the non-recognition rule should not take precedence and therefore the anti-evasion policy cannot support a global preference for the non-recognition rule.

¹⁵⁰ See text accompanying n.140 supra.

¹⁵¹ See Young [1987] LS 78, 86. It is particularly difficult to justify a positive answer to the question if the Petitioner has not been habitually resident in the UK for one year.

¹⁵² See n. 111 and accompanying text supra.

¹⁵³ cf. If he is domiciled in India, the remarriage may be a valid polygamous marriage even if the divorce is not recognised. However, the second wife may not be able to enter the UK because of the restrictions of the Immigration Act 1988 s.2.

(f) Lack of certification

Assume in example M7 that both parties are domiciled in India and neither has been habitually resident in England for 12 months. However, for bureaucratic reasons a certificate confirming the effectiveness of the divorce under Indian law cannot be obtained.

The English Court may refuse recognition under Family Law Act 1986 s.51(3)(b). There is no reported caselaw yet on this provision and it is not known what approach the Courts will take in lack of certification cases¹⁵⁴.

If, as with lack of notice in judicial proceedings, the discretion to refuse recognition is only exercised where recognition would cause hardship to the Respondent, then it will be clear that the purpose of this 'non recognition rule' is also protection of the Respondent. If discretion is exercised more widely, it may seem that the purpose is generally to minimise recognition of informal divorces. However, as seen above¹⁵⁵, the reason for this policy is also primarily to protect wives.

(g) Contrary to Public Policy.

The public policy exception could be invoked in many different situations. We will give three examples:-

(i) Assume in example M7 that neither party has been habitually resident in the UK for 12 months. However, both parties have been habitually resident in New York for a number of years. Although, the requirements of s.46(2) are met, the Court decides that recognition would be contrary to public policy because the only purpose of the husband returning to India to pronounce the talaq

¹⁵⁴ In the House of Commons, the Solicitor General 102 HC. Deb. at col. 1444 (24/10/86) said that the policy was "the necessity and desirability to have some objective certification or assurance of the validity of the relevant divorce." With respect, this adds little to the legislation itself.

¹⁵⁵ At (c) supra.

was to attempt to evade his financial responsibilities to his wife¹⁵⁶ under the law of New York¹⁵⁷.

Here the 'non-recognition rule' performs the dual purpose of protecting the wife¹⁵⁸ and preventing evasion of New York law. However, again, it is suggested that the second purpose is subsidiary to the first. We are only concerned with evasion of New York law because it causes prejudice to the wife. Thus, in this example, it is suggested that the purpose of the public policy 'non recognition rule' would also be protection of the wife.

(ii) Assume in example M8 that the trans-national get is held to be an overseas formal divorce which is prima facie entitled to be recognised under s.46(1) Family Law Act 1986, but that it is refused recognition on public policy grounds as being contrary to the policy of FLA 1986 s.44(1).¹⁵⁹

Here the major concern appears to be with the evasion of English law by acts done on English soil. The wife is not in particular need of protection. She is not prejudiced any more than if the husband travelled to Israel and started the get proceedings there, in which situation the divorce would have been recognised. In any event, the divorce is effected by the wife's voluntary

¹⁵⁶ See for example Joyce v Joyce [1979] Fam. 93.

¹⁵⁷ Assume that a talaq pronounced in New York would not be valid there (Shikoh v Murff 257 F.2d 306 (2 Cir. 1958) and that the New York Court would not award financial provision in this case (cf. Chaudhary v Chaudhary 159 N.J. Super 566, 388 A. 2d 1000 (1978)).

¹⁵⁸ See also Zaal v Zaal (1983) 4 FLR 284, where the bare talaq was held to fulfill the jurisdictional requirements under the 1971 Act, but was refused recognition on grounds of public policy and in particular that the wife was not informed that she had been divorced until some time afterwards.

¹⁵⁹ See Chapter 1, II B 4 supra.

acceptance of delivery of the get. Also, adequate financial safeguards for divorced wives exist under Israeli law. Thus, it might be argued that even where it is the wife who wishes to rely on the trans-national divorce, forum policy would require that no effect be given to it.

(iii) In example M5, assume that the decree is refused recognition on public policy grounds on the basis that recognition is inconsistent with the English policy of validation of sham marriages.

Presumably one of the purposes of this policy is to deter sham marriages. If remarriage after the decree is recognised, the effectiveness of the deterrence is substantially impaired.

We may conclude from the above survey of 'non recognition rules' in relation to matrimonial decrees that there is no clear distinction between the policy objectives of the jurisdictional requirements and the 'defences'. A better distinction is between 'non-recognition' rules which are primarily designed to protect the Respondent and those which are designed to prevent evasion of either English law or some other domestic system of law or to deter a particular type of undesirable behaviour per se.¹⁶⁰ However, even in relation to the second category it may not always be possible to justify preferring the 'non-recognition' rule if this prejudices the Respondent. In any event, it is clear that the a global rule in favour of 'non-recognition' rules in matrimonial cases cannot be supported.

¹⁶⁰ The effectiveness requirements seems to be sui generis.

IV. CONCLUSION

The doctrine of obligation seems to be the generally accepted basis for recognition of foreign judgements. Since in essence this doctrine is no more than a selective interpretation of the vested rights doctrine, it cannot justify a global preference for the recognition rule viz-a-viz the choice of law rule. Nor can any of the other theories advanced to explain recognition of foreign judgments support such a global preference.

Further, whilst an automatic preference for some of the 'non-recognition rules' may be supported, this is not universally true because the policies behind 'non-recognition' rules are not uniform.

CHAPTER 4: GIVING PREFERENCE TO THE RULE WHICH IS STATUTORY

I. INTRODUCTION

In this Chapter we shall be seeking justification for preferring the statutory rule, where one of the rules is statutory and the other is not. This would be a global rule applicable in all cases where one of the relevant rules was not statutory. Clearly such a rule would not be of any use to a country where the whole of the Conflicts of Law is codified or where none of it is enacted in statutory form. However, in England and other common law countries, where there has been piecemeal statutory reform of the Conflict of Laws, it is now not unusual for one of the rules in question to be statutory and the other common law.

A problem of definition may arise in relation to common law rules which are saved by statute. Are such rules now to be considered as common law or statutory for the purposes of the suggested rule? It is suggested that this may depend on the form of the statute. If the rules are actually set out in the legislation, they would now derive their force from the statute.¹ Whereas, if the legislation is simply clarifying the fact that the common law rules have not been changed², then the rules can arguably still

¹ This would seem to be the case with s.6 of the Recognition of Divorces and Legal Separations Act 1971 (as amended by the Domicile and Matrimonial Proceedings Act 1973), which defined and extended the common law rules.

² For example, the Canadian Divorce Act 1985 s.22(3) provides:- "Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act." See also Australian Family Law Act 1975 s.104(5).

be regarded as part of the common law.

Table 1 shows which recognition rules and choice rules have been enacted in England.³ It can be seen that recognition rules have been codified more than choice of law rules. Thus, in England a rule giving preference to the statutory rule would in most cases be identical⁴ in practice to a rule giving preference to the recognition rule. In contrast, in Israel, as can be seen from Table 2, choice rules have been put into statutory form more than recognition rules.⁵ Thus, it will be instructive to compare the operation of the proposed preference in favour of the statutory rule in England and Israel.

Particular reference will be made to the classic example of the 'conflict of rules' situation involving capacity to remarry after a foreign divorce which is recognised by the law governing remarriage and not by the forum or vice versa.⁶ We have already examined the English recognition rules. The English choice of law rule is assumed to be the dual domicile test.⁷ In Israel, Article 64(2) of the Palestine Order in Council 1922 provides that capacity to marry is governed by the law of the nationality

³ In the Appendix I.

⁴ The difference would be in the rationale. The applicability of the recognition rule would be being justified by virtue of its statutory form rather than because of the nature of the rule.

⁵ In the Appendix infra.

⁶ As in examples M1 to M4 at Chapter 1, III supra.

⁷ cf. Chapter 6 I C infra.

of the parties⁸. In contrast, there are no local provisions governing recognition of foreign matrimonial decrees. Article 46 of that Order⁹, provides that the English common law should fill any gaps in local law and thus the common law recognition rules would seem to be applicable.¹⁰

II. THEORETICAL BASIS

A. THE RATIONALES

It is suggested that three rationales can be given for preferring the statutory rule.

1. **Statutory rules are invariably more certain than common law rules.**

This point can be illustrated in a number of ways. Codifications

⁸ There is express provision for renvoi where the law of the nationality applies the law of the domicile.

⁹ This has in fact now been repealed by the Foundations of Law 1980 section 2(a). However, section 2(b) of that Law saves all English law which had already been adopted in Israel before the coming into force of that Law. It would seem that this is true of the rules for recognising foreign decrees. See n.10 infra.

¹⁰ In the case of *Kaba v Saikaly* C.A. 189/4546 A.L.R. 270, discussed in Levontin (1954) 3 Am.J. Comp. Law 199 at p. 203, the Supreme Court of Israel refused to recognise the divorce obtained in a Syrian Court in respect of parties domiciled in Israel, even though they were nationals of Syria. Levontin argues that it is illogical to have a choice rule based on nationality and not to respect a determination of status made by the Court of the nationality.

of recognition rules¹¹ in England do not suffer from the same ambiguities as the common law recognition rules.¹² The potential uncertainty of common law choice rules can be seen from the debate surrounding the English choice of law rule governing capacity to marry.¹³ In Israel, it is not clear how the old English common law rules for recognition of divorces would apply in practice because of certain important differences between the two systems¹⁴.

¹¹ Whether the codification of the contract choice of law rules has lead to greater certainty is a matter of dispute. See Cheshire and North (chapter 1, n.1 supra) and references cited there.

¹² For example, it is still not clear whether presence in the foreign country is sufficient jurisdictional basis for recognition of an in personam judgments (see chapter 1, n.19 supra). The uncertainty of the 'real and substantial' connection test, introduced in Indyka v Indyka [1969] 1 AC 33, was one of the motivations for the speedy enactment of the 1971 Recognition of Divorces and Legal Separations Act (see per Hailsham 315 HL Debs col. 485 (16.2.71)).

¹³ See at chapter 6 I C infra.

¹⁴ Firstly, domicile in Israel is more like the Continental than the common law concept. See, the definition in Succession Law 1965 s. 135 as "the place in which his life is centred" and articles by Shaki, (1966) 16 Scripta Hierosolymitana 163 and Shava (1983) 5 Tel Aviv Studies in Law 144). Secondly, the rule in Travers v Holley is difficult to apply because the divorce jurisdiction in Israel is very broad. When the divorce jurisdiction of the religious Courts is combined with the divorce jurisdiction of the civil Courts under 1969 Dissolution of Marriages (Special Cases) Law, the only marriages which there is not jurisdiction to dissolve are those where both parties belong to one of the recognised religions (see 1969 Law s.2) but do not fall within the jurisdiction of the appropriate religious Court (e.g. Jews who are neither resident nor nationals of Israel). However, under the latter Act, the President of the Supreme Court does have discretion not to grant relief wherever this is not appropriate and it is expected that he would exercise this discretion in a case which had no connection with Israel (Shava (1970) 26 Hapraklit 302 at p. 304) (Hebrew). However, a literal application of the rule in Travers v Holley would seem to mean that almost all foreign divorce decrees should be recognised. Levontin (1954) 3 Am. Comp. Law 199 argues that the common law recognition rules are completely inappropriate because

2. Statutory rules have usually been enacted to further a clearly defined policy whereas the policy behind common law rules may be obscure and outdated.

This can be illustrated by the English recognition codes, which were enacted to implement International Conventions. The policy behind the 1971 enactment of the recognition rules for divorces was to reduce limping marriages¹⁵. The policy behind the Civil Jurisdiction and Judgments Act was to facilitate free flow of judgments within the European community.¹⁶

In contrast, the policy behind choice of law rules cannot be stated definitively. The rationale for the dual domicile test, would seem to be that the country of the domicile has the most interest in the status of its domiciliaries¹⁷. The criticisms of the domicile rule stem from the argument that the interest of the domicile is weak, or non-existent, where the parties no longer have any connection with that country. Of course, if the choice rule is a more flexible rule, as advocated by various writers¹⁸, the policy behind it may be clearer and stronger.

nationality and not domicile governs issues of personal status in Israel. It should be noted that Levontin was writing before the decisions in Travers v Holley and Indyka v Indyka.

¹⁵ See references at chapter 3 n.88 supra.

¹⁶ See the Preamble to the Brussels Convention.

¹⁷ See Law Com. W.P. No. 89 para 3.27.

¹⁸ See Jaffey (1978) 41 MLR 38 (discussed at chapter 5 III B 3 infra) and (1982) 2 OJLS 368 and Fentiman [1985] CLJ 256.

In Israel, the position is more obscure. It is not clear whether there was any policy rationale behind the deliberate preference by the Mandatory legislature of the nationality choice rule¹⁹ over the common law domicile rule. Vitta²⁰ claims that it was simply a retention from the old Ottoman Law; whereas Silburg²¹ suggests that the preference for nationality stems from the fact that most foreign nationals during the period of the Mandate were immigrants from Europe, where their status was governed by the lex patriae. In any event, since 1959 domicile has been preferred in choice of law provisions in statute.²² Thus, there seems to be no sound policy reason behind the nationality rule today.

The application of the old English common law recognition rules is simply a leftover from the period of the Mandate and is only applicable by virtue of a residual provision of the Palestine Order in Council.²³ However, the first two common law rules of recognition²⁴ are consistent with the trend in Israeli Private

¹⁹ Enacted in Palestine Order in Council 1922, article 46(2).

²⁰ (1977) 12 Isr. L.Rev. 129

²¹ Silberg, Personal Status in Israel (1958, Hebrew) at p. 335

²² For example in section 17 of the Family Law Amendment (Maintenance Law) 1959, section 76 and 77 of the Capacity and Guardianship Law 1962 and sections 136, 137 and 139 of the Succession Law 1965 . See Shaki 1966, Scripta Hierosolymitana (1966) 163 and Shava (1983) 5 Tel Aviv University Studies in Law 144.

²³ Art. 46 - see supra n. 9.

²⁴ Which depend on domicile (see chapter 6 I B 1 (a) infra).

International Law of the increasing use of domicile as a connecting factor²⁵. The reciprocity rule would not be easy to apply in Israel²⁶. It is difficult to believe that the Indyka "real and substantial connection test", which was abrogated in England shortly after its creation²⁷, is intended to further any Israeli policy. Although, curiously, it may well be that taking into account the President's discretion²⁸ to determine jurisdiction under the 1969 Dissolution of Marriage (Special Cases) Law, the Israeli position on jurisdiction in divorce cases is similar to the Indyka test.

3. Rules of statutory interpretation require that a statutory provision overrules any pre-existing inconsistent common law rule²⁹.

In English law, the statutory recognition rule is not directly inconsistent with the common law rule because they are different types of rules. However, it might be argued that since the result of application of the statutory rule is inconsistent with the result of the application of the choice rule, the former should prevail.

²⁵ See references at n. 23 supra.

²⁶ See n. 14 supra.

²⁷ By the Recognition of Divorces and Legal Separations Act 1971, although it is still applied in some Commonwealth jurisdictions (see chapter 6 I B 1 (a) infra).

²⁸ Supra n. 14.

²⁹ Edgar, Craies on Statute Law 7th. edn. (1971) pp. 338 et seq.

In relation to Israel, there is a stronger argument that the statutory rule should take precedence because English common law is only to be introduced into Israel where local law does not extend or apply and "so far only as the circumstances of Israel and its inhabitants..permit and subject to such qualification as local circumstances render necessary."³⁰

B. 'NON-RECOGNITION RULES'

It may be argued that statute need not be preferred in the case of non-recognition because the statute only states the circumstances when recognition is accorded. It does not, with the exception of non-judicial divorces obtained within the British Isles³¹, provide that divorces which do not meet the jurisdiction requirements should not be recognised, although this is the way the statute is applied.³² Further, as we have seen the defences merely provide the Court with the opportunity to refuse recognition of the matrimonial decree. The Court is not mandated to refuse recognition where one of the defences is made out.

This argument would lead to the result that a statutory recognition rule should be preferred where it results in

³⁰ Palestine Order-in-Council 1922, Art. 46. Levontin (1954) Am. J. Comp. Law 199 at 206 argues that as the local choice rule makes provision for determining the status of a foreigner, there is no need to have recourse to the common law recognition rules.

³¹ Family Law Act 1986, s.44(1).

³² For example, informal divorces have not been recognised where one of the parties is domiciled in England, as in Chaudhary v Chaudhary [1985] Fam. 19.

recognition, but not necessarily where it results in non-recognition.³³ The difficulty with this is that it would be necessary to find another rule to deal with the non-recognition situation and thus the preference for the statutory rule would no longer be a global rule.³⁴

III RESULTS

We will consider how examples M2 and M4³⁵ would be decided in England and Israel using the preference for the statutory rule approach. In example M2, the remarriage will be valid in England because the divorce is recognised under the statutory recognition code. Conversely, in Israel, whilst the divorce should be recognised on the basis of the Indyka test³⁶, the remarriage will be invalid because there is no capacity under the Argentinian law of the nationality³⁷.

³³ This can also be supported by the presumption (see Craies, n.30 supra) that statute invades common law rights as little as possible. i.e. the statutory 'non-recognition rule' should not remove from the 'spouse' the common law capacity to remarry where (s)he has such capacity by the law of his/her domicile because of the application of a statutory 'non-recognition' rule, unless the statute clearly requires this result.

³⁴ However, a specific rule will be constructed which reflects this point. (see chapter 6 II 3 (d) infra).

³⁵ Chapter 1, III supra.

³⁶ The decision in Kaba v Saikaly (n. 10 supra) might have been different today on the basis that the Syrian Court was a Court with a real and substantial connection, although it is significant that nationality alone will not necessarily be sufficient under the Indyka rule (see e.g. Keresztessy v Keresztessy (1976) 73 DLR (3d) 347).

³⁷ Unless renvoi applies (supra n.8).i.e. Argentina refers the issue of capacity to the law of the domicile which it considers is Mexico.

However, the opposite results will be achieved where the divorce is not recognised by the forum. Thus, in example M4, the English Court will not recognise the remarriage. Conversely, in Israel, preference for the statutory rule would mean applying the nationality choice rule. Thus, the remarriage will be recognised because the divorce is recognised by Argentinian law, which is the lex patriae.

IV. CONCLUSION

Whilst there may be some merit in the rationales put forward in favour of the statutory rule, they fail to explain the difference between the results in England and those in Israel in the above examples. The fact that there is a fortuitous element in whether a choice rule or recognition rule is enacted increases the risk of arbitrary results which is inherent in all mechanical global rules.

In Part III, we will be constructing specific preference rules to overcome this problem. From the discussion in this chapter it can be concluded that, whilst specific rules should be formulated without reference to whether they result in giving precedence to the statutory rule over the common law rule, the fact that a proposed preference rule has such an effect will provide additional support for it.

PART III

SPECIFIC SOLUTIONS

CHAPTER 5 : THE RESULT-ORIENTED METHODOLOGY

I. INTRODUCTION

A number of writers, mainly American, have rejected the traditional jurisdiction selecting choice of law rules in favour of rules designed to ensure that the desired result is achieved, referred to as result-selecting rules. The global principles, which we considered in Part II, are analogous to jurisdiction selecting rules because they are applied 'blindly' without any attention being paid to the result of their application in each particular case. In this Part, we will be applying a result selecting approach to determine which of the two conflicting rules should prevail in the 'conflict of rules' scenario.

In this Chapter, we will be developing a result-selection methodology which is appropriate for our purposes. Firstly, in order to understand the rationale for result-selection, the defects of mechanical rules will be explained and the use of the 'escape device' of public policy illustrated. Then, the result-oriented approach, which it is proposed to adopt in this thesis, will be illustrated by reference to choice of law examples in the literature and analysed critically. Some of the problems with result-orientation in relation to pure choice of law will be found not to be relevant in the conflict of rules context. Solutions to the remaining difficulties will be sought. Finally, the conclusions of this analysis will be converted into a practical methodology for use in subsequent chapters.

II. THE RATIONALE FOR RESULT SELECTION

A. CRITICISMS OF MECHANICAL RULES

The impetus for the result selection movement seems to have been disillusionment with some of the results¹ produced by mechanical jurisdiction selecting rules, which paid no attention to the content of the rules to be applied² or to the result of the application³ of those rules. The criticism of the traditional rules is summarised by Collier⁴,

"[T]he concepts of choice of law are too rigid and artificial and cause the courts to reach decisions repugnant to common sense and ideas of justice or to use transparent devices to arrive at a more satisfactory result, by avoiding their application."

It is suggested that this criticism can equally be applied to the global principle in favour of the recognition rule. Foreign judgments are generally recognised 'blindly' without any concern for the contents of those judgments. We have already seen⁵ in relation to non-recognition rules that mechanical preference for a non-recognition rule may not necessarily achieve the policy behind the rule. Thus, Courts may be tempted to use 'transparent

¹ See, for example, Cook, Logical and Legal Basis of the Conflict of Laws, Chapter 1; Cavers (1933) 47 Harvard LR 173 and Currie, Selected Essays on the Conflict of Laws (1963).

² Cavers ibid refers to "an austere unconcern for the consequences."

³ In particular, whether the result was in accordance with the social policies behind the rules. See, for example, Hancock "Three Approaches to the Choice of Law Problem," in Nadelman et al (ed.) Legal Essays in honour of H.E. Yntema (1961).

⁴ Collier (chapter 1, n.142 infra) at p. 384. See also Shapira 'The Interest Approach to Choice of Law' (1970) pp. 20 - 24.

⁵ At chapter 3 III supra.

devices' or 'escape routes'⁶ in order to achieve the desired result.

B. PUBLIC POLICY AS AN ESCAPE ROUTE

Public policy has been chosen for more detailed examination because it is easy to show how it could apply in the conflict of rules context as a method of 'escaping' from an undesirable result produced by a global principle in favour of the recognition rule. Two cases, Gray v Formosa⁷ and Vervaeke v Smith⁸, concerning recognition of foreign nullity decrees⁹ will illustrate this point. Although they are not strictly 'conflict of rules' cases because recognition was the only issue in the case before the Court¹⁰, each case could have arisen in a choice of rule context.¹¹ In example M9, the 'conflict of rules' does

⁶ Carter (1993) 42 ICLQ 1 at p. 1.

⁷ [1963] P. 259 (followed reluctantly in Lepre v Lepre [1969] P. 52).

⁸ [1983] 2 All ER 144.

⁹ The fact that the cases are matrimonial decrees is not in itself important here, because the public policy defence relied on applies equally in relation to other judgments.

¹⁰ They belong to the category of 'pure recognition cases' (see chapter 1 I B supra).

¹¹ Vervaeke v Smith could easily have presented a choice of rule problem if the issue of recognition had arisen in the course of litigation about the succession to the estate of the second husband and such succession had been governed by a foreign law. Gray v Formosa could have arisen in a choice of rule context if, for example, the parties had remarried and the decrees were not recognised by the law governing the validity of the remarriages. In such a case, the Court could (prior to s.50 Family Law Act 1986) have openly applied the choice of law rule in preference to the recognition rule or achieved the same result by refusing to recognise the judgments on public policy grounds. Following s.50 only the latter course would be available.

arise in a similar fact situation.¹²

In both cases, nullity decrees were granted by Maltese and Belgian Courts respectively in relation to marriages which had been celebrated in England. The ground for the decree in the first case was lack of celebration in Roman Catholic form as required by Maltese law¹³ and in the second that the marriage was a sham as the parties never intended to live together as husband and wife. In Gray v Formosa, the application of English choice of law rules to the question of the validity of the marriage would have led to the application of English law as the lex loci celebrationis and the marriage would have been held valid. The position in Vervaeke v Smith is slightly more complicated. The Court of Appeal found that the validity of the marriage fell to be determined by English law under the exception in Sottomeyer v De Barros (No. 2)¹⁴. Thus, the Petitioner's foreign incapacity, which was unknown to English law, would be ignored because she married an English domiciliary in England. In the House of Lords, only Lord Simon considered the choice of law issue. He found that the question of the validity of a sham marriage was a question of quintessential validity and should be governed either by the lex loci celebrationis or alternatively by the country with which the marriage has the most real and substantial connection. Either way, English law governed and the marriage was valid.

¹² See chapter 1, III supra.

¹³ The husband was Maltese.

¹⁴ (1879) 5 P.D. 94.

The English courts refused to recognise both of these nullity decrees¹⁵. In Gray v Formosa, the Court found that recognition would constitute a denial of "substantial justice". It has been suggested that this concept coincides with that of public policy.¹⁶ In Vervaeke v Smith, the House of Lords¹⁷ concluded inter alia¹⁸ that recognition of the decree was precluded by public policy.

Carter¹⁹ includes both of the above cases in his third category of public policy, i.e. application of a foreign rule or recognition of a foreign judgment would "lead to an unacceptably unjust result in the particular circumstances of the instant case." The injustice in Gray v Formosa is that the wife would have been deprived of financial relief if the foreign decree had

¹⁵ cf. Merker v Merker [1963] P. 283, Galene v Galene [1939] P. 237 and De Massa v De Massa [1939] 2 All ER 150n, where nullity decrees were recognised even though the marriages would have been valid by English choice of law rules. See also the Australian case of Vasallo v Vasallo [1952] SASR 129 and the South African case of De Bono v De Bono 1948 (2) SA 802 where Maltese nullity decrees were recognised on similar facts to Gray v Formosa.

¹⁶ Carter (1993) 42 ICLQ 1 at p. 5. According to Sir John Arnold P. in Armitage v Nanchen (1983) 4 FLR 293 at 298 it is "very much like public policy."

¹⁷ The Court of Appeal, [1981] 1 All ER 55, had held that recognition was not contrary to public policy, but refused recognition on other grounds.

¹⁸ Arguably the ratio (or at least the main ratio) of the case was the narrower ground that the Belgian judgment was inconsistent with an earlier English judgement on the same issue, which should therefore have been treated as res judicata by the Belgian Court. Non-recognition of foreign matrimonial decrees in such circumstances is now provided for by Family Law Act 1986 s.51(1).

¹⁹ (1993) 42 ICLQ 1.

been recognised²⁰. It is more difficult²¹ to pinpoint the injustice in Vervaeke v Smith. Carter suggests that, although the Petitioner's unsavoury background was said not to be relevant, in fact this combined with her behaviour in the course of litigation led to the unarticulated feeling that it would be unjust for her to win and succeed to the estate of the man she alleged to be her husband by virtue of the second marriage. It is suggested that the idea that the Courts refused to recognise the judgments because the result was unjust can be refined by postulating that what the Courts were really doing was preferring the 'just' result of the application of choice of law²² rules to the 'unjust' result of the application of the recognition rule.²³ A hint that this thinking underlay the decision in Vervaeke v Smith can be seen from the judgment of Lord Simon²⁴. He expressly states that the fact that the choice of law rule provides for English law to determine the validity of the marriage is a reason for preferring English policy in

²⁰ Whereas because the decree was not recognised the English Court was able to grant a divorce itself and the wife could then claim financial relief.

²¹ Jaffey (1983) 32 ICLQ 500 at 503 claims that there was no question of any injustice to the Respondent.

²² See Sykes and Pryles, Australian Private International Law 3rd. edn. (1991) at p. 475.

²³ Ogden v Ogden [1908] P. 46 might also be seen as an example of preferring the English choice of law rule (under which the marriage was formally valid by the English lex loci celebrationis) to the recognition rule which would have required recognition of the nullity decree granted by the French Court of domicile on the basis that the parties lacked capacity due to absence of parental consent. However, it can hardly be said that the result of the application of the choice rule was more just in this case because the wife was unable to obtain a divorce.

²⁴ [1983] 2 All ER 144 at p. 159.

relation to sham marriages and for refusing recognition of the Belgian decree, which is contrary to public policy.

In Gray v Formasa Lord Denning said, "the marriage was lawful in England, as lawful as any marriage would be"²⁵. Since the marriage took place in England and at the time both parties were domiciled here, the Court was no doubt thinking about English domestic law. However, it is clear that applying choice of law rules, English domestic law was the relevant law to determine formal validity of the marriage and that it was because the Maltese decision was inconsistent with English law that it offended English ideas of justice.²⁶ Donovan LJ said²⁷

"It ill accords with present day notions of tolerance and justice that a wife validly married **according to our law** should be told by a foreign court that she is a mere cohabitant and her children bastards simply on the ground that her husband did not marry her in the church of a particular religious denomination". (emphasis supplied)

In Lepre v Lepre²⁸, the facts of which virtually identical with those of Gray v Formosa, Sir Jocelyn Simon P referred to the fact that the marriage was valid by the English choice of law rule.

He followed Gray v Formosa in refusing to recognise the Maltese decree because it offended against English concepts of justice.

²⁵ [1965] P 259 at p. 367.

²⁶ This conclusion has been widely criticised by commentators. See, for example, Lipstein [1972B] CLJ 67 at p. 89.

²⁷ [1963] P. 259 at p. 270.

²⁸ [1969] P. 52.

Thus, in all three cases public policy was a 'transparent device'²⁹ used to escape from the result of applying the recognition rule blindly when the result of the application of the choice of law rule was preferred. If this approach can be found in a case where the choice of law rule did not strictly come into play, a fortiori we would expect to find it in a real choice of rule case. Carter³⁰ suggests that the need to resort to an escape route indicates that there are shortcomings in the rules themselves and that the ultimate method of eliminating reliance on public policy is

"improvement in the detail of, the sophistication of, and not least the realism of, choice of law rules and rules governing the recognition and enforcement of foreign judgments."

In other words, so long as we have rigid mechanical and global principles we will need to have resort to the unruly horse of public policy. The alternative, at least in the 'conflict of rules' context, is result-selection.

III. RESULT-ORIENTED RULES

A. THE DIFFERENCE BETWEEN AD HOC RESULT SELECTION AND RESULT-ORIENTATION.

A number of different result selecting techniques have been advocated by various writers³¹, mainly from North America. Some

²⁹ This may account for the criticism, which has been levelled at the use of public policy in these cases. See, for example, Carter (1962) 38 BYIL 497 and (1978) 49 BYIL.

³⁰ Carter (1993) 42 ICLQ 1.

³¹ See summaries of the various theories in Kegel (chapter 2, n. 20 supra).

critics have 'lumped them' altogether³². However, in fact two main categories may be distinguished.

1. Methods which require judges to select the appropriate result ad hoc on the basis of, for example, which of the conflicting laws is 'better'³³; which government has an interest in application of its own law³⁴ or which country's interest will be less seriously impaired³⁵ if its law is not applied.

2. Methods which create **rules** designed to achieve the desired result in each particular category of case. These techniques, which we shall call collectively result orientation, can be said to be a via media between traditional jurisdiction selection³⁶ and the case by case ad hoc result selection discussed above. It involves the construction of choice of law rules for particular categories of case to ensure that the desired result is reached.

³² See, for example, Collier (chapter 1, n.142 supra) pp. 383 - 386.

³³ Ehrenzweig (chapter 1, n. 94 supra), who uses the term lex potior, cites American judicial support for this approach (at p. 229).

³⁴ Currie, Selected Essays on the Conflict of Laws (1963). According to this approach, where there is a 'true conflict' between the interests of different governments, the lex fori should apply.

³⁵ Baxter (1963) 16 Stan LR 1. This approach has been adopted by the Supreme Court of California inter alia in Bernard v Harrah's Club 546 P 2d 719 (1976).

³⁶ As Morris, (chapter 1, n. 142) at p. 450, points out, some of our apparently mechanical choice rules can be seen as "a synthesis" of a number of result orientated rules.

Most of the criticism by English writers³⁷ has been directed against the first category. Whilst some of their objections are not applicable in the conflict of rules scenario³⁸, the fundamental defects of lack of certainty, predictability and consistency are fatal to the acceptance of such an approach in England.³⁹ Thus, we may reject the ad hoc result selection approach⁴⁰ and concentrate on result-orientation.

B. EXAMPLES OF RESULT-ORIENTED RULES

1. Caver's Principles of Preference

Cavers, who seems to have been the founder⁴¹ of this approach, advocates "a selection between individual substantive rules of private international law"⁴² by means of principles of preference. This means that in each area of law there are a number of possible jurisdiction selecting rules. The principles of preference provide which of those rules should apply to a

³⁷ See, for example, Jaffey (1982) 2 OJLS 368 at p. 378 and Fawcett (1982) 31 ICLQ 150.

³⁸ For example, the objection to over-emphasis on the lex fori because it negates the whole purpose of the conflict of laws is not applicable in a situation where ex hypothesi the conflict is between the choice rules of the forum and the recognition rule of the forum (see chapter 1 IV 2 supra).

³⁹ The only part of the approach which might be acceptable is the identification of false conflicts. See Morris (chapter 1 n.142 supra) pp. 461 et. seq.

⁴⁰ Gottlieb (1979) 26 ICLQ 734 at pp. 782 - 795 seems to be adopting an ad hoc approach when he attempts to isolate the prime consideration in each of his model problems. He admits that his solutions involve value judgments which may not be universally accepted.

⁴¹ He first advocated it in (1933) 47 Harv. L. Rev. 173. See also his book, The Choice of Law Process (1965).

⁴² Kegel (chapter 2, n.20 supra) at p. 39.

particular law-fact pattern.⁴³ The principles are designed to ensure that the result produced in each law-fact category will be just between the parties.

2. Morris

Morris uses a result-oriented approach to recommend a choice of law rule for capacity to enter into a contract⁴⁴.

He starts by identifying the two most likely choice of law rules as being the proper law of the contract and the law of the domicile of the party alleged to be incapable. He then distinguishes two law-fact situations:-

(i) The party in question has capacity by the law of the domicile but not by the proper law.

(ii) The party in question has capacity by the proper law but not by the law of his domicile.

He concludes that the first category results in a false conflict⁴⁵. In order to come to this conclusion he has to rely on two hypotheses. Firstly, that the purpose of the invalidating rule is to protect the minor from his own immaturity and secondly, that a country only has an interest in protection of

⁴³ For example, in Cavers' five principles applicable to torts, depending on the law-fact situation, one of the following rules will apply:- (i) the law of the place of acting; (ii) the law of the parties' home state; (iii) where the parties have different home states, the law of that which affords the lower degree of protection; (iv) the law of the state in which a relationship between two parties has its seat.

⁴⁴ Morris (chapter 1, n.142 supra) at pp. 269 - 271.

⁴⁵ The idea of the false conflict originates from Currie (n.34 supra).

minors who are its own domiciliaries. Thus, reasons Morris, neither country has any interest in invalidating this contract; whereas the proper law, which has other connections with the contract, has an interest in upholding contracts.

The second category produces a real conflict. The law of the domicile does have an interest in protecting the minor. The proper law has an interest in upholding contracts. The latter should generally be preferred because of commercial convenience.

Accordingly, Morris produces a result orientated rule⁴⁶ that a contract will be valid if there is capacity by either the law of the domicile or the proper law. It can be seen that Morris has used a **generalised** governmental interest analysis approach to determine whether a particular law should apply in a particular law/fact situation. The conclusion of the analysis is used to create a rule which applies to all similar law/fact situations.

3. **Jaffey**⁴⁷

Jaffey adopts a similar approach in relation to essential validity of marriage. He identifies the two most likely choice of law rules as being the domicile of each party and the intended matrimonial home. He then investigates each different type of incapacity to determine what interest each of these laws has in relation to each reason for invalidity. On this basis he proposes a rule which will produce the desired result in each law-fact

⁴⁶ See Dicey and Morris (chapter 1, n.1 supra) rule 181(1).

⁴⁷ (1978) 41 MLR 38.

situation.

In relation to polygamy, Jaffey concludes that it is the society in which the couple are living which is most affected by polygamy. However he adds that,

"English law can tolerate the validity of a polygamous marriage between foreigners who come to live in England after the marriage... when polygamy is in accordance with the religious belief of the community or communities to which the parties belong at the time of the marriage"⁴⁸

Thus, he concludes that a polygamous marriage should only be invalid "if is so by the law of the domicile of one or both of the parties at the time of the marriage."⁴⁹

The same conclusion is reached in relation to prohibited degrees of relationship because the matrimonial home has most interest.⁵⁰

Whereas in relation to non-age, it is claimed that the law of the domicile of the 'under-age' party has an interest in protecting its domiciliaries from premature marriage and should therefore govern.

⁴⁸ Ibid at p. 40.

⁴⁹ Ibid.

⁵⁰ Because "[t]he purpose of such rules is to prevent marriage relationships which are offensive to the morality or religion prevailing in the country concerned." (ibid). It is not expressly stated that marriages which are allowed by the spouses' domicile can be tolerated by the matrimonial home. It is suggested that there must be limits to such tolerance. For example, it must be doubtful whether a marriage between a brother and sister would be recognised in England, even if valid by the law of the domicile.

C. CRITIQUE OF RESULT-ORIENTED RULES

1. Basis of Construction of Rules

Morris alleges that Cavers' approach would not work any better than Currie's interest analysis approach in an international situation⁵¹ because a judge cannot express a preference for rules adopted by one sovereign state over those of another. This criticism seems to be based on Cavers' own admission that his principles are "value judgments" but it is suggested that it is misconceived. Surely, the difficulty is not in expressing preference for the laws of one state over that of another because the whole basis of choice of law rules is to express such a preference. Rather, the objection is to using **subjective** criteria to exercise this preference.⁵² Whilst the description of Cavers' principles as value judgments may suggest that they are subjective, it is submitted that there is a significant difference between Cavers and Currie. The criteria used in Cavers' principles can be objectively ascertained and applied by anyone. They do not depend on the Court's views as to what is 'better' or whether a State has an interest in the application of its law to a particular situations. True, subjective notions have to be taken into account in formulating the principles. But this is equally so with all choice of law rules. For example, the rule that the lex domicilii applies to determine the essential validity of a marriage involves the subjective notion that the domicile is the most appropriate law to govern. Furthermore, as

⁵¹ As opposed to an inter-state case.

⁵² This was one of the main problems with both the 'better law' approach and Currie's governmental interest analysis (see n. 34 supra).

with traditional choice rules, Cavers' principles are the result of reasoned analysis⁵³. The fact that not everyone will agree with that analysis does not make his principles subjective any more than the fact that not everyone agrees that the law of the domicile is the most appropriate choice of law rule for marriage.

Indeed Morris and Jaffey's approach of basing their rules on governmental interest analysis is no less problematic from this point of view. Whilst result-orientation overcomes the difficulty of actually determining the interests of each particular Government in each particular case, it does not solve the problem of identifying governmental interest in the first place. Whilst this might be relatively easy in Morris' contract example, it is more speculative in relation to a potentially controversial issue like marriage and the analysis of the author of the rule may not command general acceptance.

It may be concluded that, **in the choice of law context**, the problem of the basis on which to select the result for each category of case can only be solved by the development of a set of objective criteria⁵⁴ and principles to inform the categorisation of law-fact patterns and the construction of the result-oriented rules.

⁵³ See p. 133 of Cavers' book (n. 41 supra). Analysis behind the principles of preference can be seen in the specific chapters of the book (e.g. torts in chapter VI).

⁵⁴ Such as Jaffey's principles of justice (see chapter 2 II C 2 supra).

However, it is submitted that the absence of objective criteria is not a problem in the context of our search for a preference rule in the 'conflict of rules' situation. We are using principles of preference to decide between **English** choice rules and **English** recognition rules. The appropriate objective criteria should have already been taken into account in formulating the choice of law and recognition rules. Where there is a conflict between those rules, then the policy of the forum must determine which prevails and thus it is appropriate to base the principles of preference on **English** 'value-judgments' as reflected in domestic policy. We will deal with the problem of ascertainment of domestic policy below.⁵⁵

2. Self-Sufficiency and Complexity.

Caver's approach is not, nor does it purport to be, self-sufficient and it is potentially excessively complex. In a sense, these two points may be two sides of the same coin. It may be that Cavers has not attempted to formulate a complete system to cover every conceivable law-fact pattern because to so would be excessively complex. In any event, since it is beyond the realms of human ability to foresee every possibility, some provision must be made for the unforeseen case.

These criticisms do not seem applicable to Morris and Jaffey because they are both attempting to deal only with a specific issue which has only a limited number of variables. Thus, it is possible to create a non-complex self-sufficient rule.

⁵⁵ See at D infra.

Similarly, the variables in the 'conflict of rules' situation are limited. Thus, it should be possible to formulate principles to cover all likely situations without undue complexity and the likelihood of an unforeseen situation arising is substantially reduced.

3. Certainty

It has been suggested that if the task of formulating the principles of preference is left to the Courts, there would be considerable uncertainty during the development period.⁵⁶

Again, this criticism is not pertinent in the present context. The outcome of cases where the conflict of rules arises is at present uncertain apart from where statute⁵⁷ applies. Thus, the adoption of a result-oriented approach would not create any further uncertainty.

D. ASCERTAINMENT OF POLICY

The need to determine the policy behind substantive laws has been one of the most criticised aspect⁵⁸ of result-selection. Whilst the criticism is generally made with reference to ad hoc result selection, most of it is equally pertinent to the search for policy in order to construct result-oriented rules, especially

⁵⁶ The Law Commission (W.P. No. 89, p. 28 at fn. 104) suggest "50 years is too long for most people to wait for the establishment of rules to determine whether their marriage is valid."

⁵⁷ i.e. Family Law Act 1986 s.50 (see chapter 6 II B 2 infra).

⁵⁸ North, Essays in Private International Law (1993) at p. 114, claims that the "difficulties are legion".

where it is envisaged that the Courts themselves will have to develop the rules.

However, North like other writers, emphasises that the search for the policy of a particular rule is "immeasurably more difficult"⁵⁹ in the international rather than the inter-State context, in which the approach has been applied in the USA. Even then, judicial attempts at analysis of the policy of the rules of sister-States have been exposed as "forum oriented assessment."⁶⁰ This is exactly what is required for our purposes!

Nonetheless, it must be appreciated that even assessment of forum policy is not free from problems. Firstly, we must guard against the idea that an English judge or any other English lawyer can instinctively divine what domestic policy is on any issue. In order to ascertain policy, proper research of the domestic law and its basis must be undertaken. Reference should be made, where appropriate, to the legislative history of statutes⁶¹.

Secondly, as North points out⁶², considerable care has to be taken when dealing with older statutes and cases, which may no

⁵⁹ Ibid at p. 116.

⁶⁰ Cheshire and North (chapter 1, n.1 supra) at p. 33.

⁶¹ cf. North (n. 58 supra) at p. 115. English Courts will now refer to Hansard in certain situations (see Pepper v Hart [1993] AC 593). In any event, we are not expecting Courts to ascertain forum policy in each case.

⁶² Ibid at p. 115.

longer reflect domestic policy. It is suggested that this problem can be solved to a large extent by reference to the reports of the Law Commission or other bodies. In fact, there are relevant reports relating to all the topics covered in this Part of the thesis.

Thirdly, we should remember that whilst we refer to forum policy, the State itself rarely has an interest in disputes between individuals other than the pervasive interest of ensuring that justice is done between the parties. Thus, the search for the policy of the forum is really a search for the forum's idea of what constitutes justice⁶³ between the parties in each case. For convenience, we will continue to refer to this as the forum's policy, but the justice point should be borne in mind.

E. CONCLUSION IN RELATION TO RESULT ORIENTATION

As with choice of law rules, a result selecting approach, as opposed to a global or mechanical rule, can ensure that results are reached which are consistent with the forum's policy.

The fundamental distinction between the two situations is that in the pure choice of law context, there may be a legitimate concern for the policies behind foreign laws; whereas in the 'conflict of rules' context, these policies if appropriate have

⁶³ In this connection, justice means 'substantive justice' between the parties. Assuming that our conflicts rules are based on justice (see chapter 2 II C supra), then **either** solution to the problem should be in conformity with conflicts' justice because either the choice of law rule or the recognition rule will be applied.

already been taken into account in formulating the choice of law and recognition rules. Thus, where there is a conflict between those rules, it is justifiable to determine which prevails on the basis solely of the policy of the forum.

Provided that clear result-oriented rules are constructed to give effect to forum policy, the approach advocated will not cause uncertainty or unpredictability. Since the 'conflict of rules' only arises in limited circumstances, it should be possible to create rules which are easily understood and not over-complex.

IV METHODOLOGY

A. INTRODUCTION

In the next five chapters we will be constructing result-oriented rules, which will be called preference rules, to solve the conflict between choice rules and recognition rules in relation to particular topics. Our aim is to produce results which are in conformity with the policy of the forum. Whilst, we are mainly concerned with result, it will be more intellectually satisfying and easier to justify the proposed rule if an acceptable theoretical basis can be found for the proposed rule.

B. IDENTIFICATION OF THE CONFLICT

In order to understand the scope of the problem, an assessment will be undertaken of when the conflict of rules is likely to arise in relation to each topic. This will involve a consideration of the relevant choice of law rules and a brief

survey of the recognition rules of other countries⁶⁴ to indicate when a decree will be recognised abroad and not in the forum and vice versa.

C. POSSIBLE SOLUTIONS

Four possible preference rules will be considered in relation to each issue. These are:-

1. Always prefer the choice rule.
2. Always prefer the recognition rule.
3. Prefer the choice rule for some purposes and the recognition rule for others (a 'differential rule').
4. Prefer the rule which upholds the validity of the marriage, the succession claim, matrimonial property rights or the tort claim, as the case may be.

It will be seen that the first two rules are identical with the global rules, which we have rejected⁶⁵. However, whilst these rules cannot be supported as global rules, they may produce the appropriate result in a particular category of case. Where the desired result can be achieved either by application of one of the global rules or by means of an expressly result selecting

⁶⁴ The English recognition rules are outlined in Chapter 1. The survey of foreign recognition rules for matrimonial decrees in Chapter 6 at I B is equally relevant to Chapters 7, 8 and 9.

⁶⁵ We saw in Chapter 4 above that the third global rule, preference for the statutory rule, in English law would always result in a preference, if at all, for the recognition rule. Thus, it is not helpful to consider it as a separate preference rule. However, we should bear in mind our conclusion that, where the recognition rule is favoured, then the fact that it is statutory (if that is the case) may add extra weight to its selection as the preference rule.

rule, the former may be preferred as being more consistent with orthodox theory.

There are number of possible differentiations which may serve as the basis for the differential approach in the third preference rule. These will be considered in Chapter 6 and it will be concluded that only one can be supported, which will thereafter be referred to as **the** 'differential rule'.

D. CONSTRUCTION OF THE RESULT-ORIENTED RULE

1. For each of the four possible preference rules in turn:-

(a) The **theoretical basis** for the rule in relation to the particular topic will be sought.

(b) Any caselaw and statutory **authority** for each rule will be reviewed.

(c) The **results** produced by the rule in relation to each of the possible law-fact patterns will be demonstrated and illustrated in tabular form.

2. Forum policy will be ascertained by examination and analysis of legislation, caselaw and reports of law reform bodies.

3. Forum policy will be applied to determine by analogous reasoning what result is required by such policy in the conflict of rules situation in relation to each law-fact category.

4. The rule(s) which produce(s) the desired result for each law-fact category will be recommended as the appropriate preference rule(s) for that situation.

CHAPTER 6: CAPACITY TO REMARRY

I. SCOPE OF THE PROBLEM

A. INTRODUCTION

The likelihood of a conflict arising between the choice rule and the recognition rule in relation to remarriage after a matrimonial decree has increased substantially over the last 50 years. Until 1953, foreign divorces and nullity decrees were only recognised in England when they were granted by or recognised in the country of domicile. As the choice rule for capacity to marry was the law of the domicile, a conflict between the choice rules and the recognition rules could only arise where the party in question had changed his/her domicile between the date of the divorce or nullity decree and the date of the remarriage. The widening of the grounds of recognition of foreign divorces and nullity decrees at common law meant that the conflict could arise even without a change of domicile where the decree was recognised by the widened rules.

As we have seen¹, recognition of divorce and nullity decrees are now governed by statute. In order to identify the scope for the 'conflict of rules' arising we need to examine the rules for recognition of matrimonial decrees in other countries.

¹ At chapter 1 II B supra.

B. RECOGNITION OF DECREES IN OTHER COUNTRIES

A brief survey of some foreign recognition rules will be sufficient to indicate in what sort of situation divorces will be recognised in England and not in the country of domicile and vice versa. It will be convenient to consider the position in Commonwealth countries, the USA and civil law countries separately.

1. Commonwealth countries²

(a) Recognition rules in Commonwealth countries

In general Commonwealth countries still adhere to the common law recognition rules³. Thus a foreign divorce etc. will be recognised in the following four situations:-

- (i) Where it is obtained in the country of the parties' domicile.⁴
- (ii) Where it is recognised by the law of the parties' domicile⁵.

² See generally McClean (chapter 3, n.22 supra).

³ Often these have been codified or expressly saved by statute. See McClean, ibid chapter 3, the Canadian Divorce and Corollary Relief Act 1985 s.22(3) and the Australian Family Law Act 1975 s.104(5).

⁴ Rule in Le Mesurier [1895] AC 517. Where the wife has a separate domicile statute will usually provide that it is sufficient if the divorce is granted in the domicile of either parties (e.g. Australian Family Law Act 1975 s. 104(3)). Even where the wife's domicile is dependent on the husband, statute may be provided that a divorce granted on the basis of the wife's domicile, determined as if she were unmarried will be recognised (e.g. Canadian Divorce Act 1968 s.6(2)).

⁵ Rule in Armitage v A-G [1906] P. 135.

(iii) Where the recognising Court would mutatis mutandis have jurisdiction on the basis of the facts existing in relation to the foreign Court.⁶

(iv) Where it is obtained in a country with which one of the parties had a 'real and substantial connection'.⁷

Some countries have added to those rules by statute either to promote certainty⁸ or in order to enable them to ratify the Hague Convention on Divorce and Legal Separations⁹.

(b) Comparison with English recognition rules

In relation to **formal** divorces, the English statutory

⁶ Travers v Holley [1953] P. 246 (for application in Australia see Sykes and Pryles (chapter 5, n.22 supra) at p. 466 and in Canada see Allerie and Director of Vital Statistics (1963) 41 DLR (2d) 553). It is not sufficient that the divorce would be recognised in such a country. i.e. it is not possible to combine the rule in Armitage with that in Travers v Holley, Mountbatten v Mountbatten [1959] P. 43.

⁷ Indyka v Indyka [1969] 1 AC 33 (for application in Australia see Nicholson v Nicholson [1971] 1 NSWLR 1 and In the Marriage of Dornom, Australian Digest, 3rd edn (1992) 35-417 para. 18.68, and in Canada see Kish v Director of Vital Statistics (1973) 35 DLR (3d) 530). It seems to be sufficient that the divorce etc. was recognised in the country with which there is a real and substantial connection, Mahoney v Mahoney [1968] 1 WLR 1773 (i.e. it is possible to combine the Indyka rule with the Armitage rule), although this result has been criticised. For analysis of the development of the Indyka rule see McClean (chapter 3, n.22 supra) at pp. 43 et. seq.

⁸ For example, in Canada, there is statutory provision for recognition of a divorce granted on the basis of the domicile of the wife (determined as if she were unmarried) and for a divorce granted in a country where either party was ordinarily resident for more than one year before commencement of the proceedings (Divorce Act 1986 s.22).

⁹ For example, in Australia.

jurisdictional bases will generally produce more liberal results than the common law rules. For example, nationality alone¹⁰ or domicile in the sense of the decree granting state after a period of short temporary residence¹¹, will not constitute a 'real and substantial connection'.¹² The reciprocity principle will only lead to more generous results in the rare situation¹³ that the recognising country has jurisdiction rules wider than habitual residence, nationality or domicile.

However, the effectiveness requirement in the English statute may restrict recognition of divorces which would be recognised under the common law rules¹⁴ or under a foreign statute. For example,

¹⁰ Keresztessy v Keresztessy (1976) 73 DLR (3d) 347. Although in Australia, such a divorce would be recognised under the reciprocity principle because jurisdiction is taken on the basis of nationality alone (Family Law Act 1975 s.39(3)(a)).

¹¹ As in Nevada. See Suko v Suko [1971] VR 28 and compare Lawrence v Lawrence [1985] Fam. 106.

¹² A fortiori, connections other than nationality, habitual residence or domicile will not be sufficient (e.g. the place where the marriage was celebrated and the parties were previously domiciled, Peters v Peters [1968] P. 275). The possibility of residence which is not yet habitual being sufficient is unlikely, given the liberal interpretation of habitual residence in England, see R v London Borough of Brent ex p. Shah [1983] 2 AC 309) and the fact that periods of residence of less than a year have been held not to evidence a real and substantial connection (see e.g. Re Darling [1975] 1 NZLR 382 and other cases cited by McClean (chapter 3, n.22 supra) at p. 48).

¹³ For example, in Australia, nullity jurisdiction may be founded on mere presence (Family Law Act 1975 s.39(4)(b)).

¹⁴ It has been held in Australia that under the statute, as at common law, it is sufficient that the tribunal has general competence to hear the type of action involved and that it is not relevant that the jurisdiction was exercised irregularly, see

in Australia it is sufficient that the divorce is "**effected in accordance** with the law of an overseas jurisdiction"¹⁵; whereas, as we saw above, the English statute requires that the divorce is effective in the jurisdiction **in which** it was obtained. Thus, for example, a talaq or ghet pronounced or obtained in Australia would be recognised¹⁶ there provided that it was done so in accordance with the law of a foreign country, such as Pakistan or India, with which one of the required connecting factors existed.

In relation to **informal** divorces, the scope for discrepancy is much wider because of the English legislation which was designed to be more restrictive than the common law¹⁷. There is no evidence that foreign courts will refuse to recognise informal

Norman v Norman (No. 3) (1970) 16 FLR 231. (For discussion of the effectiveness requirement in England see chapter 3 at II C 2 (a) supra).

¹⁵ s.104(8) makes clear that the phrase "effected in accordance with the law of an overseas jurisdiction" includes all situations where the overseas jurisdiction recognises a divorce etc. obtained in a third country. It is arguable that this provision only applies to the statutory bases of recognition and so does not overrule Mountbatten v Mountbatten [1959] P. 43. (see Sykes and Pryles (chapter 5, n.22 supra) at p. 470.

¹⁶ Sykes and Pryles ibid; cf. English Family Law Act 1986 s.44(2) (discussed in Chapter 1, III B 1 supra).

¹⁷ See leading pre-1973 English case of Qureshi v Qureshi [1972] Fam. 173. The Australian legislation specifically provides that all the recognition provisions apply "in relation to dissolutions and annulments effected whether by decree, legislation or otherwise" (Family Law Act 1985 s.104(10)). The word 'decree' has been removed in the recognition provisions of the Canadian Divorce and Corollary Relief Act 1985 to remove any ambiguity (see Castel, Canadian Conflict of Laws, 2nd edn. 1986 at p. 315).

divorces on public policy grounds.

2. The United States

(a) US Recognition Rules

The position in relation to recognition of foreign divorces in the USA is not entirely clear. Scoles and Hay¹⁸ discern the following general rules from the caselaw:-

(i) A foreign divorce of foreign nationals obtained in a country with which one party has a close relationship¹⁹ will be recognised provided that it is valid in that country. This will include extra-judicial divorces obtained abroad²⁰. The fact that the parties are domiciliaries of a US State would not seem to prevent recognition²¹.

(ii) A foreign divorce of US nationals obtained in the country

¹⁸ Scoles and Hay, *Conflict of Laws* (1982) at pp. 495 et. seq. See also Baade, 72 Col L.R. (1972) 329 pp. 334 et. seq. and Comment (1969) 35 Minn. L.Rev. 612.

¹⁹ Based on US Restatement (2nd) para. 72 which provides for divorce jurisdiction "if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage."

²⁰ e.g. Machransky v Machransky 31 Ohio App. 482, 166 NE 423 (1927) and see Chaudry v Chaudry 159 N.J. Super 566, 388 A. 2d 1000 (1978) discussed at text accompanying n.28 infra.

²¹ Sherif v Sherif 76 Misc. 2d 905, 352 NYS.2d 781 (1974) (talaq obtained in Pakistan).

of domicile²² will be recognised provided that it is valid there.

(iii) A foreign inter partes divorce of US domiciliaries who travel abroad for the purposes of obtaining the divorce will be recognised, even if the jurisdiction of the foreign Court is based on short residence or mere appearance.²³ However, ex parte divorces obtained in such circumstances will not be recognised²⁴ and nor will 'mail-order' divorces obtained whilst remaining in the USA.²⁵

(iv) Extra-judicial divorces obtained in the USA will not be recognised.²⁶ The key distinction is whether the divorce authority originates from abroad and not whether the parties were

²² Domicile of **one** party is probably sufficient. See Comment (1969) 53 Minn. Law Rev. 612 at pp. 619-20.

²³ Thus, easy 'vacation' divorces obtained in Mexico, Haiti and the Dominican Republic have been recognised. See, for example, leading New York case of Rosentiel v Rosentiel 16 N.Y. 2d 64, 73, 262 N.Y.S. 2d 86, 209 N.E. 2d 709, 712 (1965). Provided that such a divorce is recognised in one State, a declaratory judgment obtained therein will be recognised in all other states of the Union under the Full-Faith-and-Credit principles of the US Constitution.

²⁴ Scoles and Hay (n. 18 supra) p. 501.

²⁵ See Rosenbaum v Rosenbaum 309 N.Y. 371, 130 N.E 2d 902 (1955).

²⁶ See Shikoh v Murff 257 F.2d 306 (2d. Cir. 1958) and Chertok v Chertok 208 App. Div. 161, 203 NYS 163 (1924). and Comment (1969) 53 Minn. L.Rev. 612, 627 et seq.

physically present in the USA or not.²⁷ Thus, in Chaudry v Chaudry²⁸ a trans-national talaq pronounced at the Pakistani Consulate in New York and later confirmed by a Court in Pakistan, where the wife was resident at the time, was treated as obtained in Pakistan and recognised²⁹.

(b) Comparison with English Recognition Rules

There would seem to be little scope³⁰ for discrepancy between principle (i) and English law in relation to formal divorces. However, informal divorces may be recognised in situations where they would not be recognised in England³¹.

Principle (ii) would seem to yield similar results to the English rules both in relation to formal divorces³² and informal divorces.³³

²⁷ Comment ibid at p. 635.

²⁸ 159 N.J. Super 566, 388 A. 2d 1000 (1978).

²⁹ Under the principle in (i) above. It was held that 'principles of comity' required recognition.

³⁰ Although ex parte divorces obtained in the country of nationality of one party might not be recognised, at least where the parties are U.S. domiciliaries.

³¹ For example a bare talaq pronounced in the circumstances of Sherif v Sherif 76 Misc. 3d 905, 352 NYS 2d 781 (1974), would not be recognised in England because it was not obtained in the domicile of either party.

³² Habitual Residence under English law may well amount to domicile in the US sense.

³³ Except perhaps in relation to a divorce where one party has been habitually resident in England for 12 months.

The divorces recognised under principle (iii) will only be recognised in England where one party is a national of, domiciled in or habitually resident in the foreign country. Thus, usually vacation divorces will not be recognised³⁴ unless one party has become domiciled in the 'divorce haven' within the meaning of the concept in that country.³⁵ .

Divorces refused recognition under principle (iv) will not be recognised in England because they are not effective in the place where they are obtained. There is no English authority on a 'foreign' trans-national talaq. It was argued above³⁶ that the pronouncement of a talaq in a third country does not infringe English public policy and thus there is no reason to deny recognition to such a divorce.

3. Civil Law Countries

A distinction must be drawn between those countries which have adopted the Hague Convention³⁷ and those which have not. In the

³⁴ Mere residence or appearance will not suffice. Thus, a decree obtained in Mexico after two days residence there, would still not be recognised in England, even if recognised in the New York residence of the wife (as in Mountbatten v Mountbatten [1959] P. 43).

³⁵ See e.g. Lawrence v Lawrence [1985] Fam. 106 discussed at II B 2 infra.

³⁶ See discussion in Chapter 1 II B 4 supra.

³⁷ Czechoslovakia, Cyprus, Denmark, Egypt, Finland, Italy, The Netherlands, Norway, Slovak Republic, Sweden and Switzerland (written communication from Secretariat Hague Conference dated 28th. July 1994).

former, the only scope for discrepancy in relation to formal divorces and legal separations covered by the Convention³⁸, will be where the English rules are more generous³⁹ than those of the Convention or where a reservation has been entered under article 19 or 24 of the Convention.⁴⁰ Informal divorces are not covered by the Convention.

In relation to divorces not covered by the Convention, civil law countries tend to combine jurisdictional and choice-of-law considerations to determine whether to recognise a divorce.⁴¹ In general, a foreign divorce of a home national will not be recognised unless it is consistent with the substantive law of

³⁸ The Convention only requires recognition of divorces obtained in Contracting States (art. 1).

³⁹ e.g. Under the Hague Convention, the nationality of the petitioner is only a sufficient jurisdictional base if (s)he is or has been (for at least one year in the previous two) habitually resident in the country of nationality (art. 2(4)). Alternatively, where the country of last habitual residence does not provide for divorce, it will be sufficient if the petitioner was present in the country of his/her nationality at the date of the institution of proceedings (art. 2(5)). Similarly the habitual residence of the petitioner alone is not sufficient unless the habitual residence has lasted for at least one year or the spouses last habitually resided there together (art. 2(2)).

⁴⁰ Czechoslovakia, Italy, Luxemburg and the Slovak Republic entered reservations under art. 19 para. 1. Switzerland and Czechoslovakia have entered reservations under art. 24 (see Information Concerning Hague Convention on Private International Law (1993) XL Netherlands Int. Law Review 278 - 279).

⁴¹ For example, France. See Rabel, *The Conflict of Laws: A Comparative Study*, vol. 1 (1958) at p. 509.

the nationality. This may result in refusal to recognise divorces⁴² which would be recognised in England, where recognition does not depend on what substantive law was applied.

No distinction seems to be made between formal and informal divorces, although extra-judicial proceedings in the forum may well not be recognised.⁴³

4. Countries not Providing for Divorce

The 'conflict of rules' will arise wherever one of the parties is domiciled in a country which does not allow divorce at all⁴⁴. Most of the relevant English decisions concerned Italian domiciliaries at a time when Italian law did not provide for divorce and would not recognise the foreign divorces of their nationals.⁴⁵ In recent years, Italy and various other countries

⁴² The likelihood of this will decrease as grounds for divorce are liberalised (see Scoles and Hay, n. 18 supra, at p. 506 para 15.27 n. 2).

⁴³ For example, in Germany - see decision in BGH [1982] NJW 517, cited in Scoles and Hay, Conflict of Laws 1989 - 1990 Supplement para. 15.24.

⁴⁴ Art. 20 of the Hague Convention on Legal Separations and Divorce allows a contracting state to reserve the right not to recognise a divorce if it does not provide for divorce and both parties are nationals of that country. This reservation has not been used (see reference in n. 40 supra).

⁴⁵ For example, Perrini v Perrini [1979] Fam. 84, R v Brentwood Marriage Registrar ex p. Arias [1968] QB 956 and Padolecchia v Padolecchia [1968] P 314.

which did not make provision for divorce have now done so.⁴⁶ Thus, the scope for conflict where the lex causae is a country which does not recognise divorce at all is relatively small⁴⁷ in practical terms.

C. CHOICE OF LAW RULE FOR CAPACITY TO MARRY

There has long been a dispute between leading English academics as to whether capacity to marry is governed by the dual domicile test⁴⁸ or the intended matrimonial home test⁴⁹. Whilst the decisions in most of the old caselaw were equivocal, there was little express judicial preference⁵⁰ for the intended matrimonial home test. More recently some judges have favoured

⁴⁶ For example, Argentina (Law No. 23.515, which came into effect on June 21st. 1987), Brazil (Amendment XI to Constitution in 1977) and Spain (Law No. 30/1981 of July 7th. 1981).

⁴⁷ Divorce is still not available in the Republic of Ireland following the success of the opponents of divorce in the referendum of 26th. June 1986. However, foreign divorces granted by the Court of the domicile will be recognised. See North, (chapter 1, n. 1 supra), at pp. 380 - 381. The possibility of extending the recognition of foreign divorces is discussed ibid at pp. 381 et seq.

⁴⁸ Supported in successive editions of Dicey and Morris (chapter 1, n.1 supra) and Morris (chapter 1, n.142 supra).

⁴⁹ Supported in early editions of Cheshire's Private International Law, e.g. 7th. edn. (1965) pp. 276 et. seq.

⁵⁰ cf. Radwan v Radwan (No. 2) [1973] Fam. 35. However, Cumming-Bruce J. specifically limited his decision to capacity to enter into a polygamous marriage and the decision has been trenchantly criticised. See, for example, Karsten (1973) 36 MLR 291 and Pearl [1973] CLJ 143.

a real and substantial connection test⁵¹ or a rule of alternative reference⁵², which seems to be a modern version of the intended matrimonial home test. Thus, the law may be said to be in a state of flux⁵³ in England.

In general, it will make little difference to the 'conflict of rules' analysis which rule is used. However, in some cases, applying a law other than the domicile may make it possible to avoid the 'conflict of rules' problem completely where there is no dispute between the law to be applied and the forum about the recognition of the decree⁵⁴. It must be borne in mind, though, that it will not always be possible to show that another law has a closer connection than the law of the domicile⁵⁵.

⁵¹ See Lincoln J. in Lawrence v Lawrence [1985] Fam. 106 and Lord Simon in Vervaeke v Smith [1983] A.C. 145. See also Fentiman [1985] CLJ 256.

⁵² See Cairns L.J. in Lawrence v Lawrence [1985] Fam. 106.

⁵³ According to the Law Commission, W.P. No. 89 at p. 60 "there is no decision which prevents the Court of Appeal or the House of Lords from adopting either test". Furthermore, one of the reasons that they did not make any recommendations for statutory reform of the choice of law rule for essential validity of marriage in Rept. No. 165 was to allow the Courts to continue to develop the law themselves.

⁵⁴ As was done by Anthony Lincoln J. at first instance in Lawrence v Lawrence [1985] Fam. 106. Here the forum itself was held to be the country with the most real and substantial connection and thus no conflict could arise.

⁵⁵ In R v Immigration Appeal Tribunal ex p. Rafika Bibi [1989] Imm AR 1, it was held that the real and substantial connection test was inappropriate because the marriage had connection with two legal systems. The husband was a British citizen domiciled in England who married a Bangladeshi domiciliary in Bangladesh in 1969. As the wife remained in

For ease of exposition, we will continue with the assumption that the choice rule for capacity to marry is the lex domicilii, unless otherwise stated.

II POSSIBLE SOLUTIONS⁵⁶

A. PREFER THE CHOICE RULE

1. Theoretical Basis

This approach, under which the validity of the remarriage is determined solely according to the choice of law rule governing capacity and the forum's recognition rules are ignored can be supported by the following alternative theories.

(a) 'The status theory'

The concept that status is governed by domicile is fundamental⁵⁷ and takes precedence over other competing rules.⁵⁸ This idea can be illustrated by the fact that historically, the English

Bangladesh and the husband lived in England, there was found to be no matrimonial home.

⁵⁶ For tabular illustration of results of applying each preference rule, see Table 3 in the Appendix infra.

⁵⁷ See Udny v Udny (1869) LR. 1 Sc. and Div. 441 at p. 457 per Lord Westbury, Dicey and Morris 9th. edn. (1973) Rule 31 and Graveson, The Conflict of Laws 7th. edn. (1974) at p. 226. Levontin (1953) 3 Am. J. Comp. Law 199 at 202. writes, "Anglo-American law.... considers the community of a person's domicile as the one most intimately connected with his status and with the legal, social and economic consequences flowing therefrom." The Law Commission (Rept. No. 137 para. 6.59) refers to "the tradition of the common law that status is exclusively to be determined by the law of the domicile."

⁵⁸ See Gottlieb (1977) 26 ICLQ 734 at p. 778.

rule for recognising foreign divorce and nullity decrees was simply an application of the domicile choice rule. However, even then it was possible for a conflict to arise where there was a change of domicile. The question of recognition would be governed by the law of the domicile at the time of the decree whilst the capacity would be governed by the law of domicile at the time of remarriage. In such a case, the 'status theory' would seem to favour the domicile at the time of remarriage because in determining the party's present status the deciding factor is whether the remarriage is valid.⁵⁹

(b) 'The capacity theory'

This theory is based on the premise that the validity of the remarriage depends upon the capacity of the parties and that capacity is separate from status. Thus, capacity is governed by the law indicated by the choice of law rule and does not flow directly from status as determined by the foreign decree. Allen distinguishes between status, capacity and rights as follows,

"Status, the condition which gives rise to certain capacities or incapacities or both; Capacity, the power to acquire and exercise rights; and the Rights themselves

⁵⁹ In Padolecchia v Padolecchia [1968] P. 314, the Court favoured the domicile at the time of the remarriage because otherwise the propositus would be denied the power "to change his capacity by changing his domicile or nationality." Palsson (chapter 1, n. 121) cites a German case (at p. 223) supporting application of the national law at the time of the remarriage and an Italian case (at p. 222 n. 706) supporting application of the national law at the time of the divorce. Gottlieb (1977) 26 ICLQ 734 at p. 777 suggests that it might be sufficient if either domicile recognises the divorce.

which are acquired by the exercise of capacity." ⁶⁰

One advantage of the 'capacity theory' over the 'status theory' is that it does not depend on the choice of law rule for the essential validity of marriage being the domicile.

2. Authority

Support for the 'status theory' can be found in the two classic common law cases⁶¹ where this issue arose, the Ontario case of Schwebel v Ungar⁶² and the English case of R v Brentwood Superintendent Registrar of Marriages ex p. Arias.⁶³ It will be helpful to give a summary of the facts of these cases.

In Schwebel v Ungar, the defendant W. married her first husband H1 in Hungary in 1945. Shortly after their marriage they decided to emigrate to Israel. In a transit camp in Italy H1 gave W. a get, an extra-judicial Jewish divorce. The defendant then continued to Israel where she acquired a domicile of choice and lived for a number of years before coming to Ontario where she met and married the Ontario domiciled Plaintiff. The Jewish divorce was not recognised either by the law of Hungary or Italy and was thus not eligible for recognition under the recognition rules of Ontario. However, the get was recognised in Israel, the domicile of W. It was held that since by her domicile W. was

⁶⁰ (1930) 46 LQR 277, 279. Engdahl (1969) 55 Iowa L.Rev. 56, 65 contrasts this approach with Austin who would say that "the rights, duties, capacities or incapacities ... **constitute** the status."

⁶¹ Palsson (chapter 1, n. 121 supra) pp. 229 - 239 brings many examples of the supremacy of the lex patriae in Continental decisions.

⁶² (1963) 42 DLR (2d) 622 afd. (1964) 48 DLR (2d) 644.

⁶³ [1968] 2 QB 596 (hereinafter 'the Brentwood Marriage case').

single and had capacity to remarry, the second marriage was valid.

In the Brentwood Marriage case, H. was an Italian national domiciled in Switzerland. His first marriage had been dissolved in Switzerland and his first wife had remarried. However, under the law of H's nationality the divorce was not recognised and he did not have capacity to remarry. Since the Swiss law referred capacity to marry to the law of the nationality he was unable to remarry in Switzerland and thus came with his intended second wife to England hoping to remarry. The Swiss divorce was eligible for recognition under English recognition rules. The Brentwood Marriage Registrar refused to marry them because H. lacked capacity. This decision was upheld by the Divisional Court on the ground that capacity to marry is governed by the law of the domicile and that by Swiss law H. did not have such capacity.

In the Brentwood Marriage case, the problem was not expressed by the Court as being a conflict between choice rules and recognition rules. However, in line with the 'status theory', the Court emphasised the importance of status being governed by the law of the domicile. In the words of Sachs L.J., "status is particularly a matter for the law of the country in which the parties are domiciled."⁶⁴

In Schwebel v Ungar, where there does seem to have been an awareness of the conflict between Ontario recognition rules and Ontario choice rules, it was stated that

"to hold otherwise would be to determine the personal status of a person not domiciled in Ontario by the law of Ontario instead of by the law of that person's country of domicile."

and

"for the limited purpose of resolving the difficulty created by the peculiar facts of the case, the governing consideration is the status of the Respondent under the law

⁶⁴ [1968] 2 QB 956 at pp. 967 - 968.

of her domicile at the time of her second marriage and not the means whereby she secured the status."

Again, the supremacy of the domicile seems to have been the main concern⁶⁵ in line with the 'status theory.'

3. Results

a) Where the lex causae recognises the decree.

This is the situation in example M1.⁶⁶ We saw that application of the choice rule will lead to the validity of the remarriage between Alexander and Bella.

This may lead to absurdity⁶⁷ if the forum is called upon to determine the validity of the matrimonial decree in a different context. For example, suppose that Natasha, the first wife becomes domiciled in England. It would seem that she would not have capacity to remarry because the get is not recognised. If she died intestate domiciled in England, Alexander would seem to have the right to claim the surviving spouse's share as he would seem to be recognised as Natasha's husband by the law of her

⁶⁵ An alternative explanation of Schwebel v Ungar is that the case extended the Ontario recognition rules so that a divorce would be recognised if it was recognised by a domicile subsequently acquired by one of the parties, see Gottlieb (1977) 26 ICLQ 734 at p.776 and Webb (1965) 14 ICLQ 659.

⁶⁶ Chapter 1, III supra.

⁶⁷ See Jaffey (1975) 91 LQR 320, 322 and Gordon (chapter 1 n.1. supra) pp. 151-2.

domicile at the date of her death.⁶⁸ Similarly if Alexander were to become domiciled in England and to die intestate, he might be considered to leave two widows. It is thus possible that Alexander might be considered as married to Bella for some purposes and to Natasha for other purposes. This has been referred to as 'legal bigamy'⁶⁹ and 'internal disharmony.'⁷⁰

Engdahl argues that such disharmony is not problematic⁷¹ because the notion of universality of marriage⁷² is misconceived. Whether or not Engdahl's view is accepted, the fact that the result creates disharmony cannot be considered separately from the other aspects of the result. As Clark⁷³ says,

"Logical inconsistency need not bother us if a valid social policy is served."

We shall examine below⁷⁴ forum policy in relation to remarriage

⁶⁸ cf. The approach in the German decision, KG 13 Jan 1925, JW 1925, 2146, brought by Palsson (chapter 1, n.121 supra) at p.223, where it was held that whilst the original divorce decree was not recognised, the celebration of a valid remarriage by one of the parties had the effect of ending the first marriage from the date of the remarriage. Gordon (chapter 1, n.1 supra) at p. 151-153 supports such an approach.

⁶⁹ Palsson ibid at pp. 216 and 225.

⁷⁰ See chapter 1, n. 103 supra.

⁷¹ (1969) 55 Iowa L.Rev. 56. At p. 101 he gives other examples of where marriages are recognised for some purposes and not others.

⁷² See Graveson (n. 57 supra) at pp. 234 - 238.

⁷³ The Law of Domestic Relations 2nd. edn. (1987) para. 13.4.

⁷⁴ At section III infra.

following divorce.

We should also point out that in many cases inconsistency of status within the forum will be an entirely theoretical problem because the party's status will not in fact become an issue in the different circumstances postulated. Usually the parties to the first marriage which has been purported to be dissolved will not wish to assert that their marriage continues. Any claim, relying on the continued subsistence of that marriage, can be barred by the doctrine of preclusion⁷⁵ where appropriate.

b) Where the lex causae does not recognise the decree

In this situation too, there will be internal disharmony. As we saw in the Brentwood Marriage case, whilst the first marriage was no longer considered to be subsisting for any purposes as between the parties to it, in relation to the proposed remarriage the husband was still considered to be a married person. This inconsistency created by the English decision simply mimics the inconsistency⁷⁶ of the Swiss position.

⁷⁵ Discussed in detail at Chapter 6, II A 3 infra.

⁷⁶ It may be argued that this position contains no inconsistency but merely distinguishes between the effect of a divorce decree in ending the legal relationship between the parties to the first marriage and the effect of a divorce decree as a licence to remarry. See Palsson (chapter 1, n.121 infra) at p. 240 and discussion at B 1 infra.

A similar phenomenon can be seen from example M2⁷⁷. Evita is considered as a divorced person in England because the divorce is recognised. However, she cannot validly remarry whilst she retains her Argentinian domicile.

This practical problem is the converse of 'legal bigamy'. Thus, one⁷⁸ or both⁷⁹ parties are in a state of 'enforced legal celibacy'. The spouse in question is no longer married to his/her first spouse and cannot remarry⁸⁰. (S)he is thus being denied the fundamental right of marriage⁸¹. The unfairness of this situation is exacerbated where the other party to the first marriage is free to remarry, as in the Brentwood Marriage case.

B. PREFER THE RECOGNITION RULE

1. Theoretical Basis

It may be argued that, where the foreign decree is recognised, the recognition policy of the forum should be applied to its logical conclusion by giving 'full effect' to the foreign divorce

⁷⁷ Chapter 1, III supra.

⁷⁸ In the Brentwood Marriage case, it was only the husband who could not remarry because of his Italian nationality.

⁷⁹ In example M2, Pedro also cannot remarry whilst he retains his Brazilian domicile.

⁸⁰ This has been called 'legal schizophrenia', Palsson (chapter 1, n.121 supra) at p. 256.

⁸¹ Khan Freund (chapter 1, n.103 supra at p. 293) writes "The revulsion which one feels against this decision is not, however, caused by its treatment of the incidental question, but by its result which is inimical to the freedom of marriage."

decree. Ackner L.J. expresses the logic as follows,

"I consider that it is plainly inconsistent with recognising a divorce to say in the same breath that the marriage which it purported to dissolve still continues in existence. Such a recognition would be a hollow and empty gesture"⁸²

This rationale assumes that it is necessary to allow remarriage in order to give 'full effect' to a matrimonial decree.

The basis for preferring the recognition rule where the decree is not recognised is much less clear.⁸³ It has been suggested that the basis is the forum's interest in monogamy⁸⁴. Thus, whilst the forum still considers the first marriage to be subsisting it cannot recognise the validity of the second marriage, even if it is valid by the law of the domicile⁸⁵. Nott⁸⁶ suggests that a distinction might be drawn in this situation between allowing remarriage in the forum, which would be tantamount to authorising bigamy and recognition of a foreign remarriage in which the forum has less interest.

⁸² [1985] Fam. 106 at p. 123 The same idea has been expressed variously as "the obvious consequences" (per Anthony Lincoln J. in Lawrence v Lawrence [1985] Fam. 106 at p. 112) and "the tail must go with the hide" (per Douglas J. in Estin v Estin 334 U.S. 541, 68 S.Ct. 1213 (1948)).

⁸³ We have already seen that the policy behind the non-recognition rule does not necessarily require invalidation of the remarriage (chapter 3 III C supra).

⁸⁴ See Palsson (chapter 1 n.121 supra) at p. 216.

⁸⁵ See Jaffey (1979) 91 LQR 320 at p.322.

⁸⁶ (1985) 15 Fam. Law 199 at p. 202.

2. Authority

(a) Where the decree is recognised

Support for the 'full effect' or 'logical conclusion' approach can be found in recent English caselaw and statute.

In the Court of Appeal case of Lawrence v Lawrence⁸⁷, H1 and W were at all material times domiciled in Brazil. W. obtained a divorce from H1 in Nevada. This divorce was not recognised in Brazil, but did satisfy the English recognition rules because of W's domicile in Nevada in the Nevada sense. The case concerned the validity of W's remarriage to H2, an English domiciliary. A majority of the Court of Appeal held that the recognition of the divorce by virtue of the 1971 Recognition of Divorce and Legal Separations Act 1971 carried with it the right to remarry and thus the second marriage was valid. The minority in the Court of Appeal and the first instance Judge came to the same conclusion on different grounds⁸⁸.

Whether or not this approach in fact represented English law at the time of the decision in Lawrence is open to doubt. In particular, it will be noted that the decision appears to be irreconcilable with that in the Brentwood Marriage case. There are, however, two possible ways in which the cases might be distinguished.

Firstly, it might be argued that it is the wording of the 1971 Act⁸⁹ which requires the conclusion that recognition of the

⁸⁷ [1985] Fam. 106.

⁸⁸ i.e. that the essential validity of the second marriage was governed by English law as the law of the intended matrimonial home or the law with the most real and substantial connection to the marriage (see section I C supra).

⁸⁹ i.e. that in section 3 of the 1971 Act (now section 46 Family Law Act 1986) where it is stated that, "the validity of an overseas divorce...shall be recognised" the word divorce must be taken to have the same meaning as divorce in English

divorce automatically confers freedom to remarry. This seems to be the basis of Sir David Cairn's judgment⁹⁰, which is narrower on this point than Ackner L.J.'s. Since the divorce in the Brentwood Marriage case was recognised under common law prior to the 1971 Act, this conclusion did not follow there.

Secondly, the Brentwood case concerned the question of a priori permission to remarry whereas Lawrence concerned the ex post facto recognition of a second marriage which had already taken place. It might be argued that the policy of giving 'full effect' to the foreign divorce is more important where the parties have already relied on that divorce in order to effect a second marriage⁹¹. However, it is clear that neither of the majority in Lawrence purported to make such a distinction.

It is therefore submitted that both of these apparent distinctions merely attempt to disguise the fact that the policy in the two cases is diametrically opposed. In the Brentwood case, precedence was accorded to the domicile choice

domestic law unless the contrary is stated.

⁹⁰ He interprets divorce in section 3 as denoting dissolution with the consequential right to marry again, as in English domestic law. (see at [1985] Fam. 106 at p. 135 C-D of the judgement).

⁹¹ This view was taken by German Courts prior to 1971 (see Palsson, chapter 1, n.121 supra, at p. 232). But cf. Clarkson (1990) 10 Legal Studies 80 at p. 82 who claims that there is no justification for applying more lenient rules to the ex post facto situation, because taken to its logical conclusion this approach would require recognition of all marriages.

rule; whereas in Lawrence precedence was accorded to the recognition rule. This conclusion can be supported by reference to the case of Perrini⁹².

In this case, W1, an American domiciled in New Jersey obtained a nullity decree from H, an Italian national, in the New Jersey courts. This decree was entitled to recognition in England on the basis of W1's residence in New Jersey for more than three years, but was not recognised in Italy. H. subsequently remarried W2, an English domiciliary, in England. It was held at first instance that the second marriage was valid.

The main problem with this decision is that the conflict between the recognition rule and the choice rule does not seem to have been perceived by the Judge who does not mention the Brentwood case. However, the mere fact that Sir George Baker P. simply treated the case as a recognition case suggests that he agreed with the conclusion later reached by Ackner L.J. that recognition of a foreign divorce or nullity decree confers capacity to remarry. Since the case concerned common law recognition rules, Sir David Cairns' 'via media' could not apply.

Whether or not Lawrence and Perrini were correctly decided at the time, the enactment of section 50 Family Law Act 1986 has ensured that the decisions would today be correct. However, these pre-section 50 decisions are not only of historical interest for two reasons. Firstly, as already seen they give us some insight into the basis for giving precedence to the

⁹² [1979] Fam. 84.

recognition rule and secondly, they may be relevant where the case falls outside section 50 as explained below.

Section 50 Family Law Act 1986 states:

"Where in any part of the United Kingdom-

(a) a divorce or annulment has been granted by a court of civil jurisdiction, or

(b) the validity of a divorce or annulment is recognised by virtue of this Part⁹³

the fact that the divorce or annulment would not be recognised elsewhere shall not preclude either party to the marriage from re-marrying in that part of the United Kingdom or cause the remarriage of either party (wherever the re-marriage takes place) to be treated as invalid in that part."

This provision replaces section 7 of the Recognition of Divorces and Legal Separation Act 1971 which was limited to persons re-marrying in the United Kingdom after a foreign divorce. The anomalies caused by this limitation⁹⁴ can be seen by the fact that section would have applied to the facts of the Brentwood case, but did not apply in Lawrence. Indeed this discrepancy may help to explain the attitude of the Court of Appeal in the latter case⁹⁵.

⁹³ i.e. Part II of the Family Law Act 1986.

⁹⁴ Discussed in more detail at C infra.

⁹⁵ Sir David Cairns ([1985] Fam. 106 at p. 135) claims that it would be absurd if the divorce enabled the wife to remarry in England but not in Nevada. However, the ratio of the majority in the Court of Appeal in Lawrence appears to render section 7 of the 1971 Act redundant. Sir David Cairns overcomes this difficulty by suggesting that section 7 was strictly unnecessary and was enacted to avoid any doubt for the benefit of Marriage Registrars requested to celebrate marriages after foreign divorces. cf. Purchas L.J. (at p. 131).

Thus, in searching for the policy behind section 50, it is helpful first to consider the history of section 7. The 1971 Act was enacted to give effect to the 1970 Hague Convention on Recognition of Divorces and Legal Separations, the objective of which was to increase recognition of divorces and legal separations in the member states and thus to reduce limping marriages. Article 11 of the Convention provides:

"A State which is obliged to recognize a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognize that divorce."

This seems to have been understood by the United Kingdom⁹⁶ as only requiring a State to allow remarriage in that State following a recognized foreign decree. But, as the Law Commission points out⁹⁷, the Article is ambiguously phrased and could be interpreted as precluding a State from not recognizing the validity of a foreign remarriage following a recognized decree. Thus, it is suggested, that the Law Commission could have based its recommendation to extend section 7 to cover all remarriages on this ambiguity⁹⁸ and on the anomalies caused by

⁹⁶ Most of the other Contracting States apparently did not find it necessary to make any special provision to comply with Article 11 because their law already preferred the recognition rule. See Palsson (chapter 1, n.121 supra) at p. 254. cf. Australian Family Law Act 1975 s.104(9). It is also of interest that none of the pre-1970 Commonwealth legislation has any provision regulating the validity of remarriages. See McClean (chapter 3, n.21 supra) at pp.61 et seq.

⁹⁷ Law Com. 137 at para. 6.55.

⁹⁸ Although Article 11 clearly does not apply to remarriages after English divorces, the inclusion of such cases within section 50 could have been explained on the basis of the

the limitations in section 7. Nonetheless, the Law Commission went further and clearly supported

"the policy that where a divorce or annulment is recognised in this country, the parties should be free to remarry, whether here or abroad, even though regarded as incapable by the law of their domicile because of non-recognition there of the divorce or annulment."

What is perhaps strange is that the Commission does not attempt to justify their support for this policy other than by asserting, without proffering any evidence, that there would seem to have been general agreement as to this policy. With respect, the Brentwood Marriage case itself together with the fact that in 1971 the Bill submitted to Parliament included the limited section 7 instead of the wider version suggested at that time by the Law Commission⁹⁹ contradict this assertion. What is clear is that section 50, which enacted the Law Commission's 1984 recommendation on widening section 7, is based on a policy of giving precedence to the recognition rule.

(b) Where the decree is not recognised

The only English case which might appear to support application of the recognition rule in the situation where the foreign

limited policy of giving full effect to decrees of the forum (but cf. infra at C 2 (b)).

⁹⁹ Clause 7 of the Draft Bill (Law Com. 34 at p.40) simply states that "neither spouse should be precluded from remarrying" Whilst there is no geographical limitation in the clause, it does not expressly state that foreign remarriages will be recognised as does s.50 Family Law Act 1976. Thus, its meaning was ambiguous.

decree is not recognised by the forum is Shaw v Gould¹⁰⁰. In this case, the Scottish divorce decree was not recognised in England. However, the 'conflict of rules' problem did not in fact arise in that case for two reasons. Firstly, the real issue was one of succession and the succession in question was governed by English law¹⁰¹. Secondly, even if the real issue had been one of capacity to marry, the wife's capacity to remarry was in fact governed by English law. She could not obtain a domicile of choice in Scotland because according to English law she still had a domicile dependent on her first husband.

However, Palsson's survey¹⁰² among European countries reveals that in general the recognition rule has been preferred and the re-marriage not recognised¹⁰³. The Law Commission in their Consultation Paper¹⁰⁴ had recommended that this rule should be adopted. However, because of opposition at the consultation

¹⁰⁰ (1868) LR 3 H L 55.

¹⁰¹ The testator died domiciled in England and the succession was in relation to movables.

¹⁰² Op. cit. (chapter 1, n.121) at pp 213 - 216.

¹⁰³ Although he does point out that, in most of the cases, the capacity of the other party to the second marriage was governed by the lex fori as either the lex domicilii or lex patriae. So the decisions could be explained on the basis that the impediment of the prior marriage was treated as bilateral and rendered the other party incapable by his/her personal law.

¹⁰⁴ (1983) unpublished (see chapter 3, n. 112 supra) at para. 6.50.

stage, this recommendation was not contained in the Report. Thus, section 50 only covers cases of recognition of foreign decrees and leaves unclear what would be the result in a Schwebel type cases.

3. Results

The remarriage will be recognised and will therefore limp between the forum and the law of the domicile, which does not recognise its validity. Thus, in example M2¹⁰⁵ the marriage limps between England and Argentina.

It might be argued that in many cases the remarriage will limp already if the decree-granting jurisdiction recognises the remarriage. Thus, in example M3¹⁰⁶, the marriage already limps between Israel and Russia. However, this result will not follow if the decree granting jurisdiction itself prefers the choice rule to its own decree.¹⁰⁷ Thus, in example M2, if Mexico applies the law of the nationality to determine the validity of the marriage there will be no limp.

Where the marriage does already limp, the decision of the forum will determine whether the marriage limps between the forum and

¹⁰⁵ At chapter 1 III supra.

¹⁰⁶ Ibid.

¹⁰⁷ This was the position of Swiss law in the Brentwood Marriage case.

the domicile or between the forum and the decree-granting jurisdiction. On one view, once the marriage limps the harm is already done and whatever the forum decides will not make any difference. On the other hand, it might be crucial which way the marriage limps because the limp will only cause actual hardship if the parties have a real interest in the views of both of those jurisdictions as to the validity of their marriage. Thus, where they no longer have a connection with the decree-granting jurisdiction, as in example M2, it can be argued that a limp with that country does not matter as much as a limp with the domicile which will continue to have an interest in the status of the parties. On the other hand, where the parties retain a strong connection with the decree granting jurisdiction a limp between the forum and that jurisdiction may be more serious than a limp with the domicile.

Also, the degree of hardship caused by the limp depends on the circumstances in which the validity of the marriage is called into question. One major problem is that it is impossible to foresee the future and so it is not known when the question of validity in a particular jurisdiction will arise. If the second marriage limps there would always seem to be the potential for abuse by one party. For example, on the breakdown of the second marriage, a deserting husband might choose to move to a country where the second marriage is not recognised because his financial obligations to his second wife cannot be enforced

against him there.

b) Where the decree is not recognised

The effect of applying the recognition rule would be that the remarriage is invalid with the result that the second marriage limps as between the forum and the domicile. In example M1,¹⁰⁸ the remarriage would limp as between Israel and England.

The Law Commission in their Report dismiss this problem by explaining that it is very unlikely to arise for two reasons¹⁰⁹. Firstly, the United Kingdom's liberal recognition laws mean that few foreign divorces are not recognised. Secondly, where the remarriage takes place in the United Kingdom, capacity by the lex loci celebrationis is required in addition to capacity by the domicile. The Commission further justifies its inaction by reference to the Australian legislation¹¹⁰ which is in similar terms to what is now Family Law Act 1986 section 50. With respect, the Law Commission's reasons are not convincing. We have already seen that the English rules for recognition of divorces are significantly more restrictive than their Australian counterparts¹¹¹, in particular with respect to informal divorces. Secondly, there

¹⁰⁸ Chapter 1, III supra.

¹⁰⁹ Law Com. No. 137 at para. 6.60.

¹¹⁰ Family Law Act 1975 s.104(9).

¹¹¹ Section I B 1 supra.

is no clear authority that capacity by the lex loci celebrationis (even where it is part of the United Kingdom) is required¹¹². Apart from this, the question of validity of a second marriage contracted abroad after a non-recognised decree is just as likely, if not more so¹¹³, to arise.

We have already demonstrated that the policy behind 'non-recognition rules'¹¹⁴ does not necessarily require invalidation of the second marriage and that, on the contrary, invalidation may harm the 'victim' whom the non-recognition rule is designed to protect. Everything will depend on the circumstances and who is denying the validity of the decree. Thus, automatic preference for the recognition rule could lead to hardship. Maybe this was why, at the end of the day, the Law Commission left the problem to the Courts.

C. A 'DIFFERENTIAL RULE'

1. Introduction

Under a differential approach, the choice of rule is preferred in some fact situations and in others the recognition rule

¹¹² Law Com. W.P. 89 para 3.8 and Clarkson (1990) 10 Legal Studies 80.

¹¹³ The very fact that the decree is not recognised in England means that the parties are likely to remarry in a country where it is recognised.

¹¹⁴ Chapter 3 III B supra.

prevails. English law probably¹¹⁵ did and possibly still does¹¹⁶ adopt such an approach to the 'conflict of rules' problem.

The clearest example of a differential approach is section 7 of The Recognition of Divorces and Legal Separations Act 1971. This purports to apply the recognition rule where the remarriage takes place in England after a foreign decree. Thus, the common law preference for the choice rule¹¹⁷ would have remained applicable where (a) the remarriage was abroad or (b) the remarriage followed an English decree or (c) the remarriage followed a foreign nullity (as opposed to divorce) decree.

It has already been seen that whilst section 50 Family Law Act 1986 removes the above distinctions in respect of marriage following divorces which are recognised, it maintains the silence of section 7 of the 1971 Act in respect of decrees which are not recognised. Thus, we are again left with a differential approach. Where the divorce is recognised, the recognition rule is applied. Where the divorce is not recognised by the forum, the choice rule is applied. We shall call this differentiation (d).

¹¹⁵ The doubt is caused by the decision in Lawrence v Lawrence [1985] Fam. 106, which seems to treat section 7 of the Recognition of Divorces and Legal Separations Act 1971 as redundant or merely declaratory.

¹¹⁶ If the choice rule is preferred in the Schwebel v Ungar situation (see example M1 at chapter 1 III supra).

¹¹⁷ See A2 supra.

2. The Possible Bases for Differentiation

We will examine these four bases for differentiation in turn:-

(a) The place of the remarriage

The apparent¹¹⁸ discrepancy between the treatment of remarriages in the United Kingdom¹¹⁹ and those abroad under section 7 of the Recognition of Divorces and Legal Separations Act 1971 was perceived by many¹²⁰ including the Law Commission¹²¹ as anomalous. The differential approach of section 7 is however supported by Carter¹²². Whilst in general denigrating any rule which accords preference for the recognition rule he suggests that such preference can be justified in the narrow circumstances provided for by section 7. He argues that the marriage is only likely to be celebrated in England if at least one party is domiciled and the marriage has a real and substantial connection with England. Hence, application of the forum's recognition rules is justifiable.

With respect, the first part of Carter's explanation is difficult to accept. In the situation which he envisages,

¹¹⁸ See n.118 supra.

¹¹⁹ For convenience we will refer below to celebration in England.

¹²⁰ See, for example, the concluding comment of Sir David Cairns in Lawrence v Lawrence [1985] Fam. 106 at p. 135E.

¹²¹ Law Com. No. 137 para. 6.56.

¹²² (1985) 101 L.Q.R. 496, 505.

section 7 is not needed to validate the remarriage in England. The party whose incapacity is in doubt cannot be domiciled in England because then there would not be any discrepancy between the choice rule and the recognition rule. Where the party whose incapacity is not in doubt is domiciled in the United Kingdom, the marriage will in any event be valid under the rule in Sottomeyer v De Barros (No. 2)¹²³.

The second part of his explanation might however provide a sound policy base for the differential approach in section 7, which could then be justified as follows. In cases where there is no prior connection between the parties and the forum, the supremacy of the domicile principle applies to the question of the validity of the remarriage; whereas if the remarriage takes place in the United Kingdom, this provides sufficient connection with the forum for it to prefer its own recognition rules to that of the domicile. Academic¹²⁴ and judicial support¹²⁵ for the interest of the forum in the capacity of the parties where it is also the lex loci celebrationis can be found. On the other hand, this justification of the rule almost encourages forum shopping. Where parties know that a marriage will not be recognised by the law of the domicile because of

¹²³ (1879) 5 PD 94.

¹²⁴ See Clarkson [1990] 10 Legal Studies 80 and references therein at p. 83.

¹²⁵ Sottomeyer v De Barros (No. 2) (1879) 5 PD 94.

non-recognition of a foreign decree, they can come to England to get remarried even if they had no prior connection with England provided that the foreign decree is recognised by the relatively liberal English recognition rules. It would seem that discouragement of such forum shopping was one of the reasons why the Court in the Brentwood Marriage case¹²⁶ refused to allow the parties to remarry in England.

With respect, the Brentwood approach is to be preferred. The mere fact that the marriage is celebrated in England should not in itself affect whether precedence is given to choice of law rules or recognition rules. However, a different view may be taken where the fact of the celebration of the marriage in England is indicative of a real and substantial connection with the country. An appropriate test might be either that England is the intended matrimonial home of the parties or that one of them has been habitually resident in England for one year.

Thus, it is suggested that a differential approach cannot be justified if it depends entirely on whether the remarriage was celebrated in the forum. Only where there is some further connection with the forum, as suggested above, could the displacement of the choice rule in favour of the recognition

¹²⁶

[1968] 2 QB 956.

rule be justified¹²⁷. It might be noted that this idea is really a rejection of the domicile rule where the forum is seen to be more closely connected with the issue¹²⁸. Thus, a similar result might be achieved by replacing the domicile choice rule with a real and substantial connection¹²⁹ rule. There would then be no need for this differential approach because the choice rules would anyway require that English law is to be applied in the circumstances in which it is envisaged above that the recognition rule should displace the choice rule.

(b) The place of the decree¹³⁰

Although the question has never directly arisen, there are weak dicta in Breen v Breen¹³¹ which may indicate that the choice rule should apply to a foreign remarriage following an English decree. Nonetheless, commentators¹³² seem to have assumed

¹²⁷ This idea of displacing a foreign governing law in favour of the law of the forum where the latter is more closely connected to the issue can be found in relation to the choice of law rule for torts in the House of Lords' decision in Boys v Chaplin [1971] A.C. 356.

¹²⁸ Just as the Boys v Chaplin 'exception' is a rejection of the lex loci delicti where the forum (or in theory some other law) is more closely connected.

¹²⁹ See supra at I C.

¹³⁰ See supra at chapter 1 VI.

¹³¹ [1964] P. 144.

¹³² Law Com. No. 137 para. 6.56; Cheshire and North (chapter 1, n.1 supra) p. 592 and Lipstein [1972B] CLJ 67 at p.95. This problem has caused much difficulty in various

that, notwithstanding the wording of section 7, where a remarriage followed an English divorce or nullity decree the parties would automatically be accorded capacity to remarry, regardless of the choice of law rules, without any better justification than that it would "seem right" to do so¹³³. This seems to be an assertion of the 'full effect' or 'logical conclusion' argument which is the basis of giving precedence to the recognition rule in all cases¹³⁴. The question here is whether, if that argument is not accepted generally, there is any particular reason why, on a differential approach, it should apply to remarriages following English decrees. Two possible reasons might be suggested for treating remarriages following English decrees differently. The first is that such decrees are intrinsically in some way of greater weight than foreign decrees and the second that as matter of policy a Court should give 'full effect' to its own decrees even if it does not give 'full effect' to foreign decrees which it recognises.

(i) 'English decrees are of greater weight.'

If the jurisdiction rules for granting decrees are narrower than those for recognising decrees, it could be argued that an English decree involves a stronger connection with the parties

European countries, in particular Germany and Switzerland. See Palsson (chapter 1, n.121 supra) at pp. 229 et. seq.

¹³³ See Cheshire and North ibid at p.592.

¹³⁴ See B 1 supra.

than a foreign decree, which therefore justifies the decree overriding the law of the domicile. In fact, as we have seen, recognition rules in respect of formal divorces are more liberal in that decrees granted in the country of nationality, habitual residence for less than one year and domicile in the sense of the decree-granting jurisdiction will be recognised, although none of these bases are sufficient for jurisdiction in England and Wales.

However, the argument is defective, partly because of the artificial nature of domicile. Whilst domicile in the English sense may involve a greater connection than domicile in the foreign sense¹³⁵, the converse might equally be true¹³⁶. Moreover, it does not seem possible to differentiate between those foreign decrees where jurisdiction is based on domicile or habitual residence for one year and English decrees.

(ii) Policy

It is clearly undesirable that a legal system should in one breath grant a person a divorce and in the next refuse to allow him/her to remarry because such a divorce is not recognised by the law of the domicile. However, it might be argued that this phenomenon is no more than a manifestation of the general

¹³⁵ See, e.g. in Lawrence v Lawrence [1985] Fam. 106, where domicile in Nevada was acquired after 6 weeks residence, which was only intended to be temporary.

¹³⁶ For example where a domicile of origin has revived.

'internal disharmony' problem which, as we have seen¹³⁷, arises from according precedence to the choice rules. In which case, if, despite the inconsistency problem, the choice rule is preferred there is no reason to distinguish between forum decrees and foreign decrees.

On the other hand, the view might be taken that inconsistency between the forum's decree and the party's status is more serious than where the inconsistency arises from the recognition of a foreign decree. In particular, parties will invariably expect that a divorce in England will allow them to remarry or have a remarriage recognised in England; whereas they might not automatically assume that a divorce abroad will enable them to remarry or have their remarriage recognised in England.

Thus, it may be possible to justify a preference for the forum's domestic law over the choice rule on the basis of 'conflicts justice'¹³⁸, even if the choice rule takes precedence over recognition rules in relation to foreign decrees.

(c) Type of Decree

It is clear that the reason that section 7 only applied to

¹³⁷ See at A 3 supra.

¹³⁸ See chapter 2 II C supra.

divorce and not nullity decrees is because the 1971 Act itself did not deal with nullity decrees rather than because of any deliberate policy to distinguish between the effects of the two types of decree on capacity to remarry. However, the decision in Perrini¹³⁹ was justified by some commentators¹⁴⁰ on the basis that it concerned a nullity decree rather than a divorce decree as in the Brentwood Marriage case¹⁴¹. But there is no explanation as to **why** there should be any difference between the two types of decree.

From a private international law perspective, the main difference between divorce and nullity is that nowadays the lex fori frequently governs the former¹⁴², whereas the personal law at the time of the first marriage, at least where the marriage is alleged to be void as opposed to voidable, usually governs the latter. It might be argued that where the foreign court has applied the parties' personal law rather than its own law qua lex fori the decree somehow has greater weight, which justifies giving precedence to the recognition rules. However, this argument is anathema to the general principle of not

¹³⁹ [1979] Fam. 84 (discussed at B 2 supra).

¹⁴⁰ See, for example, Young (1980) 24 ICLQ 515, 518.

¹⁴¹ [1968] 2 QB 596 (discussed at A2 supra).

¹⁴² Palsson, International Encyclopedia of Comparative Law, Volume III Chapter 16 at para. 16-125 et. seq., explains that many Continental jurisdictions have modified the nationality choice rule to such an extent that the law of the forum usually applies.

examining the intrinsic merits of foreign judgments.

Application of the personal law rather than the lex fori reduces the likelihood of conflict between choice and recognition rules. In any event, there are far fewer nullity decrees than divorces granted. However, it is not clear why the reduced likelihood of the 'conflict of rules' situation arising indicates that a different principle should govern when it does¹⁴³.

(d) Whether or not the decree is recognised by the forum.

We will assume that the result of the enactment of section 50 of the Family Law Act 1986 is that the recognition rule applies where the decree is recognised and that the choice rule applies where the decree is not recognised.¹⁴⁴

This differential rule may be justified on the basis that the 'full effect' doctrine only applies when the decree is recognised. We have seen that whilst the policy of recognising a decree may require that capacity to remarry is conferred¹⁴⁵, the converse is not true.¹⁴⁶

¹⁴³ On the contrary, the Family Law Act 1986 deliberately places recognition of foreign nullity decrees and foreign divorce decrees on the same footing despite the differences mentioned above (see discussion at Law Com 137 paras. 5.12-5.13.)

¹⁴⁴ See n.119 supra.

¹⁴⁵ At B 1 supra.

¹⁴⁶ At chapter 3, III C supra.

3. Conclusion about 'Differential Rules'

It may be concluded that the first and third bases of differentiation cannot be supported. The second basis might be supportable, but as it merely enables differentiation between forum decrees and foreign decrees, it assumes a preference for the choice of law rule in respect of the latter. Thus, for our purposes, it is identical with the first preference rule. However, the fourth basis, which reflects the assumed consequences of section 50 Family Law Act 1986, could provide a sound preference rule. Thus, throughout this thesis 'the differential rule' will mean according precedence to the recognition rule where it leads to recognition and otherwise to the choice rule.

D. PREFER THE RULE WHICH UPHOLDS THE VALIDITY OF THE MARRIAGE

The principle of upholding the validity of the marriage has been supported by a number of writers¹⁴⁷. The reason given is because of the general social policy in favour of marriage. The presumption in favour of validity is usually considered to apply once a marriage has already been celebrated rather than when the parties are seeking permission to celebrate a

¹⁴⁷ Law Com. W.P. 89 para 2.35(e); Hartley (1972) 35 MLR 571; Jaffey, (1978) 41 M.L.R. 38; Scoles and Hay, (n.18 supra) at p. 416 and Palsson (chapter 1 n.121 supra) at p. 18. The decision in the German case mentioned at n.68 supra would seem to be based on the policy of upholding the validity of the remarriage.

marriage¹⁴⁸.

It may however be argued that the presumption should apply equally to the first marriage. Thus, it does not help us to decide which marriage should be upheld. It is suggested that this argument is fallacious for the following reasons. Firstly, the presumption relates to the validity ab initio of the marriage and therefore does not have any relevance in relation to whether a valid marriage has been terminated¹⁴⁹. Secondly, in so far as there is a presumption of the continued validity of the first marriage, it may be countered by a presumption of the validity of the foreign divorce.¹⁵⁰ Thirdly, the recognition of the second marriage does not necessarily mean that the first marriage should be considered as terminated for all purposes. Once it is recognised that marriage and divorce need not be universal¹⁵¹, it is possible to allow the continuation of marital rights arising from the

¹⁴⁸ Law Commission ibid.

¹⁴⁹ In Hussain v Rahman 10th. October 1980 (Lexis), the Court clearly wished to uphold the validity of the second marriage, despite the lack of any clear evidence that the first marriage had been dissolved.

¹⁵⁰ See Powell v Cockburn (1976) 68 DLR 3d 700 at p. 706. Clark (supra n. 73) at p. 136 states that the presumption that the latest of successive marriage is valid prevails over the other presumptions of validation of marriage.

¹⁵¹ See North (chapter 5, n.58 supra) at p. 132-3.

first marriage where it is just to do so¹⁵², whilst also recognising the second marriage. Thirdly, to the extent that the recognition of the second marriage is inconsistent with the continued subsistence of the first,¹⁵³ there may be policy reasons for preferring the second marriage, to which the presumption would give effect.

III POLICY

A. THE PRESENT LAW¹⁵⁴

The sole ground for divorce is irretrievable breakdown of marriage. This can be proved by five alternative facts of which three are virtually identical to the old matrimonial offences¹⁵⁵ and two involve periods of separation. The substitution of the breakdown principle for the doctrine of the matrimonial offence was recommended by the Law Commission to enable "the empty legal shell" of broken marriages "to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."¹⁵⁶

¹⁵² Below, we will be seeking to construct result-oriented preference rules for this purposes in relation to succession, matrimonial property and claims in tort in Chapters 7, 8 and 9 respectively.

¹⁵³ For example, a Court would not be able to order the spouse who has remarried to cohabit with the first spouse.

¹⁵⁴ Matrimonial Causes Act 1973 ss.1 - 10, reenacting Divorce Reform Act 1969.

¹⁵⁵ Adultery, cruelty (now behaviour) and desertion.

¹⁵⁶ The Field of Choice, Law Com. No. 6 at para. 14

It is clear, both from the Law Commission's Report¹⁵⁷ and from the Parliamentary debates¹⁵⁸ on the bill that one of the motivating factors behind the reform was to enable those whose marriages had broken down to be able to remarry. In particular, there was concern about the number of illicit stable unions, which were thought¹⁵⁹ to be a result of the restrictive divorce law, and the resultant illegitimate offspring. Thus, one of the main reasons for enabling dead marriages to be buried was in order to facilitate remarriage. In other words, the focus of divorce law had started to shift from concern about the reason for the breakdown of the first marriage to concern about second relationships.

The main¹⁶⁰ limitation to the 'burying dead marriages' policy

¹⁵⁷ Ibid para. 33 et seq.

¹⁵⁸ See, for example, 775 H.C. Debs, Divorce Reform Bill (17.12.68) at col. 1062 per Mr.D. Weitzman and at col. 1091 per Mr. D. Awdry. Also, 784 H.C. Debs Divorce Reform Bill (12.6.69) at col. 203 per Mr. D. Awdry and at col. 207 per Mr. L. Abse.

¹⁵⁹ The fact that non-marital cohabitation continued to increase after the liberalisation of the divorce law (See Social Trends 18 (1988), Central Statistical Office) suggests that this assumption was not correct.

¹⁶⁰ In addition, the grant of the decree absolute could be delayed in two situations:-

(a) Where the divorce is on the basis of two years or five years separation and the Respondent shows that insufficient financial provision has been made for him/her by the Petitioner. (Matrimonial Causes Act 1973 s.10) Since usually the Petitioner can obtain proper provision through an application for financial provision, this section is rarely used.

(b) In exceptional circumstances where it is desirable in the interests of the child for the decree to be delayed

is the 'hardship bar'. The Court may refuse to grant a decree on the basis of five years' separation where it would cause grave financial or other hardship to the respondent and it would in all the circumstances be wrong to dissolve the marriage.¹⁶¹ This provision prefers the interests of the 'innocent' Respondent to the general policy. However, apart from the fact that only a small percentage of decrees are based on five years' separation¹⁶², the provision has been interpreted very restrictively¹⁶³ and in practice is only likely¹⁶⁴ to be successfully invoked where the parties are middle aged and there is the loss¹⁶⁵ of the expectation of a widow's occupational pension¹⁶⁶ for which the husband is

(Matrimonial Causes Act 1973 s.41(2), as amended by the Children Act 1989 Sched. 12 para. 31).

¹⁶¹ Matrimonial Causes Act 1973 s.5.

¹⁶² The figure has gradually dropped from 11.6% in 1971 to 5.5% in 1989. The statistics do not show facts relied on after 1989.

¹⁶³ The fact that divorce has been contrary to the Respondent's religious beliefs has not been sufficient hardship. See Rukat v Rukat [1975] Fam. 63 and Banik v Banik [1973] 1 WLR 860.

¹⁶⁴ Even if grave financial hardship is made out it may still not be 'wrong' to dissolve the marriage. See e.g. Brickell v Brickell [1974] Fam. 31 and Matthias v Matthias [1972] Fam. 287, 299 *et seq.*

¹⁶⁵ The loss must be a net loss to the wife. Thus, there will not be considered to be a loss where any payments to the wife would result in a *pro tanto* loss of social security benefits, Reiterbund v Reiterbund [1975] Fam. 99 and Jackson v Jackson [1993] 2 FLR 848.

¹⁶⁶ As in Julian v Julian (1972) 116 S.J. 763.

unable to compensate by other means¹⁶⁷. Otherwise, it has been recognised that it is the separation which causes the hardship and not the divorce itself.

Thus, it can be seen that the present law gives precedence to second marriages, subject to limited protection for first spouses. Only in exceptional circumstances should the first spouse be protected by keeping the dead marriage alive.

B. THE LAW COMMISSION'S PROPOSALS¹⁶⁸

Divorce would be granted on the petition of either or both parties after a set period of reflection and consideration¹⁶⁹ has elapsed on the basis of a statement that the marriage has irretrievably broken down, without requiring any proof thereof.

The Law Commission's work confirms the shift away from the question as to whether or not a marriage can be terminated. However, 'illicit stable unions' are no longer seen as a social problem in the same way as in 1966. Rather, it has been

¹⁶⁷ For example, taking out an annuity as in Le Marchant v Le Marchant [1977] 1 WLR 559.

¹⁶⁸ Law Com No. 192 (1990), canvassed by the Government in a Green Paper, "Looking to the Future" Cmnd. 2424 (Lord Chancellor's Dept. 1993).

¹⁶⁹ The period recommended is one year.

realised that the process of divorce¹⁷⁰ can have long term effects on the parties and their children. Thus, today¹⁷¹ the emphasis is placed on the **method** of burying dead marriages. i.e. ensuring that the burial¹⁷² is as humane as possible so that the parties can get on to make a new start in life after their failed marriage. Thus, it is taken for granted that the central concern is about future relationships. It is not sufficient simply to validate second marriages, but also to put the parties in the right frame of mind to maximise their chance of success. The title of the recent Government Green Paper, "Looking to the Future"¹⁷³ aptly describes this policy.

It might be thought that a number of aspects of the proposed scheme detract from the principle of burying dead marriages. Firstly, the introduction of the waiting period means that some spouses would have to wait longer to get a divorce¹⁷⁴.

¹⁷⁰ Divorce is seen as part of a massive transition, which divorce law should make as smooth as possible for the parties and their children (Law Com. No. 170 para. 3.50).

¹⁷¹ The Field of Choice also called for marriages to be dissolved with the maximum fairness and minimum bitterness. However, the retention of the fault based grounds meant that this aim was not realised. See Law. Com. No. 170 paras. 3.13-3.27.

¹⁷² The 'burial' involves not only obtaining a decree but also sorting out all the ancillary matters, such as children and property.

¹⁷³ Supra n. 168.

¹⁷⁴ At present fault-based divorces may be obtained in a few months ("Looking to the Future" ibid para. 5.2.).

Secondly, the Court, on application of one of the parties, would be able to extend the one year period where this would be desirable in order to enable proper arrangements to be made in relation to the children or financial provision¹⁷⁵. Thirdly, the existing hardship bar would be retained and would become available in relation to all divorces¹⁷⁶.

However, it is suggested that in fact these do not indicate any change in the policy of giving precedence to second marriages. One of the reasons that the parties may be required to wait a little longer is so that the second marriage is more likely to start out on the right footing¹⁷⁷.

IV APPLICATION OF POLICY

It is submitted that the 'bury dead marriages' and 'looking to the future' policies outlined above both require that, where the first marriage has in fact broken down and a second marriage has been entered into after a dissolution (whether that dissolution is in fact recognised in English law or not), it is the second marriage (the 'alive' marriage) which should be recognised in preference to the first (the 'dead' marriage).

¹⁷⁵ Law Com. No. 192 para. 5.58 and cl. 6 of Draft Bill.

¹⁷⁶ Ibid para. 5.72 - 577 and cl. 4 of the Draft Bill. There is provision for the bar to be revoked if circumstances change.

¹⁷⁷ See "Looking to the Future" (n.168 supra).

Whilst it is more than possible that by the time the issue reaches Court, the second marriage may also be 'dead'¹⁷⁸, policy would seem to dictate that the one which has been 'dead' the longest should be buried first. Alternatively, it might be considered that the relevant time for deciding which marriage is to be preferred is at the date of the second marriage¹⁷⁹.

Forum policy can be implemented by adoption of either 'the differential rule'¹⁸⁰ or the express result selection rule of upholding the validity of the marriage¹⁸¹. The former is tentatively preferred because the rule itself may be supported independently of the result.

It must be stressed that the rule recommended here only applies to the conflict between choice rules and recognition rules in relation to **the validity of the remarriage**. It does not attempt to solve this conflict, for example, in relation to succession

¹⁷⁸ Frequently, the issue of the validity of the second marriage comes to light because one party wants a decree of nullity on the ground of bigamy. See, for example, Schwebel v Unger (1964) 48 DLR (2d) 644 and Lawrence v Lawrence [1985] Fam. 106.

¹⁷⁹ This seems to be the approach taken by the putative marriage doctrine applied in some countries. For example, in Stephens v Falchi [1938] 3 DLR 590, the second husband could succeed to the estate by virtue of the doctrine even though the divorce was not recognised and the second marriage was therefore void. The second marriage had also broken down before the death of the wife.

¹⁸⁰ Supra at C 3.

¹⁸¹ Supra at D.

or financial or property issues. Thus, whilst deciding that the remarriage is a valid monogamous marriage, this does not mean that the first spouse might not retain entitlement to some rights from the first marriage, for example in relation to succession, maintenance and pension rights. Where entitlement to these rights is governed by the law of a foreign country, a 'conflict of rules' may arise, which will have to be solved by a preference rule which reflects the policy in relation to that particular issue¹⁸². Where entitlement to these rights is governed by the law of the forum¹⁸³, then there is no 'conflict of rules' and if the forum does not recognise the decree, the first wife should retain her marital rights¹⁸⁴. It is suggested that the possibility of the first spouse retaining rights, despite the validity of the remarriage, reflects the policy of domestic law of giving precedence to second marriages and, wherever possible, providing protection for the first spouse by means other than keeping alive a dead marriage.

¹⁸² See Chapters 7, 8 and 9 below.

¹⁸³ Either qua lex fori or because the relevant choice rule points to the forum.

¹⁸⁴ Unless the doctrine of preclusion is applied to such cases. See chapter 7 II A 3 infra. The problem of two 'spouses' sharing rights is discussed in relation to specific issues at chapter 7 I C and Chapter 8 I E infra.

V. RECOMMENDATION

The preference rule recommended is the differential rule, under which the recognition rule prevails where the decree is recognised and the choice rule prevails where the decree is not recognised. It will be noticed that this solution is consistent with section 50 of the Family Law Act 1986, but goes further than that section by providing for cases which fall outside it.¹⁸⁵

¹⁸⁵ See Briggs (1989) 9 OJLS 251 at p. 258 and Jaffey (1985) 48 MLR 465 at p. 469.

CHAPTER 7: SUCCESSION BY SPOUSES

I. SCOPE OF THE PROBLEM

A. INTRODUCTION

Where there is disagreement between the lex fori and the lex successionis as to whether a matrimonial decree¹ made in respect of a marriage of the deceased should be recognised, there will be a conflict as to whether the 'spouse' may succeed as a spouse. In example M1², if the choice of law rules are followed, Israeli law will apply as the law of the domicile of the deceased in relation to the devolution of movables on his intestacy. Thus, the divorce is recognised and the first 'spouse', Natasha, will not receive the share of Alexander's estate which is due to a spouse under a will or intestacy since under that law (s)he is no longer married to the deceased at the date of death. Whereas if the forum's recognition rules are applied, Natasha will take, as (s)he is still considered as married to the deceased.

As with the case of re-marriage, this problem has traditionally been analysed as an example of the incidental question. The question posed is whether the incidental or preliminary question of the recognition of the decree is governed by the conflicts rules of the lex fori or the conflicts rules of the lex causae. However, as in the case of validity of remarriages, it is

¹ A judicial separation would also be relevant here because in many systems, including English domestic law, such a decree terminates the rights of the parties to inherit from each other on intestacy.

² Chapter 1, III supra.

suggested that it is more helpful to treat the problem as a single question: in this case, whether the 'spouse' is to be treated as a spouse for the purposes of succession. The issue is whether this question should be governed by the forum's choice rules including renvoi³ (i.e. the whole of the lex successionis) or by the forum's recognition rules. The scope for discrepancy between the latter and the foreign recognition rules has been examined.⁴

B. CHOICE OF LAW RULES

It is well established that the law of the domicile at the date of death applies in relation to movables⁵ and that the lex situs applies in relation to immovables⁶ both in intestate succession and in determining devolution of the property under a will. In relation to wills, questions of formal validity may be governed by a number of alternative laws (of which the domicile at death is one) and questions of construction are governed by the law intended by the testator⁷, which is presumed to be governed by the law of the domicile at the date the will is made. It is not clear whether the question of whether a person is a spouse of the deceased should be regarded as a question of construction of the will or of devolution of the property.

³ See chapter 1, VII supra.

⁴ Chapter 6, I B supra.

⁵ Dicey and Morris (chapter 1, n. 1 supra) Rules 134 and 139.

⁶ Ibid Rules 135 and 140.

⁷ Ibid Rule 141.

The scission between movables and immovables and the application of the lex situs to intestate succession have been subject to severe academic⁸ and judicial⁹ criticism. The Hague Conference on Private International Law's Convention on Succession, to which the UK is a party, provides for unity of succession with habitual residence and nationality at the date of death being the main connecting factors. However, the UK has not ratified this Convention and thus we must work on the basis that scission will remain for the foreseeable future.

Thus, where the law of the situs of the immovables is different from the domicile at death or indeed where there are immovables situated in more than one jurisdiction, the devolution of each type of property will be governed by its own lex successionis. If the question of whether a person is a spouse is a question of devolution of the property, a person who is considered to be a spouse for the purposes of succession to movables may not be considered to be a spouse for the purposes of succession to immovables and a person who succeeds as spouse to immovables in one jurisdiction may not be so entitled in another jurisdiction.

This anomaly may be considered to be a good reason for preferring to apply the law governing the interpretation of the will to

⁸ See Morris (1969) 85 LQR 339, 348-352; Cohn (1956) 5 ICLQ 395 ; Wolff, Private International Law, 2nd. edn (1950) p. 567 et seq.

⁹ See comments of Sir Nicholas Brown-Wilkinson V-C in Re Collens [1986] Ch. 505, 512-513.

determine whether an alleged spouse can inherit as a spouse.

C: DISCRETIONARY FAMILY PROVISION SCHEMES

The 'conflict of rules' can only arise where the English court applies foreign rules of succession. Thus, it is clear that the problem can occur in relation to testate succession, intestate succession and fixed inheritance rights. However, there is no English authority on whether an English court would be prepared to apply a foreign discretionary family provision statute of the lex successionis. The English texts do not discuss this point¹⁰, but there is some pertinent Commonwealth caselaw¹¹.

In Re Paulin¹², Sholl J. in the Supreme Court of Victoria refused to apply the New South Wales statute on the basis that under that statute, discretion to make orders was granted **only** to the New South Wales Court. In Re Bailey¹³, the New Zealand High Court held that it was unable to apply the English discretionary scheme in respect of immovables in England because the testator did not die domiciled in England as required by the

¹⁰ Dicey and Morris (chapter 1 n. 1 supra at pp. 1035 - 1038) talk only about the jurisdiction of the English Court to make an order under the Inheritance (Provision for Family and Dependants) Act 1975 and the jurisdiction of other Courts to make orders under **their own** similar legislation.

¹¹ In addition to cases discussed below, see also Re Corlet [1942] 3 DLR 271 where the Alberta Court held that its family provision legislation did not apply because the deceased died domiciled in the Isle of Man. It did not consider it necessary to examine whether similar provision was available under Isle of Man law. See also Re Terry [1951] NZLR 30.

¹² [1950] VLR 462. See also Heuston v Barber (1990) 19 NSWLR 354.

¹³ [1985] 2 NZLR 656.

legislation. The very fact that the Court considered the terms of the English legislation might suggest that in principle they would have been prepared to apply it if it did not contain the limiting requirement. However, Prichard J. went on to consider the Australian Courts' refusal to make orders affecting foreign immovables even where both jurisdictions had discretionary schemes. He commented,

"This attitude, if not strictly logical, is eminently reasonable because the remedy is, from its nature, a discretionary one - from which it follows that the Court in which the proceedings are brought can afford relief affecting immovables in another State in accordance with the lex situs only by purporting to exercise a discretion which is in fact reposed in the Judges of the Courts of the lex situs."

With respect, it is submitted that the reasoning of both Prichard J. and Sholl J. pays insufficient attention to the policy behind the legislation. The prime motivation¹⁴ for the enactment of family provision statutes was to protect family members to whom a legal duty of support, or at least a moral duty, was owed by the deceased during his lifetime. No doubt, the legislature had in mind the exercise of the discretion by their own Courts. However, this is true of any domestic statute. There is nothing inherent in the discretion which requires it to be exercised by the home Courts only.

As Sholl J. himself pointed out¹⁵, where the foreign law provides for fixed succession rights for dependents, it would

¹⁴ See III 2 (c) infra.

¹⁵ [1950] VLR 462 at pp.466 - 467.

enforce those rights, as in Re Ross¹⁶. With respect, it is anomalous to treat fixed rights differently from discretionary schemes, as the purpose behind the two is the same.¹⁷ The reason that some systems have preferred discretionary schemes is in order to preserve flexibility.¹⁸ Application of the scheme by a foreign Court does not impinge on flexibility.

The result of a refusal to apply foreign discretionary schemes is to leave a gap in the protection accorded. This is particularly apparent in a case like Re Paulin¹⁹ where the forum itself has similar legislation. In that case, the fact that part of the estate consisted of immovables in another State reduced the amount of the order in favour of the widow. The widow could only recover this amount by taking out a second application in the State where the immovables were situated.²⁰ One of the aims of the Conflict of Laws is to enable the same result to be reached whichever forum is chosen and to avoid unnecessary multiplicity of litigation. Refusal to apply foreign discretionary schemes is inconsistent with this objective.

¹⁶ [1930] 1 Ch. 377.

¹⁷ See III 2 (d) infra.

¹⁸ Law Com. No. 52 para. 34. cf. Scottish Law Commission Report No. 124 in which retention of fixed shares is recommended to preserve certainty.

¹⁹ [1950] VLR 462.

²⁰ If the immovables had been situated in England, the English Court would not have had jurisdiction under its discretionary scheme because the deceased died domiciled in Victoria. Thus the gap would have been greater (See Re Bailey [1985] 2 NZLR 656 discussed in the text at n.13 supra).

The Victoria Court did try to prevent the need for a second application. In determining how much to order under the Victoria Act, the Court calculated the amount that would be due if an order were made for the whole estate, including the immovable property in New South Wales. Sholl J. then apportioned the order in proportion to the value of the property in the respective countries. He said that the purpose of spelling out how much would be ordered by the New South Wales Court was

"in order that the parties may consider the possibility of agreement hereafter in order to avoid an application to the New South Wales Court."²¹

Thus, ironically, by indirect means the Victoria Court achieved a result virtually identical with that which would have been achieved if it had been prepared to apply the New South Wales' legislation. With respect, it would have been preferable to have reached this result directly and to have avoided the need for the widow to have the continued aggravation of negotiation and the likelihood of having to accept a smaller sum to avoid the need for further litigation.

For present purposes, we shall assume that the English Court would be prepared to apply a foreign discretionary scheme.

D. SECOND MARRIAGES

It should be reiterated that each particular instance of conflict between choice rules and recognition rules is being treated as a separate problem. Thus, the fact that the second marriage is

²¹ [1950] VLR 462 at p. 468.

regarded as valid under the proposed preference rule for the validity of remarriages, set out in Chapter 6 above, should not necessarily mean that the first marriage be treated as no longer valid for the purposes of succession.

However, a further more difficult question arises. Should the validity of the **second** marriage for the purposes of **succession** be governed by the principles suggested in Chapter 6 above or by the principles which are considered appropriate for succession cases.

It is suggested that the policy²² behind the preference rule recommended in Chapter 6 requires that where the second marriage is upheld under that rule, it should be upheld for all purposes. Thus, the second spouse should be entitled to a spouse's rights to succession. Therefore, if the preference rule to be constructed for succession results in the first spouse retaining succession rights, the first and second spouses will **both** be entitled to succeed as spouses, unless the first spouse is estopped from claiming under the doctrine of preclusion²³. In this situation, legal bigamy is not just a theoretical problem, but a practical reality. However, according to Palsson²⁴, legal bigamy is least problematic where the bigamous marriages have in any event been dissolved by death. Presumably this is because the

²² See chapter 6 III and IV supra.

²³ See II A 4 infra.

²⁴ Op. cit. (chapter 1, n.121) at p.225. He is commenting on the German case RG 24 Jan 1941 RGZ 165,398 where both 'widows' were held to be entitled to a widow's pension.

policy of the law which prohibits bigamy is not actually infringed by a decision that a marriage which has now been terminated by death was bigamous.

The practical difficulty of two spouses sharing succession rights can be solved relatively simply by dividing the spouse's share whether in a will or on intestacy between the two 'spouses' equally. This is already necessary in the case of valid actually polygamous marriages.²⁵ The Law Commission²⁶ envisages the possibility of a bigamist being held liable to make provision for two wives under the family provision legislation where the 'wife' in the void marriage bona fide believes it is valid.²⁷

The difficulty with this pragmatic approach is that it may involve selective application²⁸ of two laws. Thus, in example M2²⁹ above, the preference rule recommended in Chapter 6 would lead to the validity of the second marriage by application of the recognition rule. Thus, Juan may succeed as Evita's husband. If we decide that in succession the choice rule should be preferred,

²⁵ In Re Sehota [1978] 3 All ER 385, everything was left to one of the wives. The other claimed successfully under the 1975 Inheritance Provision for Family and Dependents) Act 1975. However, it has not yet been judicially decided whether each wife should be entitled to a surviving spouse's statutory legacy or whether this amount should be shared between them.

²⁶ Law Com. No. 61 para. 29.

²⁷ See definition of spouse under Inheritance (Provision for Family and Dependants) Act 1975 s.25(4).

²⁸ This is known as "depeçage" or "picking and choosing": see Morris (chapter 1, n.142) at p. 463.

²⁹ At chapter 1 III supra.

Argentinian law will be applied as the lex successionis and Pedro will be able to claim as Evita's husband. The solution suggested here is that they should share the husband's portion. However, this result does not accord either with the recognition rules of the forum, which would only allow Juan to take or with the Argentinian lex successionis, which would only allow Pedro to take.

A similar problem could arise if we were to assume that we decide that recognition rules should be preferred for the purposes of succession. In example M1³⁰, as the divorce is not recognised, Natasha would be able to claim the wife's share³¹. However, as the remarriage will be recognised under the preference rule for remarriages, Bella can also succeed as Alexander's wife. The solution under which they share the wife's portion does not accord with either the recognition rules of the forum, which would only allow Natasha to succeed, or the Israeli lex successionis, which would only allow Bella to succeed.

Morris³² suggests that 'picking and choosing' is not a problem where "the issues are unrelated except by the circumstances that they both arise in the same case." In the present situation, are the claims of the two 'widow/ers' related? In one sense they are both claiming in the same succession. On the other hand, the key

³⁰ Ibid.

³¹ This would also be the case where English law is the lex successionis, as for example in relation to immovables situation in England.

³² Morris (chapter 1, n. 142) at p. 463.

question in each case is the relationship of the claimant with the deceased. It is suggested that there is no reason why different laws should not apply in relation to the two claimants if this is necessary in order to produce a result which accords with the policy of the forum. Even though the forum only recognises one spouse as the valid spouse, making provision for both spouses might actually be in accordance with its policy³³ on what might loosely be called 'family provision on death'.

II POSSIBLE SOLUTIONS³⁴

A. PREFER THE CHOICE RULE

1. Theoretical Basis

The main argument for preferring the choice rule in relation to succession cases is the fundamental nature of the rules that succession to movables is governed by the domicile and succession to immovables by the lex situs.

The former seems to flow from the 'status theory' discussed above.³⁵ In both testate and intestate succession to movables, whether and how much a surviving spouse is to receive is governed by the law of the domicile at death. Thus, it is logical³⁶ that this law should also determine whether an alleged surviving

³³ See III and IV infra.

³⁴ For tabular illustration of the results of applying the different preference rules see Table 4 in Appendix infra.

³⁵ At chapter 6 II A 1 supra.

³⁶ Ehrenzweig (chapter 1 n.94 supra at p.170) suggests that "foreign rules of succession may well be inseparable from the family law to which they refer."

spouse is in fact a surviving spouse or an ex-spouse whose marriage has been terminated by a divorce or nullity decree.

Whilst the application of the lex situs to immovables has been criticised³⁷, there is force in the underlying rationale that only the lex situs can control the ownership of immovables within its territory. Thus, any determination of ownership which is inconsistent with the lex situs may be ineffective, a mere brutum fulmen.³⁸ Regardless of the arguments for and against the application of the lex situs, so long as that law does govern both testate and intestate succession to immovables it is only logical that it should also govern whether an alleged surviving spouse is in fact a surviving spouse or not.

If the question of whether the 'spouse' is to be treated as a 'spouse' is really a question of interpretation which is presumed to be governed by the law of the domicile at the time of making of the will³⁹, the above reasoning is inapplicable. However, the preference for the choice rule could then be supported on the basis of the rationale for that rule. i.e. giving effect to the intentions of the testator.

2. Authority

There is no direct English authority on the 'conflict of rules'

³⁷ See references at n.8 supra.

³⁸ Morris (chapter 1, n.142 supra) p. 345.

³⁹ See n.7 supra.

in succession cases. However, it has been suggested⁴⁰ that the Australian case of Hague v Hague⁴¹ is authority in support of applying the conflicts rules of the lex successionis⁴². The material facts were as follows:-

The husband, who was domiciled in India, although resident in Western Australia divorced his second polygamous wife, Azra, by talaq. He later remarried her, but the remarriage was irregular by Muslim law. The High Court of Australia held that Azra could not succeed as according to Muslim law, which was applicable under the law of the deceased's domicile, she was not his wife. Thus, the first wife and the children of the two marriages took the movable estate⁴³ in the shares prescribed by Muslim law.

It may be argued that the case is not strong authority because it was not clear that the result would have been any different if the recognition rule had been applied. Firstly, it would seem that the second marriage, which took place in Western Australia, was not recognised as valid in that jurisdiction because it was a polygamous marriage. Secondly, if the marriage was valid, it would seem that the divorce would have been recognised under the common law rules because it was 'obtained' in India, the place of the couple's domicile. Nonetheless, the Court clearly preferred the choice rule as they did not discuss the issue of

⁴⁰ See Gottlieb (1977) 26 ICLQ 734 at 774.

⁴¹ (1962) 108 CLR 230.

⁴² The case might also be understood as relating to matrimonial property because a deed was entered into between the parties on marriage. This aspect is discussed at chapter 8 II A 2 infra.

⁴³ In Hague v Hague (No. 2) (1964) 114 CLR 98, it was held by a majority of the High Court of Australia that all the property was movables. Thus, the issue of succession to immovables did not arise. However, Barwick J., dissenting in relation to some of the assets, held that succession to the immovables was governed by the law of Western Australia as the lex situs and that the immovables would pass under the will of the deceased, which was valid under that law, although not recognised by Muslim law.

recognition.

There is English authority that where there is a conflict between a **choice rule** of the forum and the application of the lex successionis concerning the right of a beneficiary to succeed, the lex successionis prevails over the choice rules of the forum.

In the case of Re Johnson⁴⁴, the lex successionis was Maltese law⁴⁵, under which the deceased was legitimated and therefore her next of kin could succeed. Under English law, she was not treated as legitimated⁴⁶ and therefore the next of kin could not succeed. It was held that Maltese law should apply to determine how the estate should be distributed.

Ehrenzweig⁴⁷ suggests that the real rationale for application of the lex successionis in cases like this is that the forum

⁴⁴ [1903] 1 Ch. 821. The case of Dogliani v Crispin (1866) L.R. 1 H.L. 301 is also sometimes cited as favouring the lex successionis. However, in fact, there was no conflict in this case. Both English law and Portuguese law agreed that the son was illegitimate. The difference was that Portuguese law, which was the lex successionis allowed the natural son of the deceased to succeed provided that the deceased was not 'noble'. In any event, the real basis for the decision in this case was that the English Court was bound to recognise the decision of the Portuguese Court regarding the administration of the estate as it was the Court of the domicile.

⁴⁵ The deceased died domiciled in Baden, under which law succession was governed by nationality. The deceased was a British subject. It was held that Maltese law should govern as the law of her domicile of origin was Maltese. There seem to be two alternative grounds for this decision. Either, the change of domicile was ineffective because Baden disregarded domicile. Alternatively, reference to the law of the nationality was a reference to how English law would apply to this particular propositus. The first ground has been held to be wrong (See Re Annesley [1926] Ch. 692 Re Askew [1930] 2 Ch. 259 and Casdagli v Casdagli [1918] P. 89). But the refusal to follow Re Johnson on this point does not weaken the case as an authority in favour of the choice of law rule.

⁴⁶ Her father was domiciled in England.

⁴⁷ Op. cit. (chapter 1, n.94 supra).

considers that unity of distribution of the estate is more important than unity of family relationships. This rationale would apply equally to the cases where there is a conflict between the **recognition** rule of the forum and the application of the lex successionis. Ehrenzweig's explanation may seem flawed in relation to those systems⁴⁸ whose choice of law rules for succession allow for disunity between succession to movables and immovables and between succession to immovables situated in different jurisdictions.⁴⁹ However, it may be argued that this possibility of disunity may make it more important that there should not be further disunity in relation to recognition of status.

3. Results

(a) Where the lex causae recognises the decree.

In this situation, the first spouse will not be able to take. Thus, in example M1⁵⁰, Israeli law will apply to succession to movables and Natasha will not be able to claim as she is no longer considered to be Alexander's spouse.

If Alexander leaves immovables, whether Natasha can claim will depend on whether the lex situs recognises the get. Where the immovables are situated in England, there can be no conflict of rules because English law will be the lex successionis as well

⁴⁸ Including English law and U.S. law about which he was primarily writing.

⁴⁹ In Re Johnson [1903] 1 Ch. 821, the estate consisted only of movables.

⁵⁰ Chapter 1, III supra.

as the lex fori.

The barring of the first wife from succession may not be a just result. In particular, the reason that the divorce is not recognised by the forum may be because of some unfairness in the acquisition or effect of the divorce. This problem would have to be dealt with by judicious use of the doctrine of public policy. In other words, the lex successionis will not be applied where its application would lead to a manifestly unjust result.

(b) Where the lex successionis does not recognise the decree.

In this situation, the first spouse will be able to succeed. Thus, in example M2⁵¹, Juan can succeed because under Argentinian law he is still married to Evita. This result occurs irrespective of the merits of the 'spouse', whether or not (s)he instituted the divorce and whether or not (s)he has remarried. This problem may be alleviated by use of the doctrine of preclusion. Since this doctrine is most likely to operate in relation to succession it will be convenient to consider it in detail at this point.

4. The Doctrine of Preclusion

(a) The Operation of the Doctrine

This doctrine, which is a form of estoppel⁵² has been applied

⁵¹ Ibid.

⁵² The doctrine is referred to as preclusion here rather than estoppel to emphasise that it need not be limited by the constraints of the latter doctrine, as for example in the dicta in Gaffney v Gaffney [1975] IR 133, discussed in detail below.

in Canada and the United States⁵³, although not yet in England. It has been criticised, particularly by British commentators. Thus, it is necessary to examine the operation of the doctrine in North America, its basis and the criticisms levied against it in order to assess whether it would be appropriate to incorporate it in some form into the preference rule which we are seeking to construct.

The American Restatement⁵⁴ provides the most helpful description of the doctrine. This states as follows:-

"A person may be precluded from attacking the validity of a foreign divorce decree if, under the circumstances, it would be inequitable for him to do so."

The subsequent comments on the scope of the rule include the following passage:

"The rule is not limited to situations of what might be termed 'true estoppel' where one party induces another to rely to his damage upon certain representations as to the facts of the case. The rule may be applied whenever, under all the circumstances, it would be inequitable to permit a particular person to challenge the validity of a divorce decree. Such inequity may exist when action has been taken in reliance on the divorce or expectations are based on it or when the attack on the divorce is inconsistent with the earlier conduct of the attacking party."

Thus, if the doctrine were applied under the situation under discussion, even where the lex successionis holds that the decree is not recognised and thus the 'spouse' can take by way

⁵³ Where it is sometimes referred to as quasi-estoppel. See, for example, Krause v Krause 282 N.Y. 355, 26 N.E. 2d. 290 (1940).

⁵⁴ American Law Institute, Restatement of the Law, Second, Conflict of Laws, 2d (1971), Section 74. This was cited with approval by the Supreme Court of Canada in Downton v Royal Trust Co. (1973) 34 DLR (3d) 403.

of succession, (s)he would be precluded from doing so where it would be inequitable to allow reliance by the 'spouse' on the invalidity of the decree. Whilst this is clearly a very broad definition, in practice the doctrine is only likely to operate in the following circumstances:

(i) the claimant 'spouse' initiated the matrimonial proceedings⁵⁵;

(ii) the claimant 'spouse' participated⁵⁶ in the proceedings unless there is some alleviating explanation.⁵⁷

(iii) the claimant 'spouse' has obtained some benefit from the proceedings. This might include claiming and being awarded alimony or other financial provision only obtainable on termination of the marriage⁵⁸.

(iv) the claimant 'spouse' has relied on the validity of the proceedings by remarrying⁵⁹.

Potentially the doctrine of preclusion might be applied in any

⁵⁵ As in Re Jones (1961) 25 DLR 595.

⁵⁶ See Stephens v Falchi [1938] 3 DLR 590, 595. cf. Caldwell v Caldwell 298 N.Y. 146, 81 N.E. 2d 60, where the New York Courts would not apply the doctrine in relation to Mexican 'mail order' divorces. The reason seems to be that they did not want to accord any effects at all to such divorces on public policy grounds.

⁵⁷ See Downton v Royal Trust Co (1973) 43 DLR (3d) 403 where the wife's submission to the Nevada Court would have precluded her from later claiming under the Family Relief Act in Newfoundland where the decree was not recognised, but for the fact that her submission was only in order to protect existing benefits under a separation agreement and did not confer on her any further benefits.

⁵⁸ See dicta in Downton v Royal Trust Co. (1973) 34 DLR (3d) 403.

⁵⁹ Ibid.

case where a 'spouse'⁶⁰ was seeking to deny the validity of a divorce in order to obtain a pecuniary benefit⁶¹. For the present we are only concerned with its application where the 'spouse' is seeking to claim to succeed to the deceased's estate. The doctrine has been held to apply to inheritance on intestacy⁶² and under will⁶³. By analogy it ought also to apply to fixed rights of inheritance⁶⁴.

(b) Rationale of the Doctrine

The rationale for the doctrine is set out by Laskin C.J., giving the judgment of the Court in Downton v Royal Trust Co.⁶⁵.

"The doctrine has an ethical basis: a refusal to permit a person to insist, to his or her pecuniary advantage, on a relationship which that person has previously deliberately sought to terminate."

In one case, a Canadian judge said that to allow the 'spouse' to rely on the invalidity of the decree in order to claim benefits out of the estate of the deceased spouse would be a "parody of

⁶⁰ In Fromovitz v Fromovitz (1977) 79 DLR (3d) 148, it was held that the doctrine could only apply against a party to an invalid decree and that a third party could not be precluded from relying on the invalidity of the decree. In this case, a man was not precluded from relying on the invalidity of his 'wife's' Mexican divorce from her first husband in order to deny any obligation to maintain her.

⁶¹ Such as claims under Insurance Policies, Fatal Accidents Acts, Workmen's Compensation Legislation. See Battersby (1977) 16 U.W. Ont. L.R. 163.

⁶² See Re Capon (1965) 49 DLR (2d) 675 and authorities quoted there.

⁶³ Re Jones (1961) 25 DLR 595, but see criticism by Battersby (1977) 16 U.W. Ont. L.R. 163 at pp. 176-7.

⁶⁴ See Battersby ibid at p.190.

⁶⁵ (1973) 43 DLR (3d) 403 at p. 412.

justice."⁶⁶

(c) Criticism of the Doctrine

Battersby⁶⁷ claims that the problems resulting from the application of the doctrine are such that the doctrine cannot be justified. His main criticisms are:-

(i) If the forum does not recognise the decree, it is illogical that it should give the decree some validity through the doctrine of preclusion.

(ii) The doctrine creates problems for personal representatives.

(iii) The doctrine creates anomalous distinctions because there are other situations in which it is inequitable for one spouse (e.g. estrangement or misconduct) to claim against the other's estate and yet there is no preclusion.

(iv) The doctrine is crude in that it cannot balance the merits of the 'spouse' against the merits of the beneficiaries who will take in his/her place.

(v) The doctrine may not operate fairly to the extent that it puts emphasis on who actually applied for the foreign decree. Where both parties have agreed to obtain a decree, it may be purely arbitrary who actually petitions for it and whether the other party participates in the proceedings.

(vi) To allow the 'spouse' to claim is not a "parody of justice" because to attempt to do something (in this case terminate the marriage) is not the same as succeeding in doing it .

⁶⁶ Per Schroeder J.A. in Re Capon (1965) 49 DLR (2d) 675 at p. 692.

⁶⁷ (1977) 16 U.W.Ont. L.R. 163.

It must immediately be pointed out that Battersby is concerned with the situation where both the lex fori and the lex successionis agree that the decree should not be recognised. In other words, there is no conflict of conflicts rules. In the context with which we are concerned, the forum does recognise the decree. Once this is borne in mind it can be seen that most of Battersby's arguments are either inapplicable or of less force. Using the same numbered paragraphs:-

(i) This point is inapplicable because the forum does recognise the decree although the lex successionis does not. Thus, the application of the doctrine actually gives effect to the law of the forum by way of an exception to the application of the lex successionis.

(ii) Since there is already a dispute about the validity of the decree, the personal representatives are already in a difficult situation. Application of the doctrine of preclusion will not make things worse and may be a just solution to the conflict.

(iii) The situation is not comparable with other domestic situations. Here the doctrine is applied to solve a particular problem arising in the conflicts of law.

(iv) If the doctrine is treated as discretionary, the relative merits could be considered.

(v) The problem of the emphasis on who is the petitioner can be resolved either by treating the doctrine as discretionary or restricting the operation of the doctrine to cases where the 'spouse' has obtained benefits as a result of the decree, irrespective of who actually applied for it.

(vi) The fact that the foreign decree is not only valid by the

law of the place where it was obtained but also by the law of the forum, although not by the lex successionis, removes the force of this point.

(d) Application of the doctrine in England

There is little English caselaw on the question. Dicey and Morris claim that "all of it is hostile to the adoption of a doctrine of preclusion or estoppel."⁶⁸ However, closer examination of the cases will reveal that there is nothing in them to deny the application of the doctrine of preclusion in an appropriate case⁶⁹, at least not in the 'conflict of rules' context.

Two of the cases involved what have been referred to as "strictly matrimonial causes."⁷⁰ In Bonaparte v Bonaparte⁷¹, the wife contended, on her second husband's petition for nullity, that he was estopped from questioning the validity of the foreign divorce decree in relation to her first marriage because it was obtained

⁶⁸ Dicey and Morris (chapter 1, n.1 supra) at p. 760. The case of Palmer v Palmer (1859) 1 Sw. & Tr. 551 is quoted by Sykes and Pryles (chapter 5, n 22 supra) at p.481 . In this case, it was held obiter that even if the foreign decree which the wife had obtained was invalid, she could not complain of her husband's adultery with his second wife. It seems that this case is probably better explained on the basis that the wife could be seen as responsible for the adultery and therefore could not rely on it rather than on the basis of the doctrine of preclusion. No doubt this is why the case is not quoted by the English textwriters.

⁶⁹ Dicey and Morris, ibid, admit that "the English Courts have not yet been confronted with such starkly unmeritorious claims as the American and Canadian courts have sometimes been."

⁷⁰ Downton v Royal Trust (1972) 34 DLR (3d) 403, 413.

⁷¹ [1892] P. 402 followed in the Australian decision of Alexsandrov v Alexsandrov [1967] SASR 303.

by his fraud and misrepresentation. It is hardly surprising that her contention was not accepted because if the doctrine of estoppel had been applied, the parties' status would have been left uncertain. In any event, even in North America, the doctrine cannot be applied against a third party.⁷²

In Hornett v Hornett⁷³, the husband sought a declaration that the foreign decree of divorce was valid. It was held that the fact that the parties had continued to cohabit for 11 years after the valid foreign decree did not estop him from later asserting the validity of that decree. Again, if the doctrine had been applied the parties' status would have been uncertain. Cumming-Bruce J. said

"..there are great difficulties about applying a doctrine of estoppel to a legal decree affecting status."

As has been pointed out⁷⁴, this comment must be viewed in the context in which it was made⁷⁵. The rejection of the doctrine of preclusion as against a party seeking a nullity decree or a declaration of status does not necessarily imply its rejection in other contexts⁷⁶.

⁷² See Fromovitz v Fromovitz (1977) 79 DLR (3d) 148.

⁷³ [1971] P. 255.

⁷⁴ Carter (1971) 45 BYBIL 410 at p.412.

⁷⁵ For example, it is clear that estoppel per rem judicatam and promissory estoppel may operate to prevent a party attacking a forum decree. See King v Kureishy (1982) 13 Fam. Law 1982 and Lexis (23.11.82).

⁷⁶ Indeed in Downton v Royal Trust Co. (1972) 34 DLR (3d) 403, 413, it seems to have been accepted that the doctrine could not apply in "strictly matrimonial causes" because "marital

However, there are also two cases, one English and one Irish, which seem to suggest that the doctrine does not apply even in cases which are not "strictly matrimonial causes."

In Papadopolous v Papadopolous⁷⁷, the decision of a Magistrate awarding maintenance to a wife, who had obtained a decree of nullity from a Maltese Court which was not recognised here, was upheld. It was assumed that because the parties were still man and wife there was no alternative⁷⁸ but to award maintenance. Although Counsel for the husband claimed that the Magistrate was wrong in holding that the wife was not estopped from alleging that she was a wife, this point is not considered in any of the judgments⁷⁹. Thus, while on the merits this might have been a case where the doctrine could have applied, the lack of discussion of the issue makes it a weak precedent.

In the Irish case of Gaffney v Gaffney⁸⁰ both parties were domiciled in the Republic of Ireland. Under duress by the

status per se cannot be altered or perpetuated by a preclusion doctrine."

⁷⁷ [1935] P. 55.

⁷⁸ Ibid at p. 68.

⁷⁹ cf. Lord Merrivale's interruption ibid at p. 58 referring to Jenkins v Robertson (1867) L.R. 1 H.L. Sc. 117, 121. This seems to relate to the issue of whether the parties' consent to the foreign judgment created an estoppel rather than to the equitable doctrine being discussed here.

⁸⁰ [1975] I.R. 133.

husband, the wife obtained⁸¹ a divorce in England by stating falsely that she and her husband were domiciled in England. The wife later claimed in the husband's intestacy. It was held that the English decree was not valid because of the lack of jurisdiction and that the wife was not estopped from claiming. The latter can clearly be supported on the basis that the estoppel should not operate against a spouse who had obtained a divorce under duress. However, the Court went on to state that in even if the Plaintiff had been a free agent there could not be any estoppel in relation to the question of whether a marriage had been dissolved⁸².

The main basis for this assertion was that the decree in England could not support an estoppel because the Court did not have jurisdiction. It is suggested that this decision is not good authority against the use of the doctrine of preclusion in the context under discussion for the following reasons. Firstly, for our purposes, the disputed decree is assumed to be valid and made with jurisdiction in the country where it is obtained and is also recognised by the law of the forum, although not the lex successionis. Secondly, at least two⁸³ of the four Judges in the Gaffney case were concerned with the technicalities of estoppel by record. The doctrine advocated here is a flexible equitable

⁸¹ In fact, the husband made all the arrangements and the wife simply signed the documents as requested and attended Court on the husband's instructions.

⁸² [1975] I.R. 125 at 143 per Kenny J. at first instance. In the Supreme Court at p. 152 per Walsh J; at p. 154 per Henchy J. and at p. 157 per Griffin J.

⁸³ Griffin and Henchy JJ.

doctrine which does not depend on the record, but on the injustice of allowing a party to obtain a pecuniary advantage because of the fortuitous fact that the decree is not recognised by the lex successionis.

It should be reiterated that in all four of the cases discussed above, the decree was not recognised by the law of the forum. Whereas in the 'conflict of rules' situation presently under discussion, the decree is recognised by the forum, but not by the lex successionis.

The main English textwriters oppose the application of the doctrine.⁸⁴ Dicey and Morris⁸⁵ claim that the doctrine leads to the loss of "all certainty in question of matrimonial status." Cheshire and North explain that estoppel is inappropriate in the present context because

"the paramount issue from which all else flows is the marital status of the parties at the time of the [deceased]'s death, and of that there can be no doubt."

With respect, it is submitted that this statement oversimplifies the issue. In the present context, we already have a conflict between the recognition rules of the forum and the lex successionis as to the marital status of the parties at the date of death and thus it cannot be said that there is no doubt as to the marital status for the purpose of succession. That is the very matter which is in dispute. Instead we should focus on the

⁸⁴ cf. Carter who suggests that the use of the doctrine of estoppel "seems attractive" in the context presently under discussion in (1971) 45 BYBIL 410 at p. 412.

⁸⁵ Op. cit. (chapter 1, n.1 supra) at p. 759.

single question of whether the 'surviving spouse' should inherit. This will involve looking at the policy of the forum on this matter. If that policy dictates that the 'spouse' should not inherit despite the fact that (s)he can take under the lex successionis⁸⁶, there seems no reason why a discretionary doctrine of preclusion should not operate as a rule of the forum's public policy. Use of preclusion in this way does not prevent the 'surviving spouse' from claiming the validity of the marriage in other contexts and therefore should not be seen as incompatible with the general principle that the existence of a matrimonial decree does not prevent either party from claiming the continued subsistence of the marriage.

B APPLY THE RECOGNITION RULE

1. Theoretical Basis

Application of the recognition rule where the decree is recognised is based on the 'full effect' doctrine, in the same way as in relation to remarriage. The hypothesis is that the recognition of a decree annulling or dissolving marriage logically requires full recognition of all the consequences thereof. Thus, once a decree is recognised, the 'spouse' must cease to be the spouse for all purposes⁸⁷, including succession. However, this interpretation is open to challenge by the argument that recognition of a divorce decree is simply an

⁸⁶ Assumed here to be the applicable rule.

⁸⁷ This argument is expressed in Estin v Estin 334 U.S. 541, 68 S.Ct. 1231 (1948) as "once a divorce is granted, the whole marriage relation is dissolved, leaving no roots or tendrils of any kind."

acknowledgment of the change of status and does not necessarily involve acceptance that there has been any variation in the rights and obligations flowing from status.⁸⁸

It is much more difficult to justify application of the recognition rule where it will result in non-recognition. It may be suggested that the very fact that the decree has not been recognised suggests that there has been some 'unfairness' in the process of obtaining the decree⁸⁹ or in its effect⁹⁰. Thus, it would be unfair to debar the 'spouse' from inheriting as a result of that decree, even where the lex successionis would recognise the decree. The forum's interest is in preventing the loss of rights by means of the 'unfair' decree.

2. Authority

The New York decision In re Degramo's Estate⁹¹ has been cited⁹² as authority for preferring the forum's non-recognition rule in a succession case. However, since it was held that the damages received by the deceased's estate from the railroad company responsible for her death should be distributed according to the

⁸⁸ See Engdahl (1969) Iowa L.R. 56 at pp. 111-114. Dicey and Morris 9th. edn. (1973) Rule 31 distinguish between status and the results of status. See also Graveson (chapter 6, n.57 supra).

⁸⁹ Either because an unconnected forum has been chosen (i.e. forum shopping) or because of lack of notice or opportunity to participate.

⁹⁰ i.e. because its effect is manifestly contrary to public policy.

⁹¹ 33 New York Supplement 502 (1895).

⁹² Gottlieb (1977) 6 ICLQ 743 at p.770.

'wrongful death' statute of the lex loci delicti and not according to the law governing the succession, the case should be treated as authority in relation to wrongful death claims rather than succession and will be discussed in that context below.⁹³

No other authority has been found which supports preference for the recognition rule in a succession case.

3. Results

(a) Where The Decree is Recognised.

The spouse will not be able to take irrespective of the circumstances surrounding the divorce and his/her connection with the forum. Thus, even a spouse who has been divorced against his/her will and perhaps without his/her knowledge in a forum with which (s)he has no connection may be prevented from receiving any share in the estate of his/her 'spouse' because of the liberal recognition rules of the forum, even though the law governing the succession would award him/her such. The hardship would seem to be particularly apparent where the 'spouse' is closely connected to the lex successionis and not at all connected to the forum.⁹⁴

Can we assume that this problem would not arise because recognition would be refused in such a case? A formal divorce will be recognised if a relevant connection exists between **either**

⁹³ At chapter 9 II B 2 infra.

⁹⁴ The case may be being heard in the forum because, for example, the executors are resident here or movables are situated here.

spouse and the country where the divorce is obtained.⁹⁵ Thus, lack of consent or connection would only seem to be relevant where they result in lack of notice or opportunity to participate. However, even these grounds are limited because the question as to whether it would have been reasonable to take steps to notify a party of the proceedings or to give a party opportunity to participate is assessed in the light of the nature of the proceedings. Thus, if a foreign system allows unilateral divorce by Court order ex parte, it is difficult to see how recognition can be refused under s.51(3)(a)⁹⁶.

Recognition may also be refused under s.51(3)(c) where recognition would be manifestly contrary to public policy. Would the fact that one party did not consent to the divorce and/or that one spouse had no connection with the jurisdiction where the divorce was obtained render recognition contrary to public policy? In Chaudhary v Chaudhary⁹⁷, Ormrod LJ said that it was against public policy in a case where both parties were domiciled in England to allow one to avoid the incidents of his/her domiciliary law by travelling abroad to a country whose laws appeared to be more favourable to him/her. It is far from clear that this would be the case where the parties were domiciled abroad as there would be no 'evasion' of English law. Also, the

⁹⁵ See chapter 1 II B 2 supra.

⁹⁶ And the better view seems to be that in such cases, lack of notice should not be a ground for refusal of recognition on the ground of public policy. See Gordon (chapter 1, n.1 supra) at pp.134-5 and D v D (Recognition of Foreign Divorce) [1994] 1 FLR 38 at p. 52.

⁹⁷ [1985] Fam. 19.

concern here was that the husband would be avoiding his financial obligations by obtaining a divorce in a particular jurisdiction. In the case of succession, the deprivation of the surviving spouse's inheritance rights occurs as a result of the divorce per se and not as a result of the divorce in a particular jurisdiction. However, where the surviving 'spouse' has not obtained any financial relief following divorce because it was obtained in an inappropriate jurisdiction, it may be against public policy now to deprive him/her also of any rights to succession on death.

In deciding whether to exercise their discretion to refuse recognition where the grounds under s.51(3)(a) or (c) are satisfied, the Courts take into account all the surrounding circumstances including

'an assessment of what the legitimate objectives of the petitioning spouse are, and to what extent those objectives can be achieved if the foreign decree remains valid.'⁹⁸

In two cases⁹⁹, recognition has been refused where it would prevent the petitioner from obtaining financial relief. By analogy, 'unfair'¹⁰⁰ deprivation of the wife of inheritance

⁹⁸ Newmarch v Newmarch [1978] Fam. 79, 95.

⁹⁹ Joyce v Joyce [1979] Fam. 93 and Mamdani v Mamdani [1984] FLR 699. These cases both involved lack of opportunity to participate. They would probably be decided differently today because even if the foreign decree were recognised the wife could claim financial provision in England under the Matrimonial and Family Proceedings Act 1984 (see chapter 8 I A infra).

¹⁰⁰ Because no other provision had been made in circumstances where it was reasonable for such provision to be made. Sometimes it may still be possible to claim financial provision ancillary to the matrimonial decree from the estate in the country where the divorce was obtained. In English law, an application for financial relief is not a cause of action which survives for or

from an estate would be a factor in favour of exercising the discretion to refuse recognition. However, as against this, Courts also have to consider other aspects¹⁰¹ of the effects of non-recognition, including

"the likely consequences to the spouses and any children of the family ..if recognition would be refused."¹⁰²

Since one of the spouses is dead and the other relies on the lack of validity of the decree, there should not be any adverse consequences to the spouses provided that the validity of a subsequent remarriage of the deceased can be recognised in accordance with the rule recommended in Chapter 6. Where the refusal of recognition would affect the validity of the subsequent marriage¹⁰³, the situation may be more problematic.¹⁰⁴ The children may of course be affected if their share of the estate will decrease if the first spouse can claim, but this is not a factor of any weight.

against a party's estate See Bromley and Lowe, Bromley's Family Law (1992) 8th. edn., p.652. Thus no order could be made for relief after a foreign divorce under the Matrimonial and Family Proceedings Act 1984 Part III after the death of either party.

¹⁰¹ The Courts seem reluctant to exercise their discretion to refuse recognition because of concerns about comity. See, for example, Newmarch v Newmarch [1978] Fam. 79.

¹⁰² Ibid at p.95.

¹⁰³ Where the decree is not recognised by the lex domicilii, non-recognition by the forum will result in invalidation of the second marriage (there is no conflict of rules and section 50 Family Law Act 1986 does not apply).

¹⁰⁴ Although in Joyce v Joyce [1979] Fam. 93, Lane J. held that the disadvantage to the wife of not having any share in the matrimonial home outweighed the disadvantage to the husband of non-recognition, despite the fact that the husband had remarried on the strength of the decree.

In conclusion, whilst one of the 'non-recognition' rules may operate where recognition would result in 'unfair' disinheritance, this result cannot be guaranteed.

(b) Where the Decree is not Recognised

If the recognition rule is preferred, non-recognition by the forum will allow the 'spouse' to inherit. However, as we have seen the policy behind the non-recognition rule may not require that both spouses should retain succession rights. A divorce will usually be refused recognition in order to protect the Respondent¹⁰⁵. Thus, whilst it might¹⁰⁶ be unfair to debar the Respondent from succeeding to the deceased Petitioner's estate, it is less likely to be unfair to debar the Petitioner from succeeding to the Respondent's estate. On the contrary, it might seem unfair to allow the Petitioner to inherit in this situation.

Again the doctrine of preclusion might be used here in order to prevent succession by the unmeritorious by preventing the claimant spouse from attacking the decree. The use of the doctrine is more difficult to justify in this context than previously because here it is the forum which refuses recognition. The effect of application of the doctrine is to give some validity to the decree in direct conflict with the non-recognition by the forum¹⁰⁷. However, it is submitted that the situation can still be distinguished from the cases in which the

¹⁰⁵ See Chapter 3 III C supra.

¹⁰⁶ But not if the Respondent has already received adequate provision.

¹⁰⁷ See Battersby's first criticism at text accompanying n.67 supra.

use of the doctrine has been expressly or impliedly rejected, because there is already a dispute as to the validity of the decree. The effect of the operation of the doctrine is in fact to prefer the choice of law rule by way of exception to a principle of preference in favour of the recognition rule of the forum.

C. THE DIFFERENTIAL RULE

1. Theoretical Basis

In relation to validity of remarriage, the theoretical basis of the 'differential rule' was stated to be that the 'full effect' doctrine only applies where the decree is recognised and that otherwise the arguments in favour of application of the choice of law rule prevail.¹⁰⁸ The same basis is applicable here with the caveat that the application of the 'full effect' doctrine is more controversial in relation to termination of the first spouse's succession rights¹⁰⁹.

2. Result

Since the divorce is always recognised, the 'spouse' will be debarred from inheritance in every case.

D. UPHOLDING SUCCESSION RIGHTS

It was submitted earlier that the key issue in relation to succession should not be seen as the continued validity of the first marriage, but rather whether the 'former spouse' should

¹⁰⁸ Chapter 6, II C 2(d) and 3 supra.

¹⁰⁹ See at B 1 supra.

inherit. Thus, a principle based upon the presumption of validity of marriage¹¹⁰ is not appropriate to decide this question.

Here, it is suggested that a similar approach of validating rights would lead to a presumption of upholding succession rights for 'spouses', where it would not be unfair to do so. Such an expressly result selecting preference rule could take the form of a presumption in favour of the application of whichever law resulted in succession by the 'spouse'. The presumption might be rebutted in circumstances where the doctrine of preclusion would estop the claimant from relying on the invalidity of the decree.

III POLICY

An examination of the English domestic rules relating to succession by spouses under will, on intestacy and by Court-ordered family provision is required in order to ascertain the relevant forum policy.

A. WILLS

In interpreting a will, the policy of the law is to give effect to the intention of the testator.¹¹¹ This can be illustrated by section 18A Wills Act 1837 (as amended by FLA 1986), which provides that where a marriage has been terminated by a divorce or annulment which is entitled to recognition in England and Wales under the Family Law Act 1986 (i) an appointment of the

¹¹⁰ See chapter 6 II D supra.

¹¹¹ See Clark and Ross Martyn, Theobald on Wills 15th. edn. (1993) at p. 199.

former spouse as an executor is deemed to be omitted and (ii) any devise/bequest to a former spouse lapses except in so far as contrary intention appears from the will.

The rationale behind this provision must be that a former spouse should not benefit from a will made before divorce¹¹² because it is assumed¹¹³ that the testator did not wish to benefit the former spouse, but simply forgot to change his will¹¹⁴.

It is not entirely clear when this provision of domestic English law will be applicable in a case involving a foreign element. If the provision is considered to relate to a question of interpretation, then it will apply if it was the law which the testator intended to govern the will. This would be presumed to be English law where the testator was domiciled in England **at the time of making of the will**¹¹⁵. If it is regarded as an issue of essential validity, then the provision will be applied in relation to immovables situated in England and in relation to movables where the testator died domiciled in England.

¹¹² See Law Reform Committee's 22nd. Report, "Making and Revocation of Wills" (1980) Cmnd 7902 and the Law Commission Consultation Paper, "The effect of Divorce on Wills" (1992), which recommends changing the method of giving effect to this policy.

¹¹³ The exceptional case is covered by the proviso that the provision does not apply where a contrary intention appears.

¹¹⁴ In Parliament, the Lord Chancellor said, "At present, divorce has no effect on a will and thus there can be unintended results where a testator who does not remarry fails to make a new will." (428 H.L. Debs. Administration of Justice Bill, 8th. March 1982 col. 31).

¹¹⁵ See n. 7 supra.

B. PROVISION FOR DEPENDANTS

1. The scheme of the 1975 Act

Under the Inheritance (Provision for Family and Dependants) Act 1975, the Court has discretion to award financial provision from a deceased's estate in favour of a spouse or former spouse where the effect of the deceased's will and/or the laws of intestacy is such that reasonable financial provision has not been made for the claimant. In the case of a former spouse, the reasonable financial provision is restricted to such financial provision as

"it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance."¹¹⁶

In the case of a surviving spouse,¹¹⁷ reasonable financial provision is such provision as

"it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance."¹¹⁸

In the latter case, in deciding whether provision is reasonable, the Court must take into account how much the applicant might have expected to receive if the marriage had been terminated by divorce instead of by death.¹¹⁹

Where the deceased died within 12 months of the matrimonial decree and the application for financial provision has not been made or has not been determined by the date of death, the Court

¹¹⁶ Inheritance (Provision for Family and Dependants) Act 1975 s.1(2)(b).

¹¹⁷ Unless there was a decree of judicial separation in force.

¹¹⁸ Inheritance (Provision for Family and Dependants) Act 1975 s.1(2)(a).

¹¹⁹ Ibid s.3(2).

may, if it thinks it just to do so, treat the former spouse as a surviving spouse for the purpose of determining reasonable financial provision under the Act.¹²⁰ The Act applies wherever the deceased died domiciled in England and Wales.¹²¹ However, in applying the Act, the Court is applying domestic English law rules as the lex fori¹²². Thus, no conflict of rules problem can arise.

2. Former Spouses

"Former spouse" was originally defined to include only those whose marriages have been dissolved or annulled under the Matrimonial Causes Act 1973. Thus, those who had obtained a matrimonial decree abroad which was recognised in England and Wales could not claim

under the category of former spouse. Three reasons were given for this exclusion in the Law Commission Report¹²³ which preceded the 1975 Act:-

(i) It is not appropriate for English Courts to interfere where

¹²⁰ Ibid s.14.

¹²¹ Ibid. s.1.

¹²² In relation to movables, English law will also be the lex successionis. The issue of whether an order can be made in respect of immovables situated abroad has not come before the English Courts. It would appear that there would be jurisdiction to hear the case under the 1975 Act provided that the deceased died domiciled in England and Wales. The first exception to the Mocambique Rule (see Cheshire and North, chapter 1 n.1 supra, at pp.255-256) should be applicable as the action is founded on the obligation of the deceased. However, Commonwealth Courts have consistently refused to make such orders under similar Family Provision legislation. See cases cited by Miller (1990) 39 ICLQ 261 at p. 271.

¹²³ Law Comm No. 61 para. 45 et. seq.

a foreign law has decided financial provision.

(ii) Where the former spouse is still dependent on the deceased (s)he can claim as a dependent under s.1(1)(e) of the 1975 Act.

(iii) In order to extend the definition it would have been necessary to cover the whole question of financial provision in England after the dissolution or annulment of a marriage abroad.

The first and third reasons could no longer be sustained once legislation to provide financial provision after a foreign matrimonial decree was proposed by the Law Commission. Thus, it was recommended¹²⁴ that the definition of 'former' spouse be widened to include those whose divorce or annulment was recognised. This recommendation was implemented in the Matrimonial and Family Proceedings Act 1984.¹²⁵

Maybe the most interesting aspect of this legislation for our purposes is the recognition that a former spouse, wherever the decree was obtained, may have a legitimate claim for maintenance from the estate of the testator¹²⁶. Thus, the legislature has made it plain that there is a continuing obligation to provide for a former spouse unless there is a Court order made at the time of the financial provision order on divorce barring an order

¹²⁴ Law Comm W.P. 77 and Rept. No. 117.

¹²⁵ s.25(2) amending the Inheritance (Provision for Family and Dependents) Act 1975 s.25(1).

¹²⁶ Provided of course that the testator dies domiciled in England and Wales.

on death¹²⁷.

It was made clear by the Court of Appeal in Re Fullard¹²⁸ that there would be few situations in which a successful claim could be made by a former spouse since in most cases, (s)he will have already received all that (s)he is entitled to at the time of the decree. This would not be the case though where there have been insufficient assets at the time to provide adequately for the claimant and following death a capital sum has been released,¹²⁹ which will enable the claimant to be maintained. Alternatively, if the claimant is dependent on unsecured maintenance which ends on death, if there is sufficient capital in the estate this can be used to ensure continuation of the maintenance. It is also possible to envisage cases where the claimant was badly advised and did not pursue his/her right to maintenance at the time of the decree. Depending on the other claims on the estate, it might be appropriate for maintenance to be paid to the former spouse out of the estate.

3. The rationale behind discretionary family provision for spouses and former spouses.

The rationale behind the present discretionary family provision for spouses and former spouses can be seen to be twofold.

¹²⁷ Inheritance (Provision for Family and Dependants Act) 1975 s.15 Act. Following the substitution of this section by Matrimonial and Family Proceedings Act 1984 s.8, such an order can be made without the consent of the parties.

¹²⁸ [1981] 2 All ER 796.

¹²⁹ For example, under life insurance or pension policies.

Firstly, a person's obligation to his/her spouse does not end on death. The family is still treated as the main support unit even once a provider has died. Thus, where (s)he is able, a testator should make provision for the other family members and should not leave his/her dependants, including spouses and, where appropriate, ex-spouses to rely upon the State for support. Where (s)he has failed to do so, the law will do so for him/her.

Secondly, in relation to spouses, discretionary family provision is needed to enable the inequities caused by the system of separation of property to be counter-balanced.¹³⁰ Where spouses have both contributed in different ways to the acquisition of assets, their respective contributions may well not be properly reflected in the legal and beneficial ownership of those assets. Typically, men who earn outside the home tend to own more of the assets, whereas women who have contributed to the family in the home whether financially or otherwise tend to own less of the assets. Discretionary family provision on death, just like property adjustment on divorce¹³¹, enables a Court to make provision for the survivor¹³² which will reflect these

¹³⁰ See Miller (1986) 102 LQR 445.

¹³¹ See Wachtel v Wachtel [1973] 2 WLR 366. The Law Commission decided that the widening of family provision on death for a spouse to be akin to that on divorce made it unnecessary to introduce fixed rights of inheritance for a spouse. The Wachtel approach meant that the wife would usually get one third, which was what they had suggested would be the appropriate fixed share. Law Com. No. 52 para. 44

¹³² Usually the wife, but cf. Re Moody [1992] 2 All ER 524, where a widower successfully claimed under the Act against his deceased wife's estate. He was allowed to continue to live in the matrimonial home which had belonged to the deceased.

contributions¹³³.

The second reason explains why the level of provision which may be made for a wife is higher than for other dependents. This reason does not apply to a former spouse because it is assumed that there will have been financial provision at the time of the decree.¹³⁴ Where for some reason adequate provision has not been made at the time of a decree, an award restricted¹³⁵ to maintenance may still be available on death.

4. Fixed Share Schemes

Some laws¹³⁶ ensure proper provision for dependents by setting down fixed amounts or fixed shares¹³⁷ which have to be bequeathed to each category of relative on death.¹³⁸ If a will fails to make the required provision, it will automatically be

¹³³ Stead v Stead [1985] FLR 16, where the award was small and did not reflect the contributions. See criticism by Miller, (1986) 102 LQR 445 at p. 467.

¹³⁴ That this is so is apparent from the s.14 of the 1975 Act (see text at n. 118 supra).

¹³⁵ Unless the case comes within s.14 of the Act (see text at n. 118 supra).

¹³⁶ For example, in Scotland, the surviving spouse has a right to one third of the deceased's movable estate if there are issue of the deceased surviving and otherwise to one half (see Scottish Law Com. No. 124 para 3.1), In the U.S., most separate property states give the surviving spouse a fixed share or fixed sum (see Miller (1990) 39 ICLQ 261).

¹³⁷ Sometimes referred to as 'forced shares' or 'non-barrable interests'.

¹³⁸ In community systems, there are usually fixed shares for descendants. See, for example, French Civil Code Art. 913, which reserves 2/3 of the estate for the children where there are two children. For Italian law see Re Ross [1930] 1 Ch. 377; for Swiss law see Re Trufort (1887) 36 Ch. D. 600.

varied so as to do so.

The Law Commission¹³⁹ considered the possibility of introducing a fixed share scheme in England. However, they preferred to extend the discretionary scheme because of its flexibility.¹⁴⁰ However, it is clear that the two alternative schemes were simply treated as different methods of implementing the policy of making provision for dependents and thus the rationale for making such provision in relation to spouses should be the same as that identified above.

C. **INTESTACY**

1. **The present scheme**

At present on intestacy the surviving spouse receives as follows:-

- (i) All the chattels and
- (ii) If there are no surviving issue, parents or siblings of the whole blood, the whole estate or
- (iii) If there are issue, a statutory legacy of 125,000 pounds and life interest in half of the rest of the deceased's property or
- (iv) If there are no issue, but parents or siblings (or their issue), a statutory legacy of 200,000 pounds and half of the rest

¹³⁹ Law Com No. 52 paras 31 - 45.

¹⁴⁰ cf. Scottish Law Com. No. 124 at paras 3.3. et. seq. where the Scottish Law Commission considered the same issue and came to the opposite conclusion.

absolutely.¹⁴¹

Under the Matrimonial Homes Act 1952 a surviving spouse is entitled to insist that the matrimonial home is appropriated to him/her towards any absolute interest which (s)he has in the estate. Where the value of the matrimonial home is more than the surviving spouse's absolute interest in the estate, (s)he can make up the difference from his/her own resources. In many cases, the matrimonial home will be held in joint names and therefore will pass to the surviving spouse under the principle of survivorship.

The Law Commission of England and Wales has recently produced a working paper¹⁴² and report¹⁴³ considering reform of the intestacy rules. They recommended inter alia that on intestacy a surviving spouse should receive the whole estate¹⁴⁴.

2. The Policy Behind Intestacy Provision for Spouses

The Law Commission's discussion is relevant in considering this issue. In the Working Paper¹⁴⁵, four possible bases on which intestacy law might be based are mooted. These are :-

(i) presumed wishes of the deceased deduced from the provisions

¹⁴¹ Both of the sums were increased by S.I. 1993/2906 which came into effect from 1st. December 1993.

¹⁴² Law Com. W.P. No. 108.

¹⁴³ Law Com. No. 187.

¹⁴⁴ cf. Scottish Law Com. No. 124 in which the continuation of the scheme of a statutory legacy for the spouse was recommended.

¹⁴⁵ Law Com.W.P. No. 108 , Part IV.

that the average testator makes in his will;

- (ii) provision to those who are most likely to have the greatest need;
- (iii) provision according to desert;
- (iv) provision according to length of the cohabitation during the marriage.

In their Report¹⁴⁶, the Commission state that their proposed reforms are based on two 'considerations'. The first is the need for certain, clear and simple rules. The second, which is more relevant for our purposes and upon which it is claimed consultees agreed, is the 'need to ensure that the surviving spouse receives adequate provision.' This can be seen to correspond roughly to the second of the bases in the Working Paper. Thus, it is submitted that whilst it is alleged¹⁴⁷ that consultation produced "no agreement upon the single most appropriate principle to be applied," the Commission itself has chosen provision for the surviving spouse to be the most important policy objective of intestacy law. This conclusion is clearly supported by the recommendation in the Report that the surviving spouse should take the whole estate. For what it is worth, over 70% of the respondents in the Law Commission's public opinion survey supported the surviving spouse receiving all, even where there were children¹⁴⁸.

¹⁴⁶ Law Com. No. 187 paras. 24 to 26.

¹⁴⁷ Ibid para. 24.

¹⁴⁸ Law Com. No. 187 Appendix C, para. 2.8.

Whilst the Law Commission's views cannot be regarded as representing domestic policy unless and until they are adopted, it is suggested that in fact the present law to a large extent supports their view that the most important purpose of the law of intestacy is to make adequate provision for a surviving spouse. Whilst the Law Commission argue that the present law does not actually do this at the moment in all cases¹⁴⁹, it is still clear that in the majority of cases the surviving spouse will receive the whole of or at least a very substantial proportion of the estate.¹⁵⁰

It is suggested that the reasons for the policy of giving priority to the surviving spouse are the same as the reasons put forward above¹⁵¹ for the Court's discretion to award financial provision to a surviving spouse where reasonable provision has not been made. It should be remembered that that discretion extends to cases where the rules of intestacy do not make adequate provision for the surviving spouse.

IV APPLICATION OF POLICY

Having identified the policy of English law in relation to inheritance by spouses in purely domestic cases, we need to see

¹⁴⁹ Where the matrimonial home is not jointly owned, the rules on intestacy will often result in a surviving wife receiving less than (s)he would on divorce.

¹⁵⁰ The recent increase in the size of the statutory legacy from 85,000 pounds to 125,000 pounds may be thought to reflect the Law Commission's favoured policy, especially in view of the fact that house prices have not risen at all, and in many cases have fallen, in England in recent years.

¹⁵¹ At B 3 supra.

how this policy applies in relation to cases which have a foreign element and where there is a dispute about the validity of the decree between the forum and the lex successionis.

A. WILLS

We have seen that it is axiomatic that in interpreting a will the aim is to uphold the wishes of the testator. Thus, it could be argued that where there is a will, whether a 'spouse' should be considered to be a 'spouse' should be decided in the way in which the testator would have wished.

1. Where the testator is the other 'spouse'

Where there has been a divorce, judicial separation or nullity decree pronounced, unless there was evidence that the testator did not accept the validity of the decree, it must be presumed that (s)he did not intend the person whom (s)he considered to be his/her 'former spouse' to inherit. This seems to be the assumption behind the Wills Act 1837 section 18A as amended.

The policy behind this statutory provision can be achieved for cases where English law is not the lex causae by selecting a preference rule which will result in disinheritance. Thus, the 'differential rule'¹⁵² is appropriate.

2. The testator is a third party

What happens where the will of a third party confers a benefit on the spouse of X and there has been a matrimonial decree

¹⁵² See at II C supra.

between X and his/her spouse the validity of which is in dispute between the lex causae and the forum? It is not quite so clear that the testator did not intend the 'spouse' to take. The existence of an invalid decree might not affect his/her wish to benefit the 'spouse'. But which law should decide whether the decree is valid? It is suggested that the issue of validity should so far as possible be seen through the eyes of the testator.

In this situation, it would seem that application of the law of the testator's domicile at the time of making the will, as the law governing interpretation, is more likely to reflect the testator's intention than his domicile at the date of death. Against this, it might be argued that the reason that the testator desisted in changing his/her will before death was because (s)he relied on the view taken by the law of his/her domicile at that time as to the validity of the decree. Both positions involve an element of speculation. It is suggested that since the choice of law rule for interpretation of a will is the same for movables and immovables it will be convenient to apply that rule.

Should the doctrine of preclusion apply in this situation? In Re Jones¹⁵³, it was held obiter that it should. Battersby¹⁵⁴ disagrees on the basis that the doctrine is too blunt an

¹⁵³ (1961) 25 DLR (2d) (B.C. Sup. Ct.) 595 upheld (1962) 31 DLR (2d) 292 (Sup.Ct.Canada).

¹⁵⁴ (1977) 16 U.W. Ont. 163 at 177.

instrument to produce rational results in the context of wills. He suggests that problems in relation to wills can be solved as questions of construction. This might help in determining whether a gift to 'the spouse of X' was meant to refer to the first spouse in relation to whom there had been an invalid decree or the second spouse where the validity of the marriage was in doubt. However, it would not help if X had not remarried. There is only one possible 'spouse' of X and yet if the decree is valid, the gift lapses. However, the writer agrees with Battersby that preclusion is inappropriate here because the testator's intention is not known.

Therefore, it is submitted that the best alternative is to assume that the testator's definition of spouse is the same as the lex causae, which should be treated as being the law governing interpretation of the will.

B. PROVISION FOR DEPENDENTS

1. Discretionary Schemes¹⁵⁵

It will usually be necessary to determine whether the first marriage has been terminated either because the foreign scheme does not provide for ex-spouses or because there is a different level of provision for spouses and ex-spouses, as in the English scheme.

We saw above that English policy requires that proper provision

¹⁵⁵ It will be remembered that we are assuming that an English Court would be prepared to apply a foreign discretionary scheme - see I C supra.

should be made for both spouses and former spouses. Thus, we should apply whichever rule will enable the 'spouse' to obtain the higher level of provision. We saw above that this would be achieved by a presumption in favour of upholding succession rights of spouses. Since the provision is discretionary, the Court will only make an order in favour of a 'spouse' who is meritorious. Thus, for example, no order will be made where the 'spouse' has already been adequately provided for in divorce proceedings.

2. Fixed Share Schemes¹⁵⁶

It is quite conceivable that an English Court would be faced with a case where a foreign will fails to provide the fixed amount specified by the lex succesionis for a 'spouse'. The personal representatives argue that there has been a divorce and so the 'spouse' is not entitled to the fixed share and the 'spouse' argues that the divorce is not valid.

Since the rationale behind such fixed shares is assumed to be the same as that behind the discretionary system¹⁵⁷, the same policy should in principle be applicable. Thus, the preference rule would be the presumption in favour of upholding succession rights of spouses.

The main problems with this solution is that the fixed share system does not have the same safeguards against abuse as the

¹⁵⁶ See II B 4 supra.

¹⁵⁷ Ibid.

English law discretionary system. The latter can ensure that unmeritorious claimants do not succeed and that, for example, a spouse who has obtained financial provision following a matrimonial decree cannot have a 'second bite of the cherry'¹⁵⁸; whereas under the fixed share system the 'spouse' would take automatically under the proposed preference rule.

It is suggested that to some extent these safeguards might be provided by a limited use of the doctrine of preclusion, under which a 'spouse' who had already received financial provision could not rely on the invalidity of the decree in order to claim a fixed share on death. It will be seen that such a limited use of the doctrine of preclusion avoids the main criticisms of that doctrine¹⁵⁹. In particular, it is irrelevant whether the claimant petitioned for the decree or participated in the proceedings. The operation of the doctrine is not based on a vague notion that the 'spouse's' involvement in the proceedings is inconsistent with claiming a pecuniary benefit, but on the specific principle that since the 'spouse' has obtained adequate provision on an alleged termination of the marriage, (s)he cannot now claim more provision on the real termination of the marriage by death.

This solution would also deal with the difficulty which may arise where the parties were subject to a community of property regime, but the lex successionis is a separate property system. Thus,

¹⁵⁸ See Re Fullard [1982] Fam. 42.

¹⁵⁹ See at II A 4 (c) supra.

where the community property has already been divided on termination of the marriage by matrimonial decree, the 'surviving spouse' should be precluded from relying on the invalidity of the decree in order to claim a fixed share in the succession, because (s)he has already had the benefit of the operation of the marital property regime¹⁶⁰.

Thus it is suggested that in relation to fixed shares, the presumption of upholding succession rights of spouses should apply subject to the limited operation of preclusion doctrine. Whilst this will clearly not provide the same flexibility as the discretionary system, it is suggested that it is the preference rule which most closely reflects domestic policy.

C. INTESTACY

We saw above that the rationale behind the law in respect of spouses on intestacy was in reality the same as that of the discretionary family provision. Thus, we would expect that the same preference rule would be appropriate. Two particular points should be made to support this hypothesis.

Firstly, the policy of providing for spouses is not limited to spouses who are still living in marital harmony. Thus, the mere

¹⁶⁰ The purpose of community property interests and fixed shares are essentially the same. (See Marsh, Marital Property in the Conflict of Laws (1952) at p. 245). The problem of 'over-protection' or 'under-protection' as a result of migration from a community state to a separate property state or vice versa is well documented. (See, e.g. Marsh *ibid*; McClanahan, Community Property Law in the United States (1982) at Chapter 13 and Miller (1990) 39 ICLQ 261, 263 - 267).

fact of separation without any decree does not prevent a spouse claiming the full share on intestacy. This approach was endorsed by the Law Commission¹⁶¹. Secondly, the policy of providing for spouses on intestacy should apply to all spouses who have not been provided for at the time of a matrimonial decree. This result can be ensured by applying the doctrine of preclusion to those for whom adequate provision has already been made. The comments about this doctrine¹⁶² made in relation to fixed shares are equally applicable here.

V RECOMMENDATIONS

The following preference rules are recommended:-

1. (a) In relation to testate succession between spouses, the 'differential rule' should apply.
(b) In relation to testate succession of a third party, the choice of law rule for interpretation of the will should be applied.
2. In relation to discretionary schemes and fixed shares, there should be a presumption in favour of whichever rule upholds succession rights. In the case of fixed shares, this should be subject to the doctrine of preclusion.
3. On intestacy, there should be a presumption in favour of whichever rule upholds succession rights, subject to the doctrine of preclusion.

¹⁶¹ Law Com. No. 187 para. 39.

¹⁶² At text accompanying n. 159 supra.

CHAPTER 8: MATRIMONIAL PROPERTY

I. THE SCOPE OF THE PROBLEM

A. INTRODUCTION

Where there is a disagreement between the lex fori and the law governing the matrimonial property relations of the party as to whether a matrimonial decree should be recognised, there may be a conflict about the matrimonial property rights of the parties. The recognition or otherwise of the decree may affect the question of whether property acquired after the decree falls within the matrimonial regime and who has control over the property included within the regime.

At the outset we should emphasise that the English Court will generally not be concerned with establishing the spouses' respective rights under a foreign matrimonial property regime if it has jurisdiction to make a financial provision order under the English discretionary distribution scheme. Such jurisdiction will exist automatically where the English Court has granted the matrimonial decree.¹ Applications for financial relief following a recognised foreign formal divorce may be made with the leave of the Court where the jurisdictional requirements of section 15 of the Matrimonial and Family Proceedings Act 1984 are satisfied.² In this situation, the conflict of rules problem

¹ Unless the application for financial relief is made after the Petitioner has remarried.

² Where either party was domiciled or habitually resident in England for one year at the time of the application or at the time when the foreign divorce was obtained or either has a beneficial interest in possession in a dwelling-house in England

will not arise because it is clear that the scheme only applies where English law recognises the foreign divorce. Thus, the Court is only likely to be concerned with determining rights under foreign matrimonial property regimes on death, on bankruptcy of one of the parties or on marriage breakdown where the English scheme is not applicable.³

We will have to spend more time than in previous chapters defining the scope of the problem for two reasons. Firstly, the choice of law rule is not clearly established. Secondly, there has been little discussion of the conflict of laws' treatment of deferred community of property regimes and equitable distribution schemes.

B. THE CHOICE OF LAW RULE

Traditionally, choice of law rules in respect of matrimonial property have been classified into cases where there is a marriage contract and where there is none. However, this distinction has been criticised by a number of writers who claim that all matrimonial property regimes are contractual. Upon marriage, they are either expressly or impliedly agreed by the parties or are presumed by law. According to the proponents⁴ of this contractual analysis, there is a presumption, in the absence

and Wales.

³ For example, where the parties do not wish to take matrimonial proceedings; after a foreign decree which is not recognised or where the applicant spouse has remarried before applying for financial provision.

⁴ Goldberg (1970) 19 ICLQ 557 and Castel, Canadian Conflict of Laws Vol. 2 (1977) at p.422 and (1982) 60 Can. Bar. Rev. 180.

of an express or implied contract, that the parties have agreed on the application of the basic regime imposed by the law of the husband's domicile⁵. This presumed contract, like express and implied contracts, is governed by its proper law.⁶

The contractual analysis has a number of attractions. Firstly, it protects the justified expectations of the spouses⁷. Secondly, it avoids the problems of devising an appropriate choice of law rule. Thirdly, the use of the proper law provides flexibility⁸. Fourthly, it would seem that the proper law applies to both movables and immovables. Finally, as we shall see, it can be applied more easily to diverse types of matrimonial property regimes.

However, the dual classification is too entrenched to be ignored. The choice of law rule in cases where there is no express or implied contract would seem to be the law of the matrimonial domicile, at least in relation to movables. Ownership of

⁵ In the recent British Columbian case of Tezcan v Tezcan (1992) 87 DLR (4th.) 503, it was held that whether there was a contract or not was a question for the law which would be the proper law if there were a contract. In this case, Turkish law held there was no contract.

⁶ Where there is such an agreement, the rights of the parties are governed by the proper law of such agreement (as determined at common law because the Rome Convention is inapplicable (art. 1(2)(b)).

⁷ Castel, Canadian Conflict of Laws Vol. 2 (1977) at p. 422.

⁸ For example, where the spouses have separate domiciles.

immovables would seem to be governed by the lex situs⁹.

According to caselaw, the matrimonial domicile is presumed to be the husband's domicile at the date of the marriage¹⁰. The problem of ascertaining the matrimonial domicile following the abolition of the wife's dependent domicile has not been judicially considered. The Hague Convention on the Law Applicable to Matrimonial Property Regimes (1978) attempts to solve the problem by providing the law of the common habitual residence¹¹ of the parties after marriage¹² as the governing law, in the absence of designation by the spouses. However, as this Convention has not been signed by the United Kingdom, it is necessary to find a solution based on the traditional domicile rule.

Two suggestions have appeared in recent publications. The editors of the latest edition of Dicey and Morris have proposed that where the spouses have separate domiciles,

⁹ Welsh v Tennant [1891] A.C. 639; Tezcan v Tezcan (1992) 87 DLR (4th.) 503. This would seem to be unsatisfactory for the same reasons that the scission between movables and immovables for succession is unsatisfactory (see chapter 7 n.8 supra). In particular, the spouses' property relationship could be governed by a number of different regimes if they own immovable property in several different jurisdictions. On the other hand, at least the lex situs is always certain. Maybe this is why it has been adopted statutorily as the choice of law rule in, for example, Nova Scotia (s. 22 Matrimonial Property Act 1980) and New Zealand (s.7 Matrimonial Property Act 1976).

¹⁰ Re Egerton's Will Trusts [1956] Ch. 593. As we have seen, the proponents of the contractual analysis take a different view about the nature of the presumption referred to here.

¹¹ Art. 4.

¹² See also the Ontario Family Law Act 1986 s. 15 and the Nova Scotia Matrimonial Property Act s.22 which prescribe the last common habitual residence of the spouses.

"the applicable law should be that of the country with which the parties and the marriage have the closest connection, equal weight being given to connections with each party."¹³

Davie¹⁴ suggests adopting the United States approach, under which the law of the domicile of the person who acquired the property applies.

With respect, the former is to be preferred. One of the rationales for matrimonial property regimes is that the spouses' rights should not depend on acquisition. If the assets acquired by each party are subject to different regimes, anomalous results may be produced. The main defect in Dicey and Morris' formulation is the lack of certainty of the unstructured proper law test. It is suggested that this may be alleviated by the use of presumptions.¹⁵

English caselaw has not finally established¹⁶ whether the governing law changes with a change of domicile by one or both parties. However, the majority of academic opinion¹⁷ seems to

¹³ Dicey and Morris (chapter 1, n.1 supra) at p. 1069.

¹⁴ (1993) 42 ICLQ 855 at p. 875.

¹⁵ Analogous to those in the Rome Convention art. 4. For example, there could be a presumption that the marriage is most closely connected to the country where the parties have or had their last matrimonial home.

¹⁶ For discussion of the apparently conflicting caselaw see Davie (1993) 42 ICLQ 855 at pp. 876 - 880 and Dicey and Morris (chapter 1, n.1 supra) at pp. 1082 - 1086.

¹⁷ Cheshire and North (chapter 1, n.1 supra) at p.871; Morris (chapter 1 n. 142 supra) at p. 370; Dicey and Morris, The Conflict of Laws, 11th edn. (1987) Rule 156 supported by Collier (chapter 1 n.142 supra) pp. 283-4. (However, in the 12th. edn,

favour the North American¹⁸ system of partial mutability under which the law of the new domicile will govern subject to vested rights which have already been acquired under the law of the previous domicile.

The problem of change of domicile is made considerably more complicated by the wife's independent domicile. Most writers point out that one spouse should not be able to upset the whole matrimonial property regime by a unilateral change of domicile¹⁹. The proper law formula suggested by Dicey and Morris should avoid such difficulties. Whilst change of domicile of one of the parties will clearly be relevant, if the other spouse has no connection with the new domicile it will be unlikely to be the most connected law.

Whilst we should bear in mind the difficulties with the choice of law rule, in order to concentrate on the problems with which we are dealing we will assume that the spouses have a common domicile at all relevant times, unless the contrary is stated.

(1993) Dicey and Morris have adopted the immutability rule in Rule 152.) Under the contractual analysis, the spouses can change the matrimonial regime by express agreement.

¹⁸ Scoles and Hay (chapter 6, n.18 supra) write at p. 461, "The cases in the United States are quite uniform in applying the law of the marital domicile at the time the property is acquired, but respect the continued existence of marital rights acquired during an earlier domicile elsewhere." For Canada, see Re Heung Won Lee (1963) 36 DLR (2d) 177 at pp. 183 - 4.

¹⁹ Cheshire and North (chapter 1, n.1 supra) at p. 872. It might be noted that under English law, the spouses could acquire different domiciles while still living happily together, if upon losing their common domicile of choice, they did not acquire a new domicile of choice but both reverted to their respective domiciles of origin.

C. DIFFERENT TYPES OF MATRIMONIAL REGIME

We will now examine how, if at all, the conflict of rules problem may arise in respect of different types of matrimonial property regime. We shall use the traditional division into three basic types of regimes: separate property regimes, immediate community regimes and deferred community regimes. We shall also consider whether discretionary distribution²⁰ schemes operating on divorce can be considered as a fourth type of regime. However, we should be aware of the limitations of this classification. Firstly, there are so many variations in individual regimes that, as Wolff²¹ said "a general survey can do no more than describe the fundamental types ignoring the deviations between them."

Secondly, reforms in recent years have to a large extent blurred the distinctions between separate and community schemes.²²

1. Separate Property Regimes

Under separate property systems²³, neither party has any rights in the property of the other by virtue of the marriage. The rules

²⁰ These are generally called equitable distribution schemes in the US, but the adjective 'discretionary', which is used in England is more appropriate (See Glendon, *New Family and New Property* (1981) at p.64).

²¹ Wolff, *Private International Law*, 2nd. edn (1950) at p. 353.

²² See Glendon (n. 20 supra) at p. 58 and Rheinstein and Glendon (1980) *International Encyclopedia of Comparative Law*. vol. iv chapter 4 at p. 170.

²³ Examples of completely separate property states are Muslim countries such as Turkey (see Tezcan v Tezcan (1992) 87 DLR (4th.) 503) and Iran (see Vladi v Vladi (1987) 39 DLR (4th.) 563).

to be used to determine their respective beneficial interests in property where the legal title is vested in one or both spouses are the same²⁴ before, during and after their marriage. Thus the recognition or otherwise of the decree is irrelevant to the ownership of property and the conflict of rules problem cannot arise. We shall consider below to what extent if at all the introduction of a scheme for apportioning the assets on termination of the marriage affects this conclusion.

2. Community of Property Regimes

(a) The Various Schemes

Common to all types of immediate community regime is the fact that during the marriage the property which is included within the scheme is owned jointly by the spouses.

The differences lie in three main aspects of the regimes. Firstly, which property²⁵ is subject to the regime? In particular, pre-marital property and post-marital gifts and inheritances are excluded from 'acquests' regimes. But there are a number of different permutations. Secondly, who has the right

²⁴ Although certain presumptions may apply during the marriage, such as the presumption of advancement. It is suggested that the fact that there has been a divorce or nullity decree, whether recognised or not, would usually be sufficient to rebut the presumption. Thus, the issue of recognition would not of itself be decisive as to ownership.

²⁵ It is possible to have a community limited to particular types of assets. For example, the Law Commission recommended joint ownership of the matrimonial home (Law Com. No. 86) and later of chattels bought for joint use (Law Com No. 175). If these suggestions had been taken up, there would have been a Statutory Community scheme in relation to the specified type of property.

to deal with the community during the continuation of the marriage? Traditionally, the husband had sole control, but this power has been substantially eroded in many community systems.²⁶

Thirdly, how are the assets divided on divorce?²⁷ Originally, each spouse simply retained his/her undivided half share in each asset. Where possible, the assets were physically divided and otherwise they could be sold and the proceeds divided. This is called the "item theory". In modern times, the assets are usually divided between the parties by agreement or, failing consensus, by a Court. Some systems²⁸, still clinging to the philosophy of the 'item theory', provide that this partition has retroactive effect to the date of divorce. Other systems²⁹ have abandoned the 'item theory' in favour of the 'aggregate theory' in which they work out an equal division of all the assets. Ownership changes from the date of the division. Some community states³⁰ have gone a step further and moved from equal division

²⁶ Since the French reform of 1966, the wife's cooperation is now required in transactions of major significance. (See Rheinstein and Glendon (n. 22 supra) at para. 11 et. seq.) Some of the American Community States have introduced 'joint management' (see Glendon, n. 20 supra, at pp. 147-8).

²⁷ See McClanahan (chapter 7, n. 158 supra) at pp.531 et seq.

²⁸ e.g. France and Holland. In Puerto Rico each spouse becomes immediately entitled on divorce to one half of the property. From that time onwards "the spouses may sell, assign or convey their rights in the conjugal property, subject to the final liquidation" See McClanahan (chapter 7, n.158 supra) at p. 539.

²⁹ For example, California, Louisiana (from 1981).

³⁰ For example, Arizona, Idaho, Nevada, Texas and Washington.

to equitable division. Others³¹ have simply given the Court power to depart from equal division where this would lead to injustice.

(b) The conflict of rules scenario.

Assume that the foreign matrimonial decree is not recognised by the forum but is recognised by the lex causae, as in example M10.³² If the recognition rule is applied, the marriage still subsists and Theresa may³³ be able to share in property acquired after the alleged divorce. Also, until a valid divorce is pronounced the community regime for management will continue and neither spouse will be able to realise his/her share in the asset or request partition.

Conversely, if the choice rule is applied, the marriage no longer subsists and the community is dissolved. Thus, post-decree acquisitions are the separate property of the 'acquirer'. In example M10, Theresa will be able to realise her share

³¹ For example, . France and Holland. cf. California, Nevada and New Mexico where equal division is only to be departed from in specified circumstances. (see Rheinstein and Glendon, supra n. 22 at para. 99).

³² At chapter 1, III supra.

³³ In some countries property acquired after separation is the separate property of the acquiring spouse (e.g. California Civil Code s.5118). In the jurisdictions where there is a discretion to vary the 50/50 split of assets, this discretion may be used to exclude post-separation acquisitions from the community, where inclusion of them would be inequitable.

immediately.³⁴

3. Deferred Community Regimes³⁵

(a) The Various Schemes

Under these regimes, property is owned separately during the marriage and each party has full powers to deal with his or her own property. However, on termination by divorce³⁶, and in most systems also by death³⁷, the property included within the regime is shared equally between the parties. Again, there are differences as to which property comes within the regime. In some countries all the property of both spouses is included³⁸, subject to mutual agreement to the contrary. In other jurisdictions, only the gains made during the marriage are included³⁹. However, it must be pointed out that under most

³⁴ In those systems which give retrospective effect to the final division, the ownership is treated as changing at the date of divorce.

³⁵ Sometimes also called participation schemes. Friedmann "Matrimonial Property Law" (1955) uses the term "Intermediate Schemes".

³⁶ A different regime usually applies where the marriage is annulled.

³⁷ cf. The Israeli scheme. Also in some systems, such as Germany, the rules on death are different and the surviving spouse may elect between taking under the inheritance or the 'community' rules.

³⁸ For example, Scandinavian countries and Holland. This may be called a deferred universal community.

³⁹ This may be called a deferred community of acquests. Such a regime operates in Israel and in Germany. Under the Reunification Treaty, West German family law applies throughout Germany from October 3rd. 1990. However, in the case of spouses married in East Germany before that date, either may elect that the old GDR regime still applies (see Frank, (1991) 30 J. Fam. Law 335, 341 - 343).

modern schemes, a Court has discretion to deviate from equal sharing of the community assets.⁴⁰

A second important difference is the method of distribution. In some systems⁴¹, each spouse acquires a right to share in the property of the other on dissolution of the community. Whereas in other systems⁴², the 'loser' spouse simply has a right to claim an equalising 'compensation' payment from the 'gainer' spouse. Thus, it has been suggested⁴³ that the labelling of the West German scheme as a deferred community scheme is misleading. Nevertheless, in order to be consistent with most of the literature, we will include what might be called 'fixed distribution' or 'compensation' schemes under the heading of deferred regimes, whilst bearing in mind the important differences.

(b) Conflicts' Treatment of Deferred Schemes

The standard English conflicts of law texts do not discuss the

⁴⁰ For example, under the Swedish Marriage Act of 1987 uneven division is allowed where the relevant circumstances indicate that equal division would be unreasonable. Similarly in British Columbia, the Court may vary the equal division where it would be unfair having regard to the various circumstances set out therein (Family Relations Act 1979 s.43).

⁴¹ Such as the Danish, Dutch and British Columbian schemes.

⁴² Such as the German and Ontario regimes. For discussion of the difference between the British Columbia and Ontario schemes see Tezcan v Tezcan (1992) 87 DLR (4th.) 503 at p. 512 and Raffery, (1982) 20 UWOL Rev. 177 at 197.

⁴³ Voegeli and Wilenbacher, "Property Division and Pension-Splitting in FRG" in Weitzmann and Maclean (eds.) "Economic Consequences of Divorce. The International Perspective, (1992).

conflictual aspects of deferred schemes⁴⁴ because they treat them as separate property schemes⁴⁵, under which property rights are not affected by marriage. Thus, where the community crystallises on divorce, the issue will be seen as one of financial relief on divorce, which is governed by the lex fori. If this is correct, the conflict of rules problem cannot arise because ex hypothesi there can be no conflict where the choice of law rule is the lex fori. Where the English Court has no jurisdiction to deal with financial relief on divorce, it would presumably have to decide any issue regarding ownership of the matrimonial property on the basis of separate property principles⁴⁶, under which the termination is irrelevant.

Where the community crystallises on death, the issue is likely to be treated as one of succession. Thus, if the law governing the deferred community is the lex successionis, it will be applied. Otherwise, the appropriate lex successionis will be applied.

⁴⁴ However, Courts and legislatures in other jurisdictions have recognised the issues. For example, in Vladi v Vladi (1987) 39 DLR (4th.) 563 (discussed further below), the Nova Scotia Supreme Court applied the West German (fixed right distribution) scheme as the law of the last common habitual residence of the parties. The New Zealand Matrimonial Property Act 1976 s.7 provides a choice of law rule for application of its fixed right distribution regime.

⁴⁵ See, for example, Dicey and Morris (chapter 1, n.1 supra) at p. 1068 and Morris (chapter 1, n.142 supra) at p. 366.

⁴⁶ The procedure under the Married Women's Property Act 1882 s.17 can be used in respect of foreign property provided that there is jurisdiction over the Defendant, Razelos v Razelos [1969] 3 All ER 929.

It is respectfully suggested that the assumption of the text writers should be challenged and that foreign deferred community schemes should come within the matrimonial property choice of law rules and therefore be capable of being given effect to by the English Court on divorce, where there is no jurisdiction under the English discretionary distribution scheme, and on death. The desirability of such an approach can best be illustrated by means of an example.

Suppose that Marguerita and Hans are Danish domiciliaries who marry in Denmark. In the absence of contrary agreement, their matrimonial property is subject to the Danish deferred regime. Hans acquires substantial property in England. The marriage breaks down. The parties leave Denmark and have no remaining assets there. Hans goes to live in Japan and Marguerita goes to live in France. Hans obtains a divorce in Japan. He is currently working in England for a few months and Marguerita wishes to claim title to half of Hans' property in England, to which she is entitled under Danish law, on the dissolution of the deferred community.

If the Court is not prepared to give effect to the Danish deferred regime, it would have to declare that all the property is Hans' separate property⁴⁷. It is suggested that such a result is not consistent with conflicts' justice because it does not accord with the parties' legitimate expectations. It is distortionary because it accords neither with the domestic policy of the forum nor with that of the law governing the parties' matrimonial property relationship.⁴⁸

⁴⁷ This is the same problem as that experienced when spouses migrate from a separate property state to a community state. This problem has been dealt with in the United States, inter alia, by treating some property as quasi-community property. See McClanahan (chapter 7, n.160 supra) chapter 13 and Schreter (1962) 50 Calif. L.R. 206.

⁴⁸ Both England and Denmark provide for sharing of assets on divorce.

As there is no jurisdiction under the Matrimonial and Family Proceedings Act 1984, it would seem that Marguerita's only recourse is to obtain a judgment in Denmark granting her a half share which can be recognised in England. This would seem to be virtually impossible, without Hans' cooperation.⁴⁹ Even if it is possible, surely it will be fairer and more convenient for the English Court⁵⁰ to apply the Danish regime directly.⁵¹ In particular, it should be noted that if the couple came from Belgium or some other immediate community state, the Court would clearly be prepared to enforce Marguerita's title to half the property.

(c) Basis for Applying Foreign Deferred Schemes

Whether or not the contractual analysis is accepted, the English

⁴⁹ A foreign judgment will only be recognised if Hans is resident in the relevant foreign country or submits to the jurisdiction of the foreign Court. It should be noted that as the issue is a right in property arising out of a matrimonial relationship, it is excluded from the scope of the Brussels Convention.

⁵⁰ Which would seem to be the forum conveniens. In both Tezcan v Tezcan (1987) 46 DLR (4th.) 176 and Vladi v Vladi (1986) 73 NSR (2d) 418, the respective Canadian Courts were prepared to take jurisdiction because otherwise the wife would not obtain any share in the husband's property.

⁵¹ It may be argued that the English Court cannot calculate the shares of the parties in specific items of property if other items of property are not within its jurisdiction. However, account can be taken of the value of the foreign properties. In Tezcan v Tezcan (1992) 87 DLR (4th.) 503, the Court took into account the value of Turkish properties in ascertaining how to divide the British Columbian Properties. It should also be noted that the English Court, in deciding whether and how much financial relief to grant after a foreign divorce, has to take into account foreign financial provision which has already or is likely to be made (MFPA 1984 ss 16(2) and 18(6)).

Court will only enforce the foreign scheme if it classifies it as a matrimonial property regime rather than ancillary relief on divorce. There is some Canadian authority for such a characterisation. In Tezcan v Tezcan⁵², the British Columbia Court of Appeal characterised the claim before them as a property⁵³ matter because it would be so under both of the competing jurisdictions, Turkey and British Columbia. They found that the deferred regime contained in their own Family Relations Act was a property matter because "its true nature and character is to regulate the right to the beneficial use of property and its revenues and the disposition thereof."⁵⁴

Nova Scotia seems to have avoided the problem of classification, at least in respect of movables⁵⁵, by providing the same choice of law rule (i.e. the last common habitual residence) in relation to "the division of matrimonial assets and the ownership of movable property as between the spouses.". In Vladi v Vladi,⁵⁶ this provision was used in order to apply the West German deferred scheme.

⁵² (1992) 87 DLR (4th.) 503.

⁵³ It was common ground that the lex situs was the common law choice of law rule applicable to proprietary claims arising from marriage in respect of immovable property.

⁵⁴ This definition was adopted from the case of Derrickson v Derrickson (1986) 26 DLR (4th) 175.

⁵⁵ Section 22 (2) of the Matrimonial Property Act 1980 (N.S.) provides that "The ownership of immovable property as between spouses is governed by the law of the place where that property is situated." Thus, in relation to immovables it would seem necessary to determine whether the issue was one of division of assets or ownership of the property.

⁵⁶ (1987) 39 DLR (4th.) 563.

It is suggested that the classification of deferred schemes as issues of matrimonial property, rather than divorce, can be supported on a number of grounds.

(i) In most systems the deferred regime was not introduced in order to provide a solution on divorce. It was introduced in order to give effect to the matrimonial partnership⁵⁷ concept whilst allowing women more independence during marriage⁵⁸.

(ii) As we have seen, in practice there is often little difference between immediate and deferred regimes in the divorce situation.

(iii) It is incorrect to say that ownership of marital acquisitions is totally unaffected by the existence of the marriage⁵⁹. This is reflected by the common anti-avoidance provisions, under which one spouse is either prohibited from dealing with certain types of property⁶⁰ or can be restrained⁶¹

⁵⁷ See Gray, Reallocation of Property on Divorce (1977), Chapter 2.

⁵⁸ In some systems, such as Quebec, traditional community regimes have been reformed into deferred regimes for this reason.

⁵⁹ Although the Israeli Spouses' Property Relations Law s.4 specifically states this.

⁶⁰ For example, under the Danish regime, the matrimonial home cannot be sold or mortgaged without both spouses consent (see Pederson (1965) 28 MLR 137 p. 140). There is a similar provision in the German Family Code Art. 15 - See Forder (1987) 1 Int. J. of Law and the Family 47 at p. 61.

⁶¹ By Court order. Note that under English law, a restraining order can only be sought once matrimonial proceedings have been commenced, Matrimonial Causes Act 1973 s.37.

from dealing with his own property in a specific way if this would defeat the rights of the other under the deferred community. Under some regimes,⁶² one party can ask for dissolution of the community if the other has abused his powers under the community, even whilst the marriage still subsists.

However, even if the issue is classified as one of matrimonial property, it is not clear whether an English Court would be prepared to do any more than simply declare the property rights which have been vested by the foreign scheme.⁶³ In which case a distinction would have to be made between those regimes under which rights in the property are acquired and those where only a right to compensation is acquired.⁶⁴ It is suggested that such differential treatment would be unfortunate and that the Court should take the view that it can enforce a foreign matrimonial property regime even where the rights are not yet vested.

(c) Application of the Choice Rule

Under the contractual analysis, the English Court would enforce the terms of the implied/presumed contract, which are supplied by the provisions of the foreign deferred regime. The foreign law, in the above example Danish, will govern as the proper law of the contract.

⁶² For example, the Danish regime para. 38 and Dutch regime para. 180. See Pederson (1965) 28 MLR 137 at p. 141.

⁶³ It might take the view that it has no power to redistribute assets other than that accorded to it by statute. See Pettit v Pettit [1970] AC 777.

⁶⁴ See text at notes 41 - 43 supra.

The situation is more complicated if the contractual analysis is rejected. How would the English matrimonial domicile rule work in relation to deferred schemes? The particular difficulty with deferred schemes is one of timing. This problem did not arise in the two Canadian cases discussed above. In Vladi v Vladi⁶⁵ the choice of law rule, the last common habitual residence, specifies the appropriate time. In Tezcan v Tezcan⁶⁶, the property concerned was immovable and thus subject to the lex situs which is unaffected by time.

However, under the domicile rule, we need to know at what point in time the parties have to be domiciled in the deferred regime country in order for that scheme to be applied. It is suggested that as a matter of **principle** the most appropriate option⁶⁷ is to apply the domicile at the date of the acquisition of each item of property, as this corresponds to the partial mutability approach advocated above.⁶⁸ The very essence of the deferred

⁶⁵ (1987) 39 DLR (4th.) 563.

⁶⁶ (1992) 87 DLR (4th.) 503.

⁶⁷ The other two options are:-

(i) The date of the marriage. This approach is subject to the same defects as the immutability principle. Whilst it has been adopted in Israel, it has been criticised (Shava (1982) 31 ICLQ 307 and Goldwater (1981) 16 Isr. L.R. 368) and an amendment proposed (Fasberg (1990) 39 ICLQ 856 at p.858).

(ii) The date of the termination of the marriage. This corresponds to full mutability and treats the scheme as if it is a pure distribution rather than a community regime at all. (An even more extreme form of mutability can be found in the New Zealand Matrimonial Property Act 1976 .7 which provides that the New Zealand deferred regime applies wherever either spouse is domiciled in New Zealand **at the date of the application**. This is criticised by Forsyth (1977) 7 NZULR 397 at 399).

⁶⁸ See text accompanying n. 18 supra.

regime is that the actual realisation of rights is deferred. This assumes that inchoate and largely unenforcable⁶⁹ rights are actually acquired during the marriage, presumably at the time of acquisition. The parties' legitimate expectations as to their rights in acquests during the marriage will presumably reflect the matrimonial property regime in the country of domicile at the time of acquisition. Thus, that regime should be applied on later termination in relation to those acquests. The problem of the non-vesting of rights could be solved by saying that on the subsequent termination of the marriage, the rights are retrospectively vested according to the law of the domicile at the time of acquisition.

The main drawback with this proposal is the **practical** complexity of determining the domicile at the time of the acquisition of each asset. It is suggested that this problem should not be exaggerated. It is unusual for couples to change domicile more than once during their marriage. In any event, the administrative difficulties are no greater than in applying the partial mutability approach to immediate community schemes.

It should be reiterated that application of the deferred regime by the English Court would not affect the English Court's jurisdiction to apply its own discretionary scheme, where available⁷⁰, at the date of divorce. The English⁷¹ discretionary

⁶⁹ Until termination of the marriage, the only method of enforcement is usually by means of anti-avoidance devices (see n. 62 supra).

⁷⁰ See text accompanying notes 1 and 2 supra.

scheme allows for the variation of all rights in the property, whether or not vested under any previous scheme. Nonetheless, the legitimate expectations of the parties at the time of acquisition should at least be a relevant⁷² factor.

(d) Conclusion

If the above hypothesis is correct, then the 'conflict of rules' problem will arise in relation to deferred regimes,⁷³ where there is a dispute as to whether the foreign decree is recognised or not. The recognition or otherwise of the decree may⁷⁴ affect both the quantum of the property to be included within the deferred community and whether or not the rights thereunder can yet be realised⁷⁵. Thus in the example given above, the problem

⁷¹ Although some discretionary distribution schemes are limited to property acquired during the marriage.

⁷² The Court is obliged "to have regard to all the circumstances of the case." (Matrimonial Causes Act 1973 s.25(1) as amended by Matrimonial and Family Proceedings Act 1984). For discussion of the effect of a matrimonial property contract, see Cretney and Masson, *The Principles of Family Law* 5th. edn. (1990) chapter 21 and Law Society, *Maintenance and Capital Provision on Divorce* (1991).

⁷³ At least those under which rights in property are vested automatically on termination.

⁷⁴ As with immediate community schemes, some systems exclude from the community property acquired after separation. See for example New Zealand where property acquired after the parties have ceased to live together normally constitutes separate property as distinct from matrimonial property. (Matrimonial Property Act 1976 s.9(4)). In Germany, the Court may prevent a party from sharing in post-separation acquisitions of the other where separation follows from the deliberate choice of the former (see Gray, n. 57 supra) at p. 253.

⁷⁵ Although under some regimes, the community can be dissolved otherwise than on divorce or death. For example, under the Ontario Family Law Act 1986 a claim for division can be made where there is separation with no reasonable prospect of resumed cohabitation (see Baxter (1987) 35 Am. J. Comp. Law 801, 804).

would arise if the Japanese decree was recognised by Danish law⁷⁶ and not English law or vice-a-versa. This could affect Marguerita's rights to property acquired by Hans after the decree or her right to claim at all.⁷⁷

4. Discretionary Distribution Schemes

(a) Introduction

In modern times, most Western separate property systems⁷⁸ have introduced discretionary schemes for reallocation of matrimonial property on divorce, similar to the English scheme. Can the conflict of rules problem arise in relation to such regimes?

At first sight, the answer would seem to be in the negative because the English Court always applies English law to the question of redistribution of property on divorce, even where the divorce was obtained abroad.⁷⁹ However, this does not cover the

In Denmark, one party may apply to dissolve the community where the other has abused the assets (para. 38 of the Danish Matrimonial Property Act 1925).

⁷⁶ Under all the versions of the choice of law rules discussed above, Danish law would still apply even if one or both spouses has lost their Danish domicile since they have not acquired a new common domicile and there does not seem to be any other country which is now more closely connected with the marriage.

⁷⁷ Although no doubt she could in any event request dissolution of the community.

⁷⁸ For example, in Australia, Canada and the separate property states of the USA. According to Bala (1987) 1 Int. J. Law and Family 1 at 16, by 1984 all 42 common law property states had adopted some form of discretionary distribution law, although in three the reform was judicial rather than legislative.

⁷⁹ The Law Commission expressly preferred English law to govern financial relief following a foreign divorce because (i) the foreign law may not give effective relief which is exactly the mischief aimed at; (ii) it is not easy to think of an appropriate choice of law rule and (iii) it would be expensive

situation where the English Court does **not** have jurisdiction to exercise its powers of property adjustment following an overseas divorce,⁸⁰ but simply has to determine who has ownership of property situated in England.⁸¹ The orthodox approach would be to apply the foreign law's separate property system, ignoring its distribution scheme. It is submitted that this approach should not be accepted without further analysis.

(b) Should Foreign Discretionary Schemes be Applied?

It is suggested, that as a matter of **principle**, an English Court should be prepared to apply a foreign equitable distribution scheme, where it cannot apply its own,⁸² for the same reasons as those advocated above in relation to deferred community schemes.⁸³ In particular:-

(i) Statutory redistributive powers were created in order to reflect the real value of the non-economic contributions of the wife, which cannot otherwise be recognised under a separate property system,⁸⁴ and the modern concept of matrimonial partnership.⁸⁵ Thus, discretionary distribution schemes in

and difficult to get expert evidence about foreign law. (Law Com. W.P. No. 77 (1980) para. 56).

⁸⁰ See supra pp. 276 - 277.

⁸¹ For example under s.17 Married Woman's Property Act 1882.

⁸² This deals with the Law Commission's first objection, supra n. 79.

⁸³ The arguments are also similar to those put forward in relation to discretionary financial provision on death, see Chapter 7 I C supra.

⁸⁴ See chapter 7 III B 3 supra.

⁸⁵ See n. 57 supra. and Law Com. No. 25.

separate property systems should not create substantive rights any less than deferred community systems.⁸⁶

The main reason⁸⁷ for preferring discretionary regimes seems to be the desire for flexibility⁸⁸ to take into account variation between the circumstances, including the length and financial circumstances⁸⁹ of specific marriages. This demonstrates the difficulty of finding an appropriate fixed formula for such rights rather than any inconsistency with the conferring of substantive rights which crystallise when their quantum is fixed by a Court.

⁸⁶ See Gray (n. 57 supra) at p. 336. Waters (1970) 22 McGill LJ 315 at p. 318 writes, "Community of acquests is a deliberate modern attempt to place the parties in a fair and equitable position; separation as to property, accompanied by a statutory judicial discretion to allocate assets between the parties on the termination of marriage, is another. The second deserves as much respect as the first." A number of English writers have commented on the similarity of the results obtained under the English discretionary system and deferred community of acquests regimes. See, for example, Freedman et al., "Property and Marriage: An Integrated Approach" Institute of Fiscal Studies Reports Series No. 29 (1988) and Forder (1987) 1 Int. J. of Law and the Family 47 at p. 48.

⁸⁷ See Law Com. No. 52.

⁸⁸ It is significant that in recent years there has been increasing disillusionment with discretionary systems. In New Zealand, the discretionary system introduced in 1963 was replaced by a deferred community system in 1976. In England there is now a fixed formula system in relation to child support under the Child Support Act 1991. It has also been suggested that the use of computerisation may enable the creation of formulae which are sufficiently sophisticated to take into account all relevant factors. See Green, Maintenance and capital provision on divorce: A need for precision? (1987).

⁸⁹ For example, under the 1973 Act, early caselaw showed the need for a different approach in high, middle and low income cases, see Bromley and Lowe, chapter 7 n. 100 supra, at pp.767-768.

The fact that under discretionary distribution systems one spouse has rights in the property of the other prior to divorce has been recognised by a number of American writers⁹⁰ and Courts⁹¹ in U.S. community states when considering the nature of property brought in by migrants from separate property states.

(ii) Applying the foreign law's separate property system without its discretionary distribution scheme may produce results which are not consistent with conflicts' justice and are distortionary.⁹²

However, it may be argued that there is a significant distinction between deferred community and discretionary schemes because of the **practical** difficulty of ascertaining how the foreign court would have exercised its discretion in any particular case. It is suggested that this difficulty is largely

⁹⁰ Sampson, Common Law Property in a Texas Divorce (1979) 42 Tex.B.J. 131 quoted in Scoles and Hay at p. 466 writes, "It is true that 'common law separate property' assets or rights brought into Texas by a husband come with legal title vested in him. However, it follows logically that the property also must come to the state attached with whatever equitable claims the wife has under the statutes and caselaw of the common law jurisdiction. Thus, if the husband's separate property is subject to equitable division in the state of origin, it must be similarly subject to such treatment in Texas."

⁹¹ For example, in Hughes v Hughes 91 N.M. 339, 573 P.2d 1194, 1201 (1978), the New Mexico Court held that the characterization of the property as separate must be made under the applicable laws of the State of Iowa from where the parties had migrated. Thus, "the property is subject to all the wife's incidents of ownership, claims, rights and legal relations provided in any and all of the law of the State of Iowa that affect marital property." See also Rau v Rau 432 P. 2d 910 (Arizona 1967), Burton v Burton 531 P. 2d 204 (Arizona 1975), Berle v Berle 546 P. 2d 407 (Idaho 1976).

⁹² See text accompanying n.48 supra.

illusory. After examining caselaw, a foreign court is in almost as good a position as a domestic court⁹³ to exercise the discretionary powers. Also as we have seen modern immediate and deferred community schemes usually allow for Court discretion to vary the equal shares⁹⁴ or in some cases⁹⁵ for equitable distribution ab initio. It would seem that today in order to apply most immediate or deferred community schemes, a Court will have to consider whether to exercise such a discretion⁹⁶.

(c) Basis for Application of Foreign Discretionary Schemes

Under the contractual analysis, it could be held that where parties are domiciled in an equitable distribution regime at the date of the marriage, the provisions of the discretionary scheme form the terms of an implied or presumed contract. In other words, the parties are deemed to agree that on termination of the marriage their property rights are to be determined by a Court in accordance with the statutory regime. The English Court should be able to enforce the terms of that contract. Such contract might be varied by express or implied agreement, where the

⁹³ One of the reasons for the disillusionment with discretionary scheme is the evidence of inconsistency between decisions of different courts. See Eekelaar, *Regulating Divorce* (1991) pp.61 et. seq. There is no reason why this should be any worse where a foreign court is involved. There is also no reason why there should be any more difficulty in bringing evidence of the foreign law than in any other type of case. This answers the Law Commission's third objection (supra n.79).

⁹⁴ For example, in Germany and Nova Scotia.

⁹⁵ Arizona, Texas, Idaho, Nevada and Washington.

⁹⁶ In Vladi v Vladi (1987) 39 DLR (4th) 563, the Trial Judge expressly found that there was no case for invoking the West German provision for unequal division where equal division would be grossly unfair.

parties' domicile changes. If the contractual analysis is rejected, the choice of law rule would be the domicile of the parties at the date of the acquisition of the asset in question.⁹⁷

However, as we saw in relation to deferred community schemes, whichever analysis is adopted, an English Court can only apply a foreign regime if it can classify it as relating to matrimonial property rather than to financial relief on divorce. It is reluctantly conceded that the classification problem seems to be insurmountable in relation to discretionary distribution schemes. In this situation, the forum has a domestic scheme of its own. Thus, its classification will be heavily influenced by its own scheme, which is treated as relief ancillary to divorce.⁹⁸ Whilst there are cogent arguments⁹⁹ in favour of classification as a matrimonial property regime, it is unlikely that these would

⁹⁷ See text accompanying n.67 supra. This answers the Law Commission's second objection (n. 79 supra).

⁹⁸ Even where financial provision is awarded under the Matrimonial and Family Proceedings Act 1984, it is clearly regarded as being ancillary to the foreign divorce.

⁹⁹ (i) Division of property between the parties is basically a private law issue inter se, as distinct from the issue of whether a divorce should be granted or recognised, which is a matter for the policy of the forum. (ii) Parties may rely on the financial provision law in their place of domicile in organising their financial affairs, in much the same way as they may rely on a traditional matrimonial property regime. For example, they may take much less care about who has legal title to investments and household durables. Thus, it is not only on divorce that the scheme is relevant. Acknowledgment of this fact led most of the community states in the USA to treat property brought in by migrants from separate property states as 'quasi-community' property which is available for distribution on divorce (see references at n. 47 supra).

be accepted in England.¹⁰⁰

(d) Conclusion

Despite the real similarities in the rationale behind discretionary distribution schemes and community schemes, it is unlikely that an English Court would be prepared to give effect to a foreign discretionary scheme. Thus, it is more realistic to proceed on the basis that the conflict of rules situation could not arise in relation to such schemes.

D. MATRIMONIAL PROPERTY AND SUCCESSION

The interrelationship between matrimonial property and succession is complex.¹⁰¹ In the situation of a disputed decree followed by death of one of the parties, there may well not have been any division of the matrimonial property on divorce.

If the relevant regime only provides for realisation on termination by divorce,¹⁰² then if the decree is not recognised, the divorce regime will not apply at all and the only issue will be as to succession. If the decree is recognised, the regime will have to determine whether rights to division of assets on divorce

¹⁰⁰ There is also the problem of whether an English Court has power to order redistribution of assets at all. (supra n. 63 and accompanying text).

¹⁰¹ For some aspects of this see references at n. 160 in chapter 7 supra.

¹⁰² This is the position with all discretionary distribution regimes and some deferred community regimes, for example Israel.

can be claimed by or against the estate of one of the spouses.¹⁰³

Where the community or deferred community regime applies on death as well as divorce, whether or not the decree is recognised may affect the question whether post-decree acquisitions are part of the community property to be distributed on death. If the divorce is not recognised, the distribution on death will be as normal. If the divorce is recognised, then in theory the community is dissolved by the divorce and division should take place under the divorce rules in favour of or against the deceased's estate. This will clearly be the case where the effect of divorce is to impose an automatic division of assets. It is less clear what will be the position where partition requires agreement or Court order and neither has been obtained before the date of death.

E. SECOND MARRIAGES

We must consider how the matrimonial property rights of the first spouse should be affected where there has been a second marriage which is valid under the preference rule recommended in Chapter 6. As with succession, the validity of the second marriage should not necessarily mean that the first marriage has ceased to subsist for all purposes. However, the possibility of the two wives sharing the rights is more problematic than in relation to succession¹⁰⁴ both as a matter of principle and from the practical point of view.

¹⁰³ In English law, no order for financial relief can be made after the death of either party. See Bromley and Lowe (chapter 7, n.100 supra) at p. 725, citing Dipple v Dipple [1942] P. 65.

¹⁰⁴ See chapter 7 I D supra.

As a matter of principle, the difference is that it is more objectionable to enforce the marital rights of the concurrent marriages by affording property rights to both wives during the lifetime of the 'bigamist'. From a practical point of view, how can property acquired by one spouse (we will assume the husband) after the disputed decree form part of the community of property or deferred community regime¹⁰⁵ of two different spouses?

It is suggested that the best solution, where the first marriage ought to be upheld for the purposes of matrimonial property rights, is to limit the matrimonial property rights of the second spouse. Her property rights would be considered to be subject to those of the first spouse. In other words, the husband's half share in his post-decree acquisitions under the community regime with the first wife would belong to the community with the second wife.

II POSSIBLE SOLUTIONS¹⁰⁶

A. APPLY THE CHOICE RULE

1. Theoretical Basis

Since the choice rule depends on whether there is a contract governing the matrimonial property, we will have to consider the contractual situation separately. Under the 'contractual

¹⁰⁵ In some regimes, the assets will not be included in the first regime because they have been acquired after separation. Otherwise, depending on the circumstances, it may be appropriate to invoke the unfairness exception to equal sharing (where there is such an exception, in relation to these assets).

¹⁰⁶ For tabular illustration of results of applying different preference rules, see Tables 5A and 5B in the Appendix infra.

analysis',¹⁰⁷ all situations would fall within this category, including deferred community regimes.

(a) Where there is a contract

The question as to whether particular property has been acquired during the continuation of the marriage would seem to be a pure question of construction of the contract, which should be governed by its proper law. It would seem anomalous if the proper law were to determine the existence of all the requirements necessary for the creation of a right under the marriage settlement except for the question of the continued existence of the marriage.

It will be remembered that application of the choice rule in the 'conflict of rules' scenario involves use of the doctrine of renvoi in the broad sense that we are using the conflicts rules (the type known as recognition rules) of the lex causae.¹⁰⁸ It has been judicially stated¹⁰⁹ and is generally accepted¹¹⁰ that renvoi does not apply in relation to contract. Does this cause any problems for the above view that the choice rule should apply where there is a marriage settlement?

There would seem to be two main reasons why renvoi is thought

¹⁰⁷ See supra, text accompanying n. 4 et seq.

¹⁰⁸ See chapter 1, VII supra.

¹⁰⁹ Re United Railways of Havana and Regla Warehouses Ltd. [1960] Ch. 52; Amin Rasheed Shipping Corporation v Kuwait Insurance Co. Ltd. [1984] AC 50.

¹¹⁰ Article 15 of the Rome Convention expressly excludes renvoi.

inappropriate in contract cases. Firstly, the doctrine of unity requires that, unless the parties provide otherwise, all contractual issues should be decided by the same law to avoid distortions which can occur from the interrelationship between two systems with different rules. In our context, there is no breach of unity because we are not remitting a contractual issue for determination by another domestic system. We are simply using the recognition rules of the proper law to determine the validity of the decree. Indeed, the rationale behind the doctrine of unity would seem to require that the validity of the decree should be tested by the proper law rather than by the forum. Otherwise, a distortionary result could occur under which rights would be conferred on a spouse under the marriage contract even though such rights would not be conferred either under the proper law¹¹¹ or under the forum.¹¹²

A second reason for rejecting renvoi in relation to contract is that when parties choose a law to govern their contract, they are assumed to refer to the domestic law of that legal system only and not to its conflicts provisions. Again this argument has no real relevance to our problem. If we are concerned with the parties' intention at the time of contracting, it would seem more likely that they would envisage the issue of continued subsistence being determined by their chosen¹¹³ proper law than

¹¹¹ Because it considers the marriage to have been previously dissolved.

¹¹² Because, for example, it did not recognise the validity of the marriage contract.

¹¹³ Whether expressly, impliedly or by presumption.

by a forum, whose identity is not yet known to them.

Thus, it is suggested that arguments of principle point to application of the choice rule in all cases where there is a marriage settlement, although these would seem to be considerably weaker in the case of implied and presumed contracts.

(b) Where there is no Contract

There would seem to be two main arguments in favour of the choice rule. The first is the familiar one that the domicile is dominant in relation to all matters relating to status. The second is the internal consistency of the regime itself. Even if the regime is not treated as being contractual, it is designed to be a complete scheme for determining the rights of the parties in respect of matrimonial property. It should define itself all the various requirements which have to be fulfilled in order for certain rights to be created. One of the most fundamental requirements will be the formation and **continuation** of a valid marriage. The law governing the regime should determine whether this requirement is met. Otherwise, as we have seen, we may end up with distortionary results which are consistent with neither the lex causae nor the lex fori.

One practical difficulty with applying the choice rule is that under the principle of partial mutability there may be several different systems applying to different items of property where there has been a change in domicile. This creates the potential

for considerable complexity, if the divorce is recognised by some of the systems and not others. However, it would seem wrong to reject the choice rule for all cases just because there may be cases where there are two or more successive domiciles.

2. Authority

The Australian case of Haque v Haque¹¹⁴, which we discussed above in relation to succession¹¹⁵, may also be cited in support of the application of the law governing the marital property settlement. In this case, the settlement was governed by Muslim law and the Court applied Muslim law to determine if Azra was the deceased's wife. The limitations of the case as authority in relation to the 'conflict of rules', explained in chapter 7¹¹⁶, are equally applicable here.

3. Results

It will be helpful to examine how the choice rule would work in practice by reference to a hypothetical example. We will assume that the contract or the regime provide that:-

- (i) The contract/regime applies to all property acquired during subsistence of the marriage and
- (ii) Some rights under the contract or regime are only realisable on termination.

¹¹⁴ (1962) 108 CLR 230.

¹¹⁵ At chapter 7 II A 2 supra.

¹¹⁶ Ibid.

(a) Where the lex causae recognises the decree.

This will lead to exclusion from a share in post-decree acquisitions, but will allow immediate realisation where this is an issue. One spouse may use the decree¹¹⁷ in order to exclude unfairly the other from sharing in post-decree acquisitions. As with succession, the reason that the decree is not recognised by the forum may be that there has been some element of unfairness about the way in which it was obtained or its effect¹¹⁸. The unfairness may be exacerbated where the parties no longer have any real connection with the country whose law governs the contract or the matrimonial regime applicable to the assets in question. Again, it seems that this problem would have to be dealt with by judicious use of the doctrine of public policy. In other words, the recognition rules of the proper law of the contract or of the matrimonial domicile would not apply where their application would lead to a manifestly unjust result.

(b) Where the lex causae does not recognise the decree.

This would result in the potential sharing of post-decree acquisitions, but may prevent immediate realisation. This gives rise to two possible difficulties.

The first is legal bigamy. We have already seen that this concept per se is not a fatal objection to the application of the choice

¹¹⁷ The decree may have been obtained specifically for this purpose.

¹¹⁸ See chapter 7, II A 3 (a) supra.

rule,¹¹⁹ although it is more problematic in relation to matrimonial property than succession.¹²⁰ Furthermore, we have already suggested a solution to the practical problem of one party being subject to matrimonial property regimes with two successive spouses at the same time.¹²¹

The second is the possibility of abuse whereby a spouse relies on the fortuitous fact of non-recognition by the lex causae in order to obtain a pecuniary benefit. This argument seems to have less validity here than in relation to succession¹²² because the lex causae will have or have had a real connection with both spouses. Under the contractual analysis it is a law chosen either expressly, impliedly or by reference to objective factors pertaining at the time of the creation of the contract. Otherwise, it is the law of the matrimonial domicile at the relevant time. Thus, it is not simply fortuitous that this law applies to determine the continued subsistence of the marriage. This can be compared with the situation on succession where the law governing the distribution may be a law which has no connection with the marriage between the parties.¹²³ If,

¹¹⁹ See chapter 6 at II A 3(a) supra.

¹²⁰ See I E supra. It is arguable that the contractual situation is less problematic because the marriage is being treated as still subsisting only for the purposes of the contract, which can be considered as legally isolated from the provisions of general law rules.

¹²¹ At I E supra.

¹²² See chapter 7, II A 3 (b) supra.

¹²³ Either the lex situs in the case of immovables or the domicile at death, which was acquired by the deceased after the separation of the parties.

however, there were a situation in which one party's reliance on non-recognition was abusive, the doctrine of preclusion¹²⁴ could be used to prevent denial of the validity of the decree.

It may be argued that the delay in realisation is not a problem because it is appropriate for the law governing the regime to specify when realisation is possible.

B. APPLY THE RECOGNITION RULE

1. Theoretical Basis

It is suggested that the 'logical consequences' argument is weaker here than in relation to remarriage or succession. In particular, Courts have shown a willingness to ignore the financial and proprietary effects of a foreign decree even though they recognise the decree.

For example, under the doctrine of divisible divorce, the New York Courts¹²⁵ have been prepared to continue and even to grant a spousal maintenance order,¹²⁶ even though they were obliged to recognise a decree of divorce obtained in a sister state. The English Court of Appeal in Wood v Wood¹²⁷ in effect¹²⁸ applied this doctrine when they allowed an English maintenance order

¹²⁴ Discussed in detail in chapter 7 at II A 4 supra.

¹²⁵ Estin v Estin (1948) 334 U.S. 541 and Vanderbilt v Vanderbilt (1956) 1 N.Y. 2d 342.

¹²⁶ As opposed to an order of alimony between ex-spouses.

¹²⁷ [1957] P. 254.

¹²⁸ Lord Evershed M.R. preferred to reach the same result by different means

granted in favour of a married woman to continue¹²⁹ despite the fact that the subsequent Nevada divorce was required to be recognised.¹³⁰ The following comment by Goodhart, in a note on the first instance decision is apt in our context:-

"There is much to be said for the American doctrine of divisible divorce, as it provides that a marriage which has been terminated by the Courts of one State, having proper jurisdiction, must be regarded as terminated in all other states, so that no problems of bigamy or illegitimacy can arise in the case of subsequent marriage, but it does not follow from this that a husband should be enabled, by obtaining such an ex parte divorce to avoid all the financial obligations which he may owe to his wife." ¹³¹

Furthermore, s.51(5) Family Law Act 1986 specifically provides¹³² that there is no requirement to recognise any maintenance or other ancillary order made in the foreign matrimonial proceedings.

2. Results

(a) Where the decree is recognised

Application of the recognition rule will prevent sharing of post decree acquisitions, but allow immediate realisation. The former may be unjust where a divorce has been obtained ex parte, or in

¹²⁹ There was no jurisdiction to grant post-divorce maintenance.

¹³⁰ cf. the opposite situation arose in Macaulay v Macaulay [1991] 1 FLR 235. The English Court refused to recognise the Irish maintenance order because it was irreconcilable with the English divorce decree.

¹³¹ (1957) LQR 29 at p. 32.

¹³² This replaces s.8(3) 1971 Recognition of Divorces and Legal Separations Act 1971. See Sabbagh v Sabbagh [1985] FLR 29 where the Court recognised the Brazilian judicial separation, but did not recognise its effect of freezing the proprietary rights of the parties.

some other way unfairly, and the Respondent is the one deprived of the share. As we have seen, whilst deprivation of financial provision on divorce is a factor to be taken into consideration in exercising the discretion to refuse to recognise a decree under Family Law Act 1986 section 51, there is no guarantee that recognition will be refused in every case where it would be unjust to deprive the 'spouse' of a share in post-decree acquisitions under a foreign matrimonial property regime. In particular, it should be pointed out that here, as in relation to succession, the deprivation occurs as a result of the divorce per se and not as a result of the fact that the divorce was obtained abroad.¹³³

(b) Where the decree is not recognised

The 'spouse' will be allowed to share in post-decree acquisitions, but may not be able to claim immediate realisation. Any unfairness caused by one spouse relying on the fortuitous fact of non-recognition by the forum in order to obtain a benefit can be dealt with by the doctrine of preclusion.¹³⁴

The inability to realise may be more of a problem here. The spouses have obtained a decree which is recognised by the law governing their matrimonial property regime. And yet they cannot realise their rights under that regime because the forum does not recognise the decree.

¹³³ As in Joyce v Joyce [1979] Fam. 93 and Mamdani v Mamdani [1984] FLR 699.

¹³⁴ Discussed in detail at chapter 7, II A 4 supra.

They would seem to have two options. The first is to litigate in the country of the lex causae where they will be able to obtain an order for immediate realisation. However, this may not be practicable where one or both parties have severed all connection with that country. Even if a judgment is obtained in the foreign country, it will not be recognised in England unless the defendant is resident there or submitted to the foreign Court.¹³⁵ The second option is for them to obtain a fresh divorce either in the forum or which will be recognised by the forum. This can only be done if the relevant jurisdictional base¹³⁶ and grounds exist.¹³⁷

C. THE 'DIFFERENTIAL RULE'

Application of the 'differential rule'¹³⁸ leads to recognition in all cases and therefore would produce the result that there would be no sharing in post-decree acquisitions, but there could be immediate realisation.

¹³⁵ Even if it is a judgment of the Court which granted the matrimonial decree. Whilst the case of Philips v Batho [1913] 3 KB 25 suggests that an in personam judgment which is ancillary to an in rem judgment (in this case the matrimonial decree) will be recognised, the decision has been severely criticised and is generally considered to be incorrect. See, for example, Cheshire and North (chapter 1, n.1 supra) at p.363.

¹³⁶ I.e. one party is domiciled in or has been habitually resident in England for one year.

¹³⁷ In relation to a divorce in England, the latter will not generally be a problem where a divorce has already been obtained, although it is not recognised.

¹³⁸ See chapter 6 II C 3 supra.

D. UPHOLDING MATRIMONIAL PROPERTY RIGHTS

It will be remembered that in the preceding two chapters, there were mooted express result selection preference rules in favour of upholding of the remarriage and of succession rights respectively. By analogy, it might be suggested here that an appropriate preference rule would be to apply the rule which would uphold matrimonial property rights.

The difficulty is in defining what we mean by upholding matrimonial property rights. It is suggested that this has to be understood in the context of the purpose of the scheme in question. Since all types of community scheme are primarily designed to promote sharing, it might seem that rights are best upheld by including post-decree acquisitions in the scheme to maximise sharing. Where actual sharing depends on realisation it might seem that upholding rights also requires allowing the parties access to their shares. However, we have seen that in the case of a disputed decree these two objectives will often¹³⁹ be mutually inconsistent.

Thus, it seems that a preference rule based on upholding matrimonial property rights is not practicable.

III POLICY

A. OVERVIEW OF ENGLISH DOMESTIC LAW

In order to determine the policy of English law, we will have to

¹³⁹ Unless realisation may take place other than on divorce or annulment.

give a brief summary of domestic 'matrimonial property' law. The separate property system introduced by the Married Women's Property Act 1882 still applies in principle to determine ownership of the matrimonial property, subject to a number of limited specific exceptions.¹⁴⁰

However, the importance of the separate property system has been considerably diminished by the introduction in 1970 of extensive property adjustment powers exercisable by a Court on termination of a marriage by a divorce or nullity decree and on the granting of a decree of judicial separation. The 1970 provisions were consolidated in 1973 and have since been amended by the 1984 Matrimonial Property and Family Proceedings Act. Courts have made clear that wherever possible in disputes about ownership of matrimonial property following breakdown of marriage, parties should rely on these wide redistributive powers rather than ask the Courts to settle the issue of beneficial ownership.¹⁴¹ However, there will still be situations in which ownership may have to be ascertained. These include on succession¹⁴², the insolvency of one spouse or if there is no jurisdiction to apply

¹⁴⁰ The common law presumption of advancement and statutory provision for sharing of the unused part of housekeeping allowances (Married Women's Property Act 1964) and acquisition of a share in property by making improvements thereto (Matrimonial and Family Proceedings Act 1970 s.37).

¹⁴¹ See Wachtel v Wachtel [1973] Fam. 70, 92 and Kowalczyk v Kowalczyk [1973] 1 WLR 930, 934.

¹⁴² Although there is discretion to provide provision for a spouse out of the estate under the Inheritance (Provision for Family and Dependents) Act 1975, this will not be exercised until the exact respective shares of the deceased and the surviving spouse have been established.

the statutory regime¹⁴³.

Indeed, the Law Commission¹⁴⁴ in 1973 considered that, despite the width of the property adjustment powers, there was a need to provide automatic statutory co-ownership of the matrimonial home, which in most marriages is the most valuable asset. In 1988, they made a further recommendation¹⁴⁵ that in relation to pure personalty, goods intended wholly or mainly for the use or benefit of both spouses should vest in them both jointly.¹⁴⁶ The implementation of these proposals would be tantamount to introducing a system of community of property for couples who do not have investments, other than the matrimonial home. However, there is no indication that they are likely to be implemented. This is no doubt partly because in most cases the difficulties of ownership only arise on divorce¹⁴⁷ and because in any event spouses are increasingly putting assets into joint names.¹⁴⁸

Given the above state of affairs, it might be difficult to state

¹⁴³ Supra nn. 1 and 2 and accompanying text.

¹⁴⁴ Law Com. No. 52. They reiterated this proposal in 1982 in Law Com. No. 115 at para. 112.

¹⁴⁵ Law Com. No. 175. It is interesting to note that the Commission preferred this limited proposal to complete introduction of community of property largely for pragmatic reasons. See paras. 3.3-3.6.

¹⁴⁶ The Family Law (Scotland) Act 1985 provides inter alia for a presumption that household goods are owned in equal shares.

¹⁴⁷ In relation to unmarried cohabitees, ownership has to be determined on breakdown of their relationship. However, the proposals for joint ownership would not apply to cohabitees.

¹⁴⁸ See Bromley and Lowe (chapter 7, n.100 supra) at p. 564 n. 2.

the policy of English law in relation to matrimonial property prior to breakdown. However, the policy of providing for sharing of matrimonial property on termination by divorce or annulment is clear.

B. ENGLISH LAW APPROACH TO THE ISSUES IN QUESTION

How does English law deal with the two issues which are of concern in relation to the conflict of rules situation?

1. Sharing of Post-Decree Acquisitions

Under the English discretionary distribution scheme, all property belonging to either spouse, whenever acquired, is susceptible to redistribution.¹⁴⁹ Whilst the fact that property was acquired after the cessation of cohabitation¹⁵⁰ or divorce will be relevant in determining to what extent such property should be shared, it is only one factor in the exercise of the discretion as a whole. Thus, domestic policy in relation to sharing of post-decree assets is part of the overall policy in relation to financial provision on divorce.

The search for such policy must start with a brief examination of the statutory guidelines, provided in the Matrimonial Causes Act 1973 as amended by the Matrimonial and Family Proceedings Act

¹⁴⁹ Moreover, the Courts take into account resources which the parties are likely to have available in the future. (M.C.A. 1973 s.25(2)(a) as amended).

¹⁵⁰ In Krystman v Krystman [1973] 3 All ER 247, no order was made in respect of a marriage of 26 years during which the parties had only cohabited for the first two weeks. See Deech, (1982) 98 LQR 621, 630 - 632.

1984. It should be borne in mind that whilst the 1984 reform seems to have been primarily concerned with redistribution of income, in the form of maintenance, the same principles apply to property adjustment.¹⁵¹

(a) The statutory guidelines¹⁵²

The Court is mandated to take into account all the criteria set out in Matrimonial Causes Act ss.25(2), with first consideration being given to the welfare of any children of the family.¹⁵³ The Court must also consider whether it is possible to make an order which will terminate any further support obligations between the parties or alternatively to make a fixed period maintenance order after which there would be such termination of support.¹⁵⁴

(b) The policy objectives

Little help can be gleaned from caselaw because, as empirical evidence shows,¹⁵⁵ the discretion is still largely unstructured and there is inconsistency in the application of the criteria. Thus, the policy objectives must be deduced from the statutory provisions themselves, viewed in the light of their legislative

¹⁵¹ Dewar, *Law and the Family* (2nd. edn. 1992) at p. 297, Hoggett and Pearl, *The Family Law and Society Cases and Materials* (3rd. edn., 1991) pp.254-255.

¹⁵² For detailed discussion of the guidelines and their application, see Bromley and Lowe (chapter 7 n.98 supra) at chapter 21 and Dewar ibid at chapter 8.

¹⁵³ Matrimonial Causes Act 1973 s.25(1) (as substituted by the Matrimonial and Family Proceedings Act 1984).

¹⁵⁴ s. 25A of the Matrimonial Causes Act 1973 (introduced by the Matrimonial and Family Proceedings Act 1984).

¹⁵⁵ Eekelaar (n. 93 supra) at pp. 60 et seq.

history.

It is suggested that the three main objectives are:-

(i) **To Guarantee that Needs Are Met**¹⁵⁶.

Property adjustment should, so far as possible, provide for the present and future reasonable needs of the children of the family¹⁵⁷ and the parties.

(ii) **To Facilitate a Clean break.**¹⁵⁸

Property adjustment should, so far as possible, ensure that the parties can be self-sufficient following divorce and there should not be any further financial interdependence between them.¹⁵⁹

(iii) **To reflect contributions.**¹⁶⁰

Property adjustment should enable non-economic contributions and the concept of the matrimonial partnership to be recognised in

¹⁵⁶ See Law Com. No. 103 at para. 70 et. seq., Law Com. No. 112 at paras. 24- 25 and Matrimonial Causes Act 1973 s.25(2) (b) (as substituted by Matrimonial and Family Proceedings Act 1984)

¹⁵⁷ See n. 152 supra.

¹⁵⁸ See n. 153 supra, Law Com. No. 103 paras. 73 to 79 and Law Com. No. 112 paras. 28 - 30.

¹⁵⁹ For analysis of the application of the clean break principle in practice see Wright [1991] Fam. Law 76.

¹⁶⁰ See Matrimonial Causes Act 1973 s.25(2)(f) (as substituted by Matrimonial Causes Act). Whilst reflecting contributions is not specified as a separate model in the Law Commission's 1980 Discussion paper (Law Com. No. 103), it is clear that this was one of the main motivations behind the 1970 Matrimonial and Property Proceedings Act, which was consolidated in the Matrimonial Causes Act 1973 (see Law Com. No. 25 para. 69 and, for example, 305 H.L. Debs at col. 862, 18th. November 1969 (per Baroness Summerskill) and 794 H.C. Debs 28.1.70 (2nd. reading) at col. 1559 (per the Solicitor- General)). In particular, the need for the equitable distribution scheme became more acute after the House of Lords rejected judicial attempts (largely by Lord Denning) to introduce a 'contribution' approach to determine beneficial ownership in Pettit v Pettit [1970] AC 777 and Gissing v Gissing [1971] AC 886.

money's worth.

Where the above objectives conflict¹⁶¹, the needs approach takes precedence¹⁶². Thus, where needs cannot be guaranteed by property adjustment,¹⁶³ there will not be a clean break.¹⁶⁴

2. Realisation

In English law, a party can take proceedings at any time during the marriage to claim ownership of their property.¹⁶⁵ The sale of jointly owned property will be ordered¹⁶⁶ once the underlying purpose of the trust for sale¹⁶⁷ no longer exists.¹⁶⁸ However,

¹⁶¹ The 1984 reform has been widely criticised because of its introduction of contradictory objectives (see e.g. Symes (1985) 48 MLR 44 and Dewar (1986) Conv. 96.

¹⁶² Bromley and Lowe (chapter 7 n.100 supra) at p. 766 say "It is obvious however that the court's primary concern must be for the needs of all the members of the family with priority having to be given to the needs of any child of the family." The Child Support Act 1991 will prevent the Courts from 'throwing the wife and children onto the State' as they seemed prepared to do in Ashley v Blackman [1988] Fam. 85 and Delaney v Delaney [1990] 2 FLR 457.

¹⁶³ Conversely, one party may not receive the full value of their contributions if the other party's needs are greater.

¹⁶⁴ Maintenance may be ordered immediately or a nominal order made to allow for the possibility of maintenance in the future, should the need arise. See, for example, Suter v Suter [1987] 2 FLR, Whiting v Whiting [1988] 2 All ER 275; Hepburn v Hepburn [1989] 1 FLR 373 and Waterman v Waterman [1989] 1 FLR 373.

¹⁶⁵ Married Woman's Property Act 1882.

¹⁶⁶ Under s.30 Law of Property Act 1925.

¹⁶⁷ A trust for sale is imposed by law in the case of all jointly owned property, Law of Property Act 1925, ss.34 and 36.

¹⁶⁸ Jones v Challenger [1961] 1 QB 176. The purpose may be to provide a home for the children, in which case it will continue after the breakdown of the marriage. See Re Evers Trust [1980] 3 All ER 399 and Schuz (1982) 12 Fam. Law 108.

an order under the discretionary distribution scheme can only be made once a decree of divorce, nullity or judicial separation has been granted. Under the Law Commission's proposals on the Ground of Divorce,¹⁶⁹ a Court would be able to make a property adjustment order at any time after the proceedings have been started, although it would seem that the order would not actually take effect until the decree is granted. The idea is that once the marriage has broken down, the parties should be encouraged to concentrate on resolving all the practical matters such as property adjustment so that the whole process can be completed by the time the decree is granted at the end of the one year 'waiting period'.

In the light of the above, it may be argued that the policy of English law is not to allow realisation until a decree has been granted. It is suggested, however, that the English rule does not reflect any particular policy about realisation but rather pragmatic considerations¹⁷⁰. Therefore, the search for the policy of English law in relation to the issue of realisation should be undertaken in the wider context of the policy behind divorce law generally. We have already seen that one of the most fundamental objectives of modern divorce law is to enable dead marriages to be buried.¹⁷¹ The sooner the property issues between the parties can be sorted out, the sooner the marriage

¹⁶⁹ Law Com. No. 192, discussed at chapter 6, II 2 supra.

¹⁷⁰ For example, if property adjustment took effect on separation, what would happen in the event that the parties became reconciled.

¹⁷¹ At chapter 6, III supra.

can be buried.

Thus, it is suggested that it is the policy of English law to allow realisation of matrimonial property rights as soon as practicable after a marriage has broken down. In English domestic law, it is not practicable to allow realisation before the decree, but if it is practicable under other systems then this should be encouraged.

IV APPLICATION OF POLICY

A. SHARING OF POST-DECREE ACQUISITIONS

What are the implications of the objectives identified above¹⁷² for the sharing of post decree acquisitions? The contribution principle would tend towards non-sharing because the non-owning spouse cannot normally be said to have made a contribution to any post-separation acquisitions. The clean break doctrine would also seem to favour non-sharing. The needs principle would involve sharing of post-decree acquisitions where there are insufficient pre-decree acquisitions to satisfy reasonable needs. We saw that in English domestic law, where the objectives conflict, the needs approach takes precedence. By analogy, in the 'conflict of rules' situation, where needs cannot be guaranteed without recourse to post decree acquisitions,¹⁷³ the latter should be included.

¹⁷² At III B 1 (b) supra.

¹⁷³ Where the foreign scheme provides for a discretion to vary the shares, reasonable needs can be met by increasing the share in the pre-decree acquisitions.

How can such a result be obtained by use of a preference rule? Under a discretionary scheme, it is possible to provide for distribution of the appropriate proportion of the post-decree acquisitions. In contrast, a rule-based system can only produce an 'all or nothing' situation. If we adopt the rule which does not recognise the decree, **all** the post-decree acquisitions must be shared. If we adopt the rule which recognises the decree, **none** of the post-decree acquisitions can be shared.

It is suggested that the desired policy can be implemented by adoption of the 'differential rule', which always results in non-sharing of post-decree acquisitions, subject to an exception where reasonable needs cannot be met without recourse to such acquisitions.

Such an exception can be achieved by use of the doctrine of preclusion, as defined for our purposes above.¹⁷⁴ In other words, the owner spouse is precluded from relying on the decree in order to claim the pecuniary advantage of not providing for the reasonable needs¹⁷⁵ of the other out of his post-decree acquisitions. There are two possible methods of dealing with the 'all or nothing' problem. The first is to define pecuniary

¹⁷⁴ At chapter 7, II A 4 supra.

¹⁷⁵ It does not matter if the applicable matrimonial property regime does not have a reasonable needs principle because the doctrine of preclusion is a rule of English law being used to help solve the 'conflict of rules' problem. It determines to what extent post-decree acquisitions, which are not normally included within the relevant matrimonial property regime, should be included in a situation where there is a dispute about the recognition of the decree.

advantage as being the advantage of not providing for the reasonable needs of the non-owner spouse, rather than as the advantage of not sharing the post-decree property.¹⁷⁶ Only in relation to that part of the post-decree acquisitions required to satisfy reasonable needs is the owner precluded from relying on the decree. Alternatively, if the preclusion doctrine is treated as discretionary, as suggested above, the Court can simply apply it to such part of the post-decree acquisitions as it sees fit.

B. REALISATION

The domestic policy in relation to realisation deduced above would require the application of whichever rule would allow realisation. We saw above¹⁷⁷ that this result can be achieved by application of the differential rule, which ensures recognition of the decree.

V RECOMMENDATION

In relation to matrimonial property, the appropriate preference rule is the differential rule, subject to the doctrine of preclusion, in the situation where sharing of post-decree assets is required in order to meet reasonable needs.

¹⁷⁶ In other words, the pecuniary benefit is only the **illegitimate** pecuniary advantage.

¹⁷⁷ Supra at II C.

CHAPTER 9 : TORTS

I THE SCOPE OF THE PROBLEM

A INTRODUCTION

There are two issues in torts¹ in which marital status may be relevant: inter-spousal immunity and wrongful death claims. At first sight it might be thought that no question of the conflict of rules could arise because the lex fori is part of the choice of law rule in tort. However, under the double-barrelled choice of law rule, the **effective** branch of the rule is that which denies liability. Thus, where under the second branch liability is denied, the lex loci delicti is the **effective** choice of law rule. This means that where there is a dispute as to the recognition of a decree as between the lex fori and the lex loci delicti, the 'conflict of rules' may arise.

Moreover, if the exception to the rule in Philips v Eyre² formulated in Boys v Chaplin³ can displace the first as well as the second limb of the rule⁴, there would be further scope for a conflict between the choice and recognition rules.

¹ A spouse's claim for loss of consortium was abolished by the Administration of Justice Act 1982. Under the rule in Philips v Eyre (see at B. infra) even if such a cause of action was recognised under the lex loci delicti, it could not be given effect to because there would not be actionability in England.

² (1870) L.R. 6 Q.B. 1, 28-29.

³ [1971] A.C. 356.

⁴ See discussion at B. infra.

B. THE CHOICE OF LAW RULE

The House of Lords in Boys v Chaplin⁵ upheld the choice of law rule in tort enunciated by Wills J. in Phillips v Eyre⁶:-

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

However, caselaw has shown that a number of different interpretations may be placed on these words. In Boys v Chaplin itself, their Lordships arrived at the unanimous decision in favour of the Plaintiffs by a number of different routes and the ratio decidendi of the case is far from clear⁷. Subsequent English caselaw⁸ supports the view that the Philips v Eyre test requires civil actionability between the parties under both the lex fori and the lex loci delicti, but that this general rule may be departed from in appropriate circumstances.

Caselaw provides us with little guidance on the scope of the exception. In Boys v Chaplin itself and in the recent case of Johnson v Coventry Churchill⁹, the lex loci delicti was displaced in favour of the lex fori on the basis that England had

⁵ [1971] A.C. 356.

⁶ (1870) L.R. 6 Q.B. 1, 28-29.

⁷ See, for example, Briggs (1984) 12 Anglo-Am. L.R. 237; Collins (1977) 26 ICLQ 480; Karsten (1970) 19 ICLQ 35; McGregor (1970) 33 MLR 1.

⁸ For example, Coupland v Arabian Gulf Co. [1983] 1 WLR 1136, 1146-48 and Johnson v Coventry Churchill [1992] 3 All ER 14. See also Law Com. W.P. 87 at para. 2.17.

⁹ [1992] 3 All ER 14.

the closest and most real connection to the particular issue in question and that the policy behind the particular foreign rule did not apply to a case where both parties were English¹⁰.

Two important questions remain unanswered. Firstly, can the lex loci delicti be displaced in favour of a third law? Most commentators answer this question affirmatively. Secondly, can the first limb of the rule in Philips v Eyre be displaced where it is found that a foreign law, which would usually be the lex loci delicti or the law displacing it, is much more closely connected to the issue in question? Support can be found in the judgments in Boys v Chaplin for both affirmative and negative answers to this question. On the one hand, the affirmation of the decision in The Halley¹¹ may be said to make it clear that there must be actionability according to the lex fori in every case. On the other hand, it may be argued that the words "as a general rule", used by Wills J to preface his test and on which Lords Hodson and Wilberforce based their exception, clearly qualify both limbs of the test.

It is suggested that, given the equivocal nature of Boys v Chaplin on this issue and the trenchant criticism by academic writers of the first limb of the test¹², a Court would be free

¹⁰ In Warren v Warren [1971] Qd.R. 386 and Corcoran v Corcoran [1974] V.R. 164, the displacement of the lex loci delicti was also in favour of the lex fori.

¹¹ (1868) LR 2 PC 193.

¹² e.g. The Law Commission (in Rept. No. 193) has recommended abolishing the first limb of the test.

to displace the lex fori in an appropriate case.

The Law Commission have made detailed recommendations¹³ for reform of the choice of law rule in tort, which are incorporated in a draft bill, appended to their report. This effectively introduces the lex loci delicti¹⁴ as the choice of law rule subject to an exception where there is another law according to which "it would be substantially more appropriate for the questions to which those proceedings give rise to be determined."

C. INTER-SPOUSAL IMMUNITY

Inter-spousal immunity in tort was virtually abolished in England by the Law Reform (Husband and Wife) Act 1962. A Court may still stay an action in tort between a married couple where no substantial benefit would accrue to either party or it could be more conveniently disposed of under Section 17 of the Married Womens's Property Act 1882. However, inter-spousal immunity still exists in other jurisdictions.¹⁵

¹³ For commentary see Carter (1991) 107 LQR 405 and North (chapter 5, n.58 supra).

¹⁴ This is defined as follows:- (1) In actions in respect of personal injury or death, the place where the injury was sustained. (2) In actions in respect of damage to property the situs of the property when it was damaged. (3) In all other cases, the law of the country where "the most significant elements of the events constituting the subject-matter of the proceedings" took place.

¹⁵ For example, in the USA inter-spousal immunity has only been fully abolished in 35 jurisdictions. In a further 5, the immunity has only been removed for intentional torts (See Clark, chapter 6, n. 73 supra at 11.1.).

There are no English conflicts cases involving inter-spousal immunity. Authority can be found in U.S. and Australian¹⁶ caselaw for classifying the question of whether one spouse can sue the other in tort as a question of procedure¹⁷; of tort¹⁸ or of domestic relations because it requires determination of the incidents of the marital relationship.¹⁹

If the issue is procedural, immunity could never be claimed in an English Court. If the issue is one of domestic relations, it will be governed by the lex domicilii.²⁰ If the issue is treated as one of tort, then under the rule in Philips v Eyre if the law applicable under the second limb provides immunity there will not be sufficient actionability²¹ by that law and the action will fail. However, the Boys v Chaplin exception may be invoked in

¹⁶ Since the Australia cases, federal legislation (s.119 Family Law Act 1975) has been enacted stating that spouses can sue each other in tort. However, the constitutional validity of this provision has not yet been determined.

¹⁷ As, for example, in Mertz v Mertz 3 N.E. 597 (1936), where it was held that since there was no remedy for a wife against a husband under the law of the New York forum, she could not succeed even though there was actionability under the loci delicti.

¹⁸ See Gray v Gray 174 A. 508 (1934) and Dawson v Dawson 138 So. 414 (1931) and other cases cited in Clark (chapter 6, n. 73 supra) at 11.1 n. 40).

¹⁹ Warren v Warren [1972] Qd.R. 386 Haumschild v Continental Casualty Co. 95 W 2d 814 (Wisconsin 1959) and other cases cited in Clark (chapter 6, n. 73 supra) at 11.1 n. 41.

²⁰ See cases at n. 20 supra.

²¹ Corcoran v Corcoran [1974] V.R. 386 cf. In some Australian cases it was held that it was sufficient if the conduct was civilly actionable but this approach is irreconcilable with the judgments in Boys v Chaplin in which it was made explicit that there must be actionability between the **same parties** under the lex loci delicti.

order to displace the lex loci delicti in favour of the lex domicilii.²² None of the cases consider the situation where the spouses have different domiciles. It is suggested that the best solution is to apply the lex loci delicti unless the spouses have the same domicile or the laws in their respective domiciles are the same (and different from the lex loci delicti).

To avoid confusion, in the ensuing discussion we will simply refer to the lex causae.

The 'conflict of rules' situation can be seen from example T1.²³ Here, there is actionability under English law. Whether or not there is actionability under the law of Florida, the lex causae, depends on whether the parties are considered to be still married or not. If this issue is governed by the choice rule, then the law of Florida will hold that the parties are still married and thus there will be no actionability under the second limb of the rule. On the other hand, if the recognition rule is applied, the lex fori will decide that they are not married and that there can be no immunity.

It is less clear whether the conflict can arise in the reverse situation, i.e. if the decree is recognised by the lex loci delicti and not by the lex fori.²⁴ It may be argued that if the

²² Corcoran v Corcoran [1974] V.R. 164; Warren v Warren [1972] Qd. R. 386.

²³ At chapter 1, III supra.

²⁴ If, for example, the decree in Haiti was inter partes, but neither party was a national of that country.

law of Florida recognises the decree, then there is no immunity under Florida law and thus there is actionability. On the other hand, it may be argued that the issue of actionability under Florida law has to be decided without determining the status of the parties. Thus, on the basis of the immunity there would be no liability if these parties are still married. We then have to decide which rule should answer the question of whether the parties are to be considered as still married.

The first approach may seem to be more consistent with the double actionability rule as defined in Boys v Chaplin. Thus, what is required is real actionability between these parties. Whether this exists can only be determined after ascertaining whether the parties are in fact still married. But this approach produces a fait accompli in favour of the choice of law rule. It is suggested that this choice should not be made without proper consideration as to whether it is the appropriate preference rule.

Under the second approach, the issue of status is first decided according to the rule indicated by the preference rule. **Then** it is possible to determine whether there is in fact actionability under both limbs. It is suggested that this approach is to be preferred.

The Law Commission's draft bill does not deal with the topic of inter-spousal immunity. In their Report, the Law Commission recommend keeping silent because neither the law of the domicile

nor the applicable law in tort have strong credentials to apply. The removal of the lex fori from the choice of law test would not in fact have any impact here since we have seen that the issue can only arise where there is immunity according to the lex loci delicti or displacing law.

D. WRONGFUL DEATH CLAIMS

Under many systems of law, a tortfeasor who wrongfully causes death is liable in damages²⁵ to certain dependants or relatives of the deceased, including a surviving spouse.²⁶ In England, such liability is governed by the Fatal Accidents Act 1976 as amended. Originally, divorced spouses²⁷ were not included in the list of eligible dependents. However, following the recommendations of the Law Commission, a "former wife or husband²⁸ of the deceased" was added to the list of dependents²⁹ by the Administration of Justice Act 1982.

Thus, where there has been a disputed decree the 'spouse' will be able to claim under English law without determining whether

²⁵ Usually, there is a requirement that the deceased himself could have sued if he had been injured rather than killed by the tort.

²⁶ The better view is that all the surviving wives of a valid polygamous marriage would be able to claim, although there is no English authority on the point. See, for example, Morris (chapter 1, n.142 supra) at p. 178.

²⁷ Payne-Collins v Taylor Woodrow Construction Ltd. [1975] 1 QB 300.

²⁸ Defined to include persons whose marriage had been annulled or declared void, s.1(4).

²⁹ Cohabitees who had lived with the deceased as husband and wife for at least two years were also added to the list.

the decree is recognised or not. However, most other jurisdictions still limit wrongful death claims to the present spouse of the deceased.

There are no English conflicts cases dealing with wrongful death claims. The better view would seem to be that under the rule in Philips v Eyre, the dependant can only claim where he has a right to do so **both** under English law and under the lex loci delicti. Assuming that all the other criteria are fulfilled, the 'spouse' will be able to claim under English law either as a current spouse or as an ex-spouse and thus again the **effective** choice rule is the lex loci delicti or the law displacing it. This will be referred to as the lex causae.

As we saw above in relation to inter-spousal immunity, the preferable analysis is that whilst the lex causae determines whether a spouse can claim it does not necessarily determine whether a claimant is a spouse. This is an issue to be determined by the law chosen by the preference rule. Thus, the conflict of rules can arise whenever the decree is recognised by the lex causae and not the lex fori, as in example T2 above³⁰, or vice versa³¹.

We might add that implementation of the Law Commission's

³⁰ At chapter 1, III supra.

³¹ Prior to 1982, the conflict could not arise where the decree was recognised by the lex fori because the claimant could not be a 'spouse' under either the recognition rule or the choice rule (because the lex fori is part of the choice rule) unless the lex fori was displaced under the exception in Boys v Chaplin.

proposals would not affect the present issue. Since there is actionability under English law whether or not the decree is recognised, removing the requirement of actionability under the lex fori would not make any difference.

II POSSIBLE SOLUTIONS³²

A. PREFER THE CHOICE RULE

1. Theoretical Basis

The rationale will depend on what the choice of law rule is. To the extent that the rule is the lex loci delicti, we might rely on the words of Hancock quoted by Cheshire and North,³³ to the effect that the commission of a tort abroad is "of more acute concern to the foreign community than to the community of the forum." Thus, it may be argued that the foreign community should decide the extent of the tortfeasor's liability including whether a particular person is to be treated as a 'spouse' either for the purposes of claiming for wrongful death or for claiming immunity in tort.

To the extent that any other law is applicable under the Boys v Chaplin exception, the close connection which justifies its applicability in place of the lex loci delicti would provide support for applying it to determine whether the party in question is to be treated as a 'spouse' in connection with this tort. Where the displacing law is the law of the domicile, the

³² For tabular illustration of results of applying the different preference rules, see Tables 6A and 6B in the Appendix.

³³ Op. cit., chapter 1, n.1 supra at p. 546.

status theory³⁴ may also be used to justify preferring the choice rule here.

Whatever law is applicable, it may be argued that if the lex causae gives a particular immunity or right to a spouse, it only envisages their application to persons who are considered to be spouses according to its law.

2. Authority

There are no reported tort cases where the conflict between recognition rules and choice of law rules has arisen. Indirect support for application of the choice rule may be provided by the U.S. case of Meisenholder v Chicago N.W. Ry.³⁵ This involved a claim under the Workman's Compensation Acts by a 'widow'. It was held that the claim failed because the marriage was not recognised by the law of Illinois where the accident happened, although the marriage was valid under the conflicts rules of the Minnesota forum³⁶ because it was valid according to the law of Kentucky where it was contracted. Harper³⁷ hypothesises about the result in this case if the doubt about the status of the widow arose because of a Mexican divorce which was not recognised in some fora. He concludes that the validity of the divorce should be determined by the place of the wrong because the reference to 'widow' in the wrongful death statute of the loci

³⁴ See chapter 6, II A 1 supra.

³⁵ 213 N.W. 32 (1927).

³⁶ See Harper, (1959) 59 Col.L.R. 440.

³⁷ Ibid at p.456.

delicti is assumed to mean a 'widow' as understood by that law and not as understood by the domestic or conflicts rules of the forum.

3. Results in relation to Inter-Spousal Immunity

(a) Where the lex causae does recognise the decree.

The effect of preferring the choice rule is to deny immunity.

(b) Where the lex causae does not recognise the decree.

The effect of preferring the choice rule will be to uphold the immunity. In cases where the tortfeasor 'spouse' is unmeritorious, the doctrine of preclusion could be applied to prevent him/her obtaining a pecuniary benefit from denying the validity of the decree.

4. Results in relation to Wrongful Death

(a) Where the lex causae recognises the decree.

Application of the choice rule here would lead to denial of the 'wrongful death' claim because the claimant is not considered to be a spouse by the lex causae.

(b) Where the lex causae does not recognise the decree.

Since an ex-spouse can claim in English law, there is actionability under the lex fori. The claimant is still considered to be a spouse by the lex causae and can claim.

B. PREFER THE RECOGNITION RULE

1. Theoretical Basis

The only rationale here would seem to be the familiar 'full effect' argument. It might be noted that this argument would seem to have less effect in the wrongful death situation where we are concerned with a third party. It hardly lies in the tortfeasor's mouth to insist upon the strict logic of giving full effect to a matrimonial decree.

2. Authority

The American case of In Re Degramo's Estate³⁸ may be seen as providing authority for the use of the recognition rule in a wrongful death claim. The facts were as follows:-

The deceased, who was resident in Michigan at the date of her death, was killed negligently in a railroad accident in Ohio. The issue arose in a New York case as to how the damages received from the railroad company should be distributed. The deceased had obtained a divorce from her husband in Michigan, but this was not recognised in New York because the husband was not served and did not appear in the action.

The New York Court held that the distribution of the damages was governed by the law of Ohio where the accident took place. Since the divorce was not valid, apart from in Michigan, the husband was entitled to the damages.

Thus, it appears that the Court applied the recognition rules of the forum. However, the Court found that the husband remained the husband of the deceased "except as to his status in the state of Michigan". Two possible interpretations might be given to this finding. Firstly, it might seem to be a finding that the divorce was not valid under the law of Ohio. But, it is difficult to see how the Court could make such a finding when no evidence was

³⁸ 33 New York Supplement (1895) 502.

brought as to whether the divorce would have been recognised in Ohio.³⁹ The second is that it is simply a statement of New York law. Thus, a New York Court will not give effect to any incidents of the divorce decree other than those which are governed by the law of Michigan.

If the latter interpretation is correct, then the case would seem to support the application of the lex fori where the decree is not recognised. However, since there is no evidence that the result would have been any different if the lex causae had been applied, it is relatively weak authority.

3. Results in Relation to Inter-Spousal Immunity

(a) The decree is recognised.

The application of the recognition rule would result in denial of immunity.

(b) The decree is not recognised.

Here, application of the recognition rule would result in upholding the immunity. This result would seem absurd because neither system would in fact allow immunity. The lex causae would not allow immunity because it considers the parties are no longer married. The lex fori would not allow immunity because no such immunity exists under its law.

³⁹ The husband did not appear and was not served with process.

4. Results in Relation to Wrongful Death

(a) Where the decree is recognised.

The application of the recognition rule would result in denial of the claim because the lex causae does not allow claims by divorced spouses. Again this result is absurd because neither system would have denied the claim. The lex fori would have allowed it because it allows claims by ex-spouses. The lex causae would have allowed it because it considers the parties are still married.

(b) Where the decree is not recognised.

The application of the recognition rule would result in upholding of the claim because the parties are treated as still married for the purpose of applying both limbs. This result is in accordance with the lex fori but not the lex causae.

C. THE 'DIFFERENTIAL RULE'⁴⁰

1. Inter-Spousal Immunity

The differential rule will lead to denial of immunity in all situations.

2. Wrongful Death

The differential rule will lead to denial of the claim in all situations.

D. UPHOLDING TORT CLAIMS

It may be argued that the fundamental policy of the law of tort

⁴⁰ See chapter 6, II C 3 supra.

is to provide compensation for the Plaintiff. Only where some other policy objective overrides this basic principle, should there be a valid defence or exception to liability.

This argument would militate in favour of a result which upheld the claims. In relation to inter-spousal immunity, this would achieve the same result as the 'differential rule'. In relation to wrongful death, the 'differential rule' does not produce the correct result and thus we would have to rely on the express result-selecting rule, which can conveniently be referred to as the presumption in favour of upholding tort claims.

III POLICY

A. INTER-SPOUSAL IMMUNITY

There was considerable debate about the nature of the inter-spousal immunity at common law. In particular, it was unclear whether it negated liability or enforceability. Whilst it seems to have originated from the theory of unity between spouses,⁴¹ in more recent years⁴² it was justified on the basis that it was unseemly for one spouse to litigate against the other and that to tempt one spouse to claim compensation from the other might endanger the stability of the marriage.⁴³

⁴¹ This has now been said to be fully dead and buried, Midland Bank v Green (No. 3) [1982] Ch. 529.

⁴² See per McCardie J. in Gotliffe v Edelston [1930] 2 K.B. 378, 392.

⁴³ Law Reform Committee, 9th. Report Cmnd. 1268 (1961), paras. 7 - 10. See also, Clark (chapter 6, n.73 supra) at para. 11.1.

These rationales were undermined by the advent of widespread, frequently compulsory, use of liability insurance. Where the tortfeasor was insured, then a tort claim by his/her spouse was effectively a claim against the insurance company.⁴⁴ Thus, there would generally be a common interest rather than a conflict of interest between the parties.

Furthermore, it seemed unjust that the Insurance Company should benefit from the fact that the victim was married to the tortfeasor. In addition, if one spouse was jointly liable with a third party, the third party would have to bear the full liability and could not claim a contribution from the tortfeasor spouse. These concerns about justice as between the spouses and third parties outweighed any residual reluctance to sanction litigation between spouses and the immunity was abolished⁴⁵ by the Law Reform (Husband and Wife) Act 1962. The only trace of the former immunity lies in the Court's power⁴⁶ to stay a case where it considers that there would be no benefit to either party.

⁴⁴ In some Australian jurisdictions, the exception was at first expressly limited to cases where the cause of action arose from the driving of a motor vehicle registered in that State. As in such cases insurance was mandatory, no non-insurance cases could arise. Difficulties arose where accidents took place involving vehicles registered in other States. See Schmidt [1973] 1 NSWLR 59, Warren v Warren [1972] Qd. Rev. 386 and Corcoran v Corcoran [1974] VR 164.

⁴⁵ Following the report by the Law Reform Committee (n. 44 supra) See comments by Stone (1961) 24 MLR 481; Khan Freund (1963) 25 MLR 695.

⁴⁶ See Law Reform Committee Report (n. 44 supra) at para. 11. There is no reported case in which this has been exercised.

B. WRONGFUL DEATH

The common law rule forbidding claims arising out of wrongful death has been changed by statute throughout the common law world. The English Fatal Accidents Acts are typical of the legislation, which generally allows particular classes of dependents to claim sums which are quantified on the basis of the level of their dependency on the deceased.⁴⁷

The policy behind the legislation is clear. The tortfeasor should not benefit from the fact that he has killed the deceased rather than severely maimed him/her. Whilst the deceased him/herself can no longer suffer any loss as a result of the tort, those who were dependent on him/her may suffer substantial loss as a result thereof. The limitation on the class of claimants seems to reflect the requirement of foreseeability in relation to tort damages. Thus, the tortfeasor can only be expected to compensate the sorts of people whom (s)he might reasonably have foreseen would have been dependent on the deceased. Furthermore, requiring a particular relationship may prevent bogus claims, although it may also exclude meritorious beneficiaries.⁴⁸

IV APPLICATION OF POLICY

A. INTER-SPOUSAL IMMUNITY

It seems clear that the policy of English law would militate

⁴⁷ Some U.S. jurisdictions base quantum on loss to the estate. See Speiser, Recovery for Wrongful Death, 2nd. ed. (1975) Vol. I.

⁴⁸ Prior to the Administration of Justice Act 1982 cohabitants, even of many years standing, could not sue. The only remedy to this injustice was through legislation.

against upholding the immunity in the 'conflict of rules' situation. Where there is liability insurance, then there is no basis for the immunity. Where there is no such insurance, the very fact that a matrimonial decree has already been pronounced between the parties would seem to remove any argument based on 'seemliness' or stability of marriage. However, the Law Reform Committee⁴⁹ specifically stated that the power to stay should apply even after the spouses had ceased to cohabit so long as they were still married because

"there may even in these circumstances be some possibility of reconciliation between them or, where there is not, litigation may serve only as an excuse for the airing of matrimonial grievances and bitterness."

In any event, as the power to stay is a procedural provision,⁵⁰ the Court could stay the proceedings provided that the decree was not recognised by the lex fori, irrespective of the position under the lex causae. This does not affect the conclusion that domestic policy requires a result which denies effect to the foreign immunity.

The desired result can be achieved by the differential rule. As we have already seen, this rule has the advantage of consistency with the 'full effect' principle where recognition is granted and otherwise giving precedence to the law governing the issue. This rule avoids the need to rely on the doctrine of preclusion and avoids the absurdity of allowing immunity which would not be allowed by either system alone.

⁴⁹ Op. cit. (n. 44 supra) para. 13.

⁵⁰ Ibid para. 16.

B. WRONGFUL DEATH

Until 1982 ex-spouses could not claim. If we had been considering this issue before 1982, we might have had difficulty in determining how to apply English policy to the 'conflict of rules' situation. On the one hand, it might have been argued that if the 'spouse' could prove dependency, (s)he should have been able to claim. There is no reason why the tortfeasor should benefit from the fact that a decree has been obtained, if there is a dispute as to whether it should be recognised. In other words, the policy of compensation requires that the claimant should be given the benefit of the doubt about the decree. On the other hand, it might have been argued that to allow a claim where there has been an attempt to obtain a divorce decree even though this the decree is not universally recognised would be against the intention of the legislation which did not cover former spouses and could give rise to abuse. It is suggested that the former argument is more convincing.⁵¹ It was reasonably foreseeable that the 'spouse' in the disputed decree situation might suffer loss of dependency. (S)he should not be in a worse

⁵¹ It might be argued that both positions are too simplistic and that everything depends on the circumstances surrounding the decree. If the 'spouse' had not obtained financial provision because of the doubt surrounding the decree, (s)he should be entitled to claim. His/her dependency would reflect what financial provision (s)he would be able to claim in the future. If the 'spouse' had obtained financial provision in connection with the divorce/nullity decree, then arguably (s)he is in the same position as any other ex-spouse and should not have been able to benefit because there is a dispute as to whether the decree should be recognised.

position than a separated spouse⁵² simply because there had been an attempt at divorce, the outcome of which was disputed. Abuse would have been unlikely because of the requirement of dependency and in any event could have been prevented by the doctrine of preclusion.

Since the extension of the class of dependents to cover former spouses, the position is much clearer. The reason for the reform was⁵³ that former spouses might have lost valuable rights of maintenance⁵⁴ as a result of the death of the deceased.⁵⁵ Since an award will only be made on proof of dependency, an ex-spouse who has already received financial provision in a lump sum in

⁵² There do not seem to be any English decisions on the position of the separated spouse under the Fatal Accidents Act, but there is a significant amount of American caselaw. The majority view seems to be that separation does not affect eligibility (see, for example, Schilling v Gall 33 Wis. 2d 14, 146 N.W. 2d 390 (1966) and cases quoted therein and at 18 A.L.R. 1409 supplemented by 90 A.L.R. 920), although there is some authority that a deserting spouse cannot claim (see Speiser, n. supra at para 6.2.). Claims have been allowed where a divorce suit was pending (Wright v Dilbeck (1970) 122a Ga App 214, 176 SE 2d 175) and where an interlocutory divorce order entitling the claimant to a final decree in six months had been made (Piland v Yakima Motor Coach Co. (1931) 162 Wash 456, 298 P 419). However, the state of the marriage at the time of the death will usually be relevant in quantifying the amount of dependency (see Speiser op. cit. at para. 6.6). The Royal Commission on Liability and Compensation for Personal Injury (the Pearson Commission) (1978, Cmnd 7054-I at para. 417) recommended that the possibility of divorce should not be taken into account in assessing damages for lost dependency where it would be detrimental to the plaintiff to do so.

⁵³ Law Com. 56 para. 259.

⁵⁴ Maintenance payments cease on the death of the payer unless they are secured.

⁵⁵ This extension is consistent with the theory suggested above because it is reasonably foreseeable that an ex-spouse will suffer loss.

lieu of maintenance should not be able to get a 'second bite of the cherry'.

Thus, the policy of English law requires that the 'spouse' should be able to claim in all situations. This result can be achieved by applying the presumption in favour of upholding tort claims.

V RECOMMENDATIONS

1. In relation to inter-spousal immunity, the 'differential rule' is the appropriate preference rule.
2. In relation to wrongful death, the presumption of upholding tort claims should apply to determine which rule prevails.

CHAPTER 10: ADOPTION

I. THE SCOPE OF THE PROBLEM

A. INTRODUCTION

The conflict of rules can potentially arise following a foreign adoption wherever it is necessary to determine the status of the child in a case governed by a foreign law. The conflict will in fact arise where the foreign adoption order is recognised by the law of the forum and not by the lex causae or vice versa. An analogous problem may arise where an English adoption is not recognised by the lex causae. As we saw in relation to divorce, here the conflict is between a rule of domestic law and the choice of law rule, but some of the applicable policy considerations will be the same.

A child's status is most commonly questioned in relation to succession and custody/guardianship. However, there are other possible situations such as in relation to wrongful death claims, immigration, taxation, social security and rights under pension or life insurance schemes. It may also be relevant to determine a child's status in relation to the prohibited degrees of marriage and the requirement of parental consent to marriage. In English private international law, custody/guardianship, immigration, social security and taxation are governed by the law of the forum and thus the 'conflict of rules' cannot arise. In this chapter, we will be concentrating on the issues of succession and wrongful death claims.

It is important to appreciate that such cases may arise out of the death of either the child, the adoptive parents or the natural parents. The likelihood of the child claiming following the death of the natural parents has been increased by the right of adopted children to see their original birth certificate¹ as well as by the increase in 'older children' adoptions².

The choice of law rules in relation to succession and wrongful death claims have been set out above. In order to understand when the conflict is likely to arise we will need to explain the rules for recognising foreign adoptions, which are materially different from and more complicated than those for recognising foreign matrimonial decrees.

In the past there has been much debate about which law governs the incidents of a foreign adoption. Some cases³ suggested that the law of the place where the adoption was granted determined what was meant by the phrase 'adopted child' and thus what incidents were attached to the adoption. Academic writers⁴ were critical of this approach and claimed that it was inconsistent

¹ Adoption Act 1976 s.51.

² For example, the proportion of non-parental adoptions where the child was aged over 10 increased from 8% in 1975 to 27% in 1986, Bromley and Lowe (chapter 7, n. 100 supra) at p. 411 n. 3.

³ e.g. Re Marshall [1957] Ch. 507. For discussion of Commonwealth cases, see Kennedy (1956) 34 Can. B.Rev. 507, 547 et. seq.

⁴ See Kennedy ibid and Taintor (1954) 15 U. of Pitts. L. Rev. 222 at 243 et. seq.

with the approach taken in other areas, such as legitimation⁵. It now seems to be established⁶ that the law governing the succession or other 'main' issue must determine what incidents attach to adoption. What has not been decided is which law should determine whether the child in question has been successfully adopted⁷. It is to this question that this chapter is directed.

B. RECOGNITION OF FOREIGN ADOPTIONS UNDER ENGLISH LAW.

There are now four different sets of recognition rules, three of which are statutory. A new Hague Convention on Inter-Country Adoptions was concluded in 1993, but is not yet in force. We will consider each of the sets of rules in turn:-

1. Adoptions in the British Isles

All adoption orders made in Northern Ireland, the Channel Islands and the Isle of Man are automatically recognised⁸.

2. "Overseas Adoptions"

Adoption orders made in any country listed in a Statutory Instrument⁹ made by the Secretary of State under powers granted to him under the Adoption Act 1976 are entitled to automatic

⁵ Although no cases are cited which raise this issue squarely.

⁶ Re Valentine's Settlement [1965] Ch. 831, 843-5. See Cheshire and North (chapter 1, n.1 supra) p. 770.

⁷ Dicey and Morris (chapter 1, n.1 supra) at p. 901 suggest that an English Court **might** refer the whole question to the lex successionis.

⁸ Adoption Act 1976 ss.38(1)(c).

⁹ The relevant Order is S.I. 1973 No. 19.

recognition¹⁰ subject to the following limitations:-

(i) The adoption was made under the statutory law and not common or customary law of the foreign country¹¹.

(ii) The adopted person is under 18 and has not been married¹².

(iii) The authority which purported to authorise the adoption was competent to do so¹³.

(iv) Recognition is not contrary to public policy.

The most salient features of these provisions are that no reciprocity of treatment of English adoptions is required and that no connecting factor is required between the adopters or the adopted person and the foreign country. The latter may not be so surprising since countries will only be included in the Order where the Secretary of State is satisfied with the arrangements for adoption there. His primary considerations will presumably be the methods of safeguarding the interests of the child and preventing abuse. The latter should include the requirement of some connection with the foreign Court.

It should be remembered that whilst a large number of countries¹⁴ are included in the Order, there are still many

¹⁰ Either on a request for a declaration or where the issue arises in other proceedings, Adoption Act 1976 s.53(2)(3).

¹¹ S.I. 1973/19, para 3(3).

¹² Ibid.

¹³ Adoption Act 1976 s.53(2)(a).

¹⁴ See SI 1973/19. The list includes most of the Commonwealth and U.K. Dependant Territories, all Western European countries, Yugoslavia, Greece, Turkey, South Africa and the USA.

which are not.

3. Convention Adoptions

The Adoption Act 1976 provides that adoptions made under The Hague Convention on Adoptions 1965 and known as "regulated adoptions" are to be recognised as "overseas adoptions". The rules providing when adoptions may be made under the Convention are complex, but in practice they are of little significance since the Convention is only in force with Austria and Switzerland¹⁵ and both of these countries are designated under the 1973 Order.

4. Other Adoptions

Any adoptions which are not recognised under the above headings may be recognised at common law. There has been much academic debate over the common law rules. The leading case is the Court of Appeal decision in Re Valentine's Settlement.¹⁶ The majority stated that foreign adoptions will only be recognised where the adopters are domiciled in the country where the order is made **and** the child is ordinarily resident there. Danckwerts L.J. was "not sure" whether the latter requirement was in fact necessary.¹⁷

There are some indications in the judgment that the South African order would have been recognised if it had been recognised by the law of the domicile, which was Southern Rhodesia. Thus, it has

¹⁵ SI 1978/1431.

¹⁶ [1965] Ch. 831.

¹⁷ Ibid at p. 846.

been suggested¹⁸, by analogy with the rule in Armitage v A-G¹⁹, that an adoption order should be recognised if it would be recognised by the law of the domicile of the adopters.

Other writers²⁰ have gone further and suggested that the rules in Travers v Holley²¹ and Indyka v Indyka²² might apply to adoptions. Under the former, a foreign adoption would be recognised where there was a connection with the foreign Court which would mutatis mutandis have given the English Court jurisdiction. Under the Adoption Act 1976²³, the English Court may grant an adoption order where one of the applicants is domiciled in the United Kingdom, the Channel Islands or the Isle of Man and the child is in England when the application is made²⁴. Thus, the recognition rule is substantially similar²⁵

¹⁸ Morris (chapter 1, n. 142 supra) at p. 249.

¹⁹ [1906] P. 135.

²⁰ Cheshire and North (chapter 1, n.1) at p. 769; Khan Freund, *The Growth of Internationalism in English Private International Law* pp. 82-88. Kennedy (1956) 34 Can. B.Rev. 507, although writing before Indyka, would clearly have advocated the applicability of that decision to adoptions.

²¹ [1953] P 246.

²² [1969] 1 AC 33.

²³ s.62.

²⁴ In practice the applicants and the child have to be resident in England because otherwise it is not possible for the relevant authorities to carry out the assessment during the trial period. See Re Y Minors [1985] Fam. 136.

²⁵ The recognition rule refers to the domicile of **both** parties. This is no doubt because at that time the domicile of a married woman was dependent on that of her husband. The jurisdiction rule does not formally require ordinary residence of the child, but see fn. 24 supra.

to the jurisdictional rule and application of the Travers v Holley rule would not lead to any significant widening of the former. By contrast, application of the rule in Indyka v Indyka would allow all adoptions to be recognised provided that there was a "real and substantial connection" with the granting Court. Thus, for example, the habitual residence or nationality of the adopters and maybe even of the child²⁶ would probably be sufficient.

It has also been suggested²⁷ that since the requirement for the child to be resident has been removed from the English jurisdiction rule, it should also be dropped from the recognition rule if it is part of the latter.

Finally, it should be mentioned that, as with "overseas adoptions", recognition may be refused at common law where it would be contrary to public policy. No doubt this power would only be invoked in extreme circumstances.

5. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions

This Convention primarily seeks to regulate the procedures for inter-country adoptions to ensure that such adoptions are made in the best interests of the child and in particular to prevent

²⁶ The US Restatement (Conflict of Laws) para. 78 provides for jurisdiction where either the child or the adopters is domiciled or resident in the forum.

²⁷ Cheshire and North (chapter 1, n. 1 supra) p. 769.

international trafficking in children²⁸. Article 23 provides that an adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States.

C. RECOGNITION OF FOREIGN ADOPTIONS IN OTHER COUNTRIES

It is not practicable here to undertake a survey of recognition provisions worldwide²⁹, which seem to vary more than conflicts rules in other areas of family law.³⁰ All that is required is sufficient information to show that there is a real likelihood of a situation arising in which an adoption order will be recognised in England and not by the lex causae of the succession or tort claim or vice versa.

In the common law world, many jurisdictions³¹ still require a

²⁸ See art. 1 and the Preamble.

²⁹ Lipstein (1963) 12 ICLQ 835 seems to be the most comprehensive work, but there have been significant changes in the last 30 years.

³⁰ This may explain the limited success of the Hague Convention on Adoption. See Lipstein ibid, Scoles and Hay (chapter 6 n. 18 supra) at pp. 546-9 conclude that the Convention "is of limited usefulness in addressing the problems raised by international adoption cases."

³¹ For example, the Australian uniform legislation requires inter alia that the applicant(s) be resident or domiciled in the foreign country where the order is made (although there is a presumption that this requirement is met), but some of the states have abolished this requirement (see Sykes and Pryles, chapter 5, n.22 supra, at p. 524). Newfoundland and Nova Scotia have similar jurisdictional requirements (see Castel, chapter 6 n. 17 supra, at p. 387). Most American States will recognise an adoption granted in the court of the adopter's or the child's nationality or residence (see Scoles and Hay, chapter 6 n.18 supra, at p. 548).

jurisdictional link between the adopters and the jurisdiction in which the order is granted. At the other extreme, some jurisdictions recognise all adoptions³² effected according to the law of another jurisdiction. There are a variety of positions in between. Some states adopt the approach of the English adoption and prescribe which countries' adoptions should be recognised.³³ Others specify that foreign adoptions will only be recognised where certain incidents attach to them under the lex adoptionis.³⁴

The position in the civil law world is more complicated because generally adoption is governed by the personal law³⁵ of the parties. Foreign adoptions will only be recognised where they are in accordance with the personal law.

The Hague Convention on Adoption 1965 was only ratified by three

³² For example, Alberta, British Columbia, Saskatchewan and Ontario (see Castel, chapter 6, n.17 supra, p. 389).

³³ e.g. New Brunswick. In some Australian States, there is provision for a proclamation to be made declaring that adoptions made in a particular country are **conclusively** presumed to comply with the recognition requirements. See Sykes and Pryles (chapter 5, n.22 supra) at p. 525.

³⁴ For example, Manitoba, New Zealand. Under the Australian uniform legislation, the adoptive parents must have a right of custody superior to that of the natural parents and must be placed generally in relation to the adopted person in the position of parent(s). However, there is a presumption that such requirements are satisfied. See Sykes and Pryles (chapter 5, n.22 supra) pp. 524-5.

³⁵ The prerequisites for adoption will usually be governed by the personal law of the adopters, but some aspects, such as the need for the consent of the natural parents and the child, will be governed by the personal law of the child. See Lipstein (1963) 12 ICLQ 835.

countries. If the recent Convention on inter-country adoption enjoys more success, the potential for the conflict of rules arising in relation to inter-country adoptions will be substantially reduced.

In summary, a number of situations in which the conflict of rules may arise can be identified:-

1. 'Overseas adoptions' recognised in England may not be recognised by common law countries requiring a jurisdictional link.
2. 'Overseas adoptions' recognised in England may not be recognised in civil law countries if the adoption was not in accordance with the personal law of the parties.
3. Adoptions recognised under English common law may not be recognised in civil law countries if the adoption is not in accordance with the national law of the parties, even though it is in accordance with their domiciliary law.
4. Adoptions recognised in 'liberal' common law countries may not be recognised in England if they are not 'overseas adoptions' and the adoption is not granted or recognised in the country of the adopters' domicile.
5. Adoptions recognised by civil law countries, which are not 'overseas adoptions', may not be recognised in England if they are not granted or recognised in the country of the adopters' domicile.

The application of the Indyka rule would reduce the likelihood of conflicts arising under category 4 and 5 above. However, to

the extent that it increased recognition of adoptions made in the place of residence, as opposed to nationality, it might increase the likelihood of conflicts under category 3.

II. POSSIBLE SOLUTIONS

Most of the analysis of the possible rules in Chapters 7 and 9 in relation to succession and wrongful death claims by spouses will be relevant here. For example, the rationale for applying the choice of law rule would not seem to be any different since we are concerned with exactly the same choice rules. However, there may be some material differences in respect of the rationale behind application of the recognition rule because we are concerned with a different type of foreign judgment.

A. RATIONALE FOR APPLYING THE RECOGNITION RULE.

1. Where the Foreign Order is Recognised.

The 'full effect' doctrine would in the present context seem to require that in order to give full effect to a foreign adoption, it is necessary to treat the adopted child as the natural born child of the adoptive parents for the purposes of succession³⁶ and wrongful death claims. In other words, it is logically inconsistent to recognise such adoptions without according them the incidents which we accord to English adoptions.

It is submitted that there are two problems in applying the full effect doctrine to adoptions. Firstly, it is far from clear what

³⁶ Apart from the hereditary titles, see Adoption Act 1976 s.44(1).

is meant by giving full effect to an adoption. It will be remembered that the 'full effect' theory was propounded in relation to capacity to remarry.³⁷ It was seen as logically inconsistent to recognise a divorce and not allow remarriage because the right to remarry is universally seen as the main purpose and essential effect of divorce.³⁸ By contrast, there would not seem to be international agreement about the essential effect of adoption and, if this could be determined,³⁹ it would most probably not include full rights of succession.⁴⁰

Secondly, it is arguable that the institution of 'adoption' is not universal in the same way as marriage and divorce. Thus, whilst the relationship created by the foreign court may be called an adoption it should not necessarily be assimilated to the English status of the same name.⁴¹ Thus, recognition of the

³⁷ We saw above (in sections II B 1 of Chapters 7, 8 and 9 respectively) that the theory is less persuasive in relation to other issues.

³⁸ A form of dissolution which relieves the parties of matrimonial obligations but does not in principle allow the right to remarriage (although sometimes the right may be delayed), is a 'divorce a menso et thoro' and not a divorce 'a vinculo matrimonii'. In modern usage only the latter is referred to as a divorce.

³⁹ The lowest common denominator would be that the adoptive parents acquire parental authority and a duty of support in respect of the child during his minority. See Krause, Creation of Relationships of Kinship, International Encyclopedia of Comparative Law Vol. IV chapter 6 (1976) at para. 6-185.

⁴⁰ Krause *ibid.* para. 6-186 shows that the effect of adoption on inheritance rights varies greatly from system to system.

⁴¹ Krause (n. 39 *supra*) at para. 6-1767 *et. seq.* shows that in some systems adoption is much more limited and that in some countries there are two types of adoption available - full adoption and limited adoption.

foreign adoption simply requires giving effect to the status which has been created. This argument would favour determining the effect of the adoption by the lex adoptionis⁴² rather than the lex fori. Thus, it is suggested that the full effect doctrine is a weak rationale for preferring the recognition rule in respect of succession and wrongful death claims following foreign adoptions.

2. Where the Foreign Order is not Recognised

Does the policy of the non recognition rules require that they be given precedence to ensure that all effects of adoption be withheld from the parties to a non-recognised adoption?⁴³ In order to answer this question we need to examine the various 'non-recognition' rules.

(a) Lack of Jurisdictional Link

We saw above that there has been a general trend⁴⁴ liberalising the jurisdictional⁴⁵ bases for adoption. In England, no jurisdictional link is required in respect of 'overseas adoptions'. However, the common law recognition rules still depend on domicile, although it has been suggested that these

⁴² cf. Discussion at text accompanying nn. 3 - 5 supra.

⁴³ We saw above (chapter 3, III C) that the policy of non-recognition of a divorce did not necessarily require invalidation of the second marriage.

⁴⁴ cf. The 1965 Hague Convention on Adoption. The complicated jurisdictional rules probably explain why the Convention has not been successful.

⁴⁵ See McClean and Patchett in (1970) 19 ICLQ 1.

rule be widened⁴⁶. Thus, it is feasible that a situation like Re Valentine⁴⁷ could arise where the adoption was not an 'overseas adoption'.⁴⁸

The purpose of jurisdictional rules is to prevent forum shopping and consequent prejudice to the defendant. In the case of adoption, whilst it is clearly preferable ab initio that the adoption takes place in an appropriate forum, it is difficult to see why ex post facto, after the child has been treated as an adopted child, incidents of adoption should be withheld because of lack of jurisdictional link⁴⁹ even where English law is the lex causae. A fortiori, where the adoption is recognised by the lex successionis, the lack of jurisdictional link should not prejudice the parties' rights.

(b) Public Policy

Public policy restrictions on recognition of foreign adoptions will usually be designed to protect the child. For example, it would seem to be against public policy to recognise an adoption where the child had effectively been bought by the parents for the purposes of providing services for them and no doubt in this situation a Court would refuse to give custody of the child to

⁴⁶ See nn. 18 and 20 supra.

⁴⁷ [1965] Ch. 831.

⁴⁸ Today Re Valentine would be decided differently because South Africa is one of the countries listed in S.I. 1973/19.

⁴⁹ If the lack of a jurisdictional link is evidence of lack of bona fides, the adoption should also be refused recognition on public policy grounds.

the parents. However, if the issue of recognition arose in relation to succession to one of the parent's estates, there would seem to be no reason to prevent the child from succeeding. On the contrary, the child would be better protected by recognition of the order.

Where the adopted person was an adult, it may be more likely that public policy would require that the parties should not benefit from an adoption, where the parties intention was not bona fide.⁵⁰ Morris⁵¹ suggests that the "facts would have to be extreme before public policy demanded the **total** non-recognition of a foreign adoption **for all purposes**." (my emphasis).

Thus, whether the non-recognition is based on lack of jurisdiction or on public policy, there is no justification for giving it automatic precedence. In any event, whichever preference rule is chosen, the residual public policy defence will always be available.

B. AUTHORITY

There are no English decisions in which the conflict of rules has arisen in relation to adoption and the literature on the incidental question generally tends⁵² to refer to problems

⁵⁰ For example, where the motive was to evade immigration rules or to exclude another person from their legitimate share of an inheritance, recognition would be against public policy.

⁵¹ Op. cit. (chapter 1, n.142 supra) pp. 249 - 250.

⁵² While in his discussion Gottlieb (1977) 26 ICLQ 734 at 762 assimilates adoption with succession, one of his model problems (no. 8 at p. 788) does specifically refer to adoption.

arising out of legitimacy or legitimation rather than adoption. However, there are two types of case which may provide us with some guidance.

1. Legitimacy/Legitimation Cases

As we mentioned earlier⁵³, the conflict of rules with which we are concerned does not strictly arise in relation to legitimacy, legitimation, or for that matter non-judicial adoptions, because there is no issue of recognition of a foreign judgment. However, a similar⁵⁴ conflict arises between the recognition of status rules of the forum and its choice of law rules on the 'main' issue.

The legitimacy cases are all consistent with the view that the law governing the succession should apply its rules to determine whether the claimant is legitimate, but the cases are of weak precedent value because no actual conflict arose. For example, in Re Stirling⁵⁵, the claimant was illegitimate by all relevant laws. However, the Court referred to Scottish law⁵⁶ as the lex

⁵³ Chapter 1, I C supra.

⁵⁴ It has been suggested that the legitimacy/legitimation question is a 'black and white' one; whereas in adoption there may be a 'grey area' because adoption orders may not give a child full rights in respect of adoptive parents (Sykes and Pryles, chapter 5 n.22 supra, at p.526).

⁵⁵ [1908] 2 Ch. 344.

⁵⁶ Under Scottish law, there was an issue as to whether the claimant should be treated as legitimate under the putative marriage doctrine. It should be noted that in Shaw v Gould (1868) L.R. 3 H.L. 55 English law was the lex successionis and thus determined the question of legitimacy. Thus, the Scottish doctrine was not relevant unless the English choice of law rules on legitimacy referred to Scottish law as the law of the

successionis, which would not have been necessary if the question of legitimacy was determined by the lex fori⁵⁷.

2. 'Effect of foreign adoption' cases

After much debate, it now seems to be established⁵⁸ that in adoption cases it is the lex successionis which determines the extent of succession rights to and from adopted persons and not the lex adoptionis or for that matter the lex fori⁵⁹. It can perhaps be logically inferred from this that the lex successionis should also determine whether the 'adopted person' in question should in fact be treated as an adopted person for the purposes of succession.

C. RESULTS⁶⁰

The results will have to be analysed according to four possible types of cases which might arise:-

1. Child claims after death of adopted parent or other adopted
_____domicile.

⁵⁷ Gottlieb (1955) 33 Can. Bar. Rev. 523 at p. 539 and fn. 59. Gottlieb also refers to the old Kentucky case of Sneed v Ewing (1831) 5 J.J. Marsh 460. Again, the claimant was illegitimate both by the lex fori and the lex successionis but the Court expressly applied the latter.

⁵⁸ Re Valentine's Settlement [1965] Ch. 831 in which earlier caselaw to the contrary was stated to be wrong. See also U.S. case of Anderson v French (1915) 77 N.H.

⁵⁹ Although the lex successionis seems to have been the lex fori in all the decided cases.

⁶⁰ For tabular illustration of the results of applying the different preference rules, see tables 7A and 7B in the Appendix.

relative.

2. Adopted parent or other adopted relative claims after death of child.

3. Child claims after death of natural parents or other natural relative.

4. Natural parent or other natural relative claims after death of child.

1. Child claims after death of adoptive parent/relative

Here, it will be helpful to refer to examples A1 and A2⁶¹ which are based on the facts of Re Valentine's Settlement. The results of the application of the various rules may be summarised as follows.

(a) Preference for the choice rule

Where the order is recognised by the lex causae but not the lex fori, as in example A2 where South Africa is the lex successionis, the claimant will succeed. On the other hand, where the order is recognised by the lex fori but not the lex causae, as in example A1 where Rhodesia is the lex successionis, the claimant will not succeed.

(b) Preference for the recognition rule.

The opposite results will be achieved. Thus the claim will be successful where the order is recognised by the lex fori and not the lex causae (as in example A1), but not in the opposite situation (as in example A2).

⁶¹ At chapter 1, III supra.

(c) The 'differential rule'

Application of the 'differential rule'⁶² will result in successful claims in every case.

(d) Presumption of upholding succession rights or tort claims

This would produce the same result as the differential rule.

2. Adoptive Parent/Relative Claims After Death of the Child

The results will be the same as under 1. above.

3. Child Claims after Death of Natural Parent/Relative

This type of case can only arise where under the relevant law, the adoption extinguishes rights of succession between child and natural parent. Assume in examples A1 and A2, that the child wishes to claim against his natural parents whose domicile at death is the same as Dorothy's in each case.

(a) Prefer Choice Rule

The child can only claim if the adoption is not recognised by the lex successionis. This is the situation in example A1, but not A2

(b) Prefer the Recognition Rule

Here the child can claim where the adoption is not recognised by the lex fori, as in example A2, but not A1.

(c) The 'Differential Rule'

The child would not be able to claim in any situation.

⁶² See chapter 6, II C 3 supra.

(d) Presumption of Upholding Succession Rights/Tort Claims

This would ensure that the child could succeed against the natural parents where the adoption was not recognised by one of the relevant laws.

4. Natural Parents/Relative Claims After Death of Child

The conflict can only arise in this situation where under the relevant law the adoption order extinguishes the natural parent's succession rights and/or rights to claim for wrongful death in respect of the child. It may be noted that in some domestic laws there may not be reciprocity of treatment. Thus, a child may retain succession rights in respect of the natural parent, whilst the natural parent loses his/her rights in relation to the child on adoption⁶³. Where the conflict arises, the results will be the same as in 3. above.

III. POLICY

A. THE LAW

Adopted children are treated as the children of their adopted parents and no longer as the children of their birth parents from the date of the adoption⁶⁴, for nearly all purposes.⁶⁵ Thus, the child may succeed under a will or on intestacy as a child of

⁶³ For example, in Israel under the Adoption Law 1981 s.16(3).

⁶⁴ Adoption Act 1976 s.39

⁶⁵ The main exception relates to descent of peerages and there are particular rules relating to the adoption of an illegitimate child by one of his parents as the sole adoptive parent.

the adoptive parent, but not as a child of the birth parents⁶⁶. The adoptive parents will have reciprocal rights on the death of the child, whereas the natural parents will not have any rights arising from the death of the child after the making of the adoption order. Similarly, for the purposes of discretionary family provision⁶⁷ and wrongful death claims it is the adoptive relationship and not the natural relationship which is relevant.

The recent Adoption Law Review⁶⁸ has affirmed that despite certain trends towards 'open adoption'⁶⁹ adoption orders should continue to effect a complete legal transplant of the child from the natural family to the adoptive family.⁷⁰ However, we may still need to bear in mind that changes in adoption practice may increase the chance that there is a continuing relationship between the child and the natural parent and this may be relevant in application of policy.

In order to consider how we should deal with the 'conflict of rules' situation where there is a dispute as to whether an adoption order should be recognised, we need to consider the

⁶⁶ Although he will not lose "any interest already vested in possession or interest expectant (whether immediately or not) upon an interest so vested at the date of the adoption." (Adoption Act 1976 s.42(4)).

⁶⁷ It has been held that a child who has been adopted after the deceased's death cannot apply for an order in relation to his/her natural parents, Re Collins [1990] Fam. 56.

⁶⁸ Department of Health, Consultative Document on Adoption Law (1992).

⁶⁹ Ibid para 4.1.

⁷⁰ Ibid para 2 (R1).

policy of inheritance and tort law respectively in relation to succession and wrongful death claims arising out of the parent-child relationship as well as the policy of the adoption law rule explained above.

B. WILLS

We saw above⁷¹ that the prime policy objective in relation to wills is to give effect to the wishes of the testator⁷². This policy is equally pertinent in relation to bequests to and by doubtfully adopted children.

C. PROVISION FOR DEPENDANTS

The Inheritance (Provision for Family and Dependants) Act 1975, provides that 'any other person whom the deceased has treated as a child of the family in relation to any marriage to which he had any time been a party'⁷³ is entitled to claim.⁷⁴ Thus, where an adoption order is not recognised, but the child has been treated

⁷¹ At chapter 7, III A.

⁷² The principle of treating references to relatives in wills as including adoptive relatives is consistent with this objective. In particular, it should be remembered that this principle will not apply if contrary intention can be shown from the will.

⁷³ Hereinafter such a child shall be referred to as a de facto child and the parents as de facto parents.

⁷⁴ s.1(1)(d). This may be seen as an extension of the provision of support rights in favour of minor children who are treated as a child of the family during a marriage (Domestic Proceedings and Magistrates Court Act 1978 s.2 and on divorce, see Matrimonial Causes Act ss. 23, 24 and 52 (as amended by Children Act 1989, Schedule 12 para. 33)). However, the category here is wider as can be seen from the decisions in Re Leach [1986] Ch. 226 and Re Callaghan [1985] Fam.1.

as if he were adopted, the child will be eligible to claim without having to meet the additional requirement of proving that (s)he has been maintained by the deceased immediately before his death.⁷⁵

We may conclude that the policy of ensuring that proper provision is made for dependents of the deceased includes both de jure and de facto children.⁷⁶ Of course, in relation to both categories, whether the child succeeds will depend on all the circumstances of the relationship between the parties.⁷⁷

D. **INTESTACY**

1. On Death of parents

Where there is no surviving spouse, the children of the intestate take the whole of the estate. Where there is a surviving spouse, the issue take half of the residue of the estate (after the statutory legacy) absolutely and the remainder (following the surviving spouses's life interest) in the other half.

⁷⁵ See s.1(1)(e) and s.1(3). Presumably the child could also claim under the estate of the natural parents. However, where all the parties had acted on the reasonable assumption that the adoption order was valid it seems unlikely that an award would be made.

⁷⁶ It may be noted that parents are not listed as a separate category of claimants in section 1 of the Act. Thus, natural and adoptive parents can only claim if they can show that they were being maintained by the deceased immediately before his/her death under s.1(1)(e).

⁷⁷ Thus, for example, where an adoption order is invalid the child could claim against the natural parents. However, unless there has been a continuing relationship between them, it seems unlikely that an award would be made.

It is suggested that the two⁷⁸ most persuasive rationales for the intestacy rights of children are:-

(a) The presumed wishes of the intestate.⁷⁹

The intestate is presumed to wish his/her property to be divided in the same way as the average testator bequeaths his/her property. The present intestacy laws are based on an analysis of wills in the 1950s.⁸⁰ It is not surprising to find that after providing for a remaining spouse, the average testator makes provision for his/her children.

(b) The moral obligation of the intestate.

Whilst the legal obligation of parents to support their children ends when the children reach the age of 18, there is a continuing moral obligation of support, arising from the parent's responsibility for bringing the child into the world. Clearly the extent if any of this obligation depends on the respective financial position of the parents and children. On death, the parent no longer has any further personal need of his/her assets and therefore, subject to making provision for any other more needy dependants,⁸¹ the children can be considered to have

⁷⁸ The rationales of need and desert, mentioned in the Law Commission's Working Paper No. 108, are less useful because they depend more on the behaviour and financial circumstances of the particular child. In any event, the moral obligation rationale clearly reflects need and desert.

⁷⁹ See Law Commission W.P. No. 108 paras. 4.2 to 4.3.

⁸⁰ Report of Committee on the Law of Intestate Succession (Morton Committee) Cmnd. 8310 para. 3.

⁸¹ The moral obligation could be enforced under the Inheritance (Provision for Family and Dependents) Act 1975.

first⁸² claim on those assets.

The Law Commission mooted the possibility of extending intestacy rights to de facto children.⁸³ Their main reason for not recommending such a reform was that one of the main requirements of intestacy law is that it should be simple and to include de facto children would mean that "administrators would have to make complex decisions of fact".⁸⁴ They were also concerned that it would be unfair to allow such children to share both in the estate of their de facto parents and their de jure parents and that it would be complicated to prevent the latter. However, it may be noted that they did not suggest that de facto children did not come within the policy of intestacy provision.

2. On Death Of Children

If there is a surviving spouse and no issue, the parents of the deceased take half of the residue of the estate after the statutory legacy. If there is no surviving spouse and no issue, the parents of the deceased take the whole estate. In both cases, where the deceased has been validly adopted, the adoptive parents take to the exclusion of the natural parents.

It is suggested that the rights of parents to take on the

⁸² This hypothesis does not take into account the moral obligation to give charity because the law of intestacy cannot make charitable donations where the deceased himself failed to do so by testamentary bequest.

⁸³ For definition, see text accompanying n. 73 supra.

⁸⁴ Law Com. No. 187 para. 49.

intestacy of their children can also be explained on the basis of presumed wishes⁸⁵ and moral obligation.

3. On Death Of More Distant Relatives.

It is more difficult to explain the basis for the order in which more distant relatives may claim on intestacy⁸⁶. The list seems to be based on the closeness of the blood tie. Although rather speculative, the intestate might be presumed to wish closer relatives to take in preference to more distant ones. It is more difficult to base succession by more distant relatives on moral obligation, although it has been suggested that the notion of family property would provide more distant relatives with a moral claim⁸⁷.

E. WRONGFUL DEATH

In 1982, the category of eligible dependents under the Fatal Accidents Act was expanded⁸⁸ to include inter alia

(i) a person who has been treated as a child of the family by the deceased victim and

(ii) a person who was treated by the deceased as his parent.

Thus, it can be seen that the policy behind wrongful death

⁸⁵ Although it may be argued that the deceased may have preferred to benefit his/her siblings as in the long-term this would be tax advantageous. The Law Commission did not think that tax considerations should be relevant, see Law Com. No. 187 at para. 50-51.

⁸⁶ See Law Com. W.P. 108 para. 4.11.

⁸⁷ Ibid.

⁸⁸ See Fatal Accidents Act 1976 s.1(3), substituted by Administration of Justice Act 1982 s.3.

provision is to compensate de facto⁸⁹ as well as de jure children and parents for the loss of dependency arising from the defendant's tortious actions.

F. ADOPTION LAW

Finally, we should consider the policy of the domestic rule, which will be referred to as a rule of adoption law, that adopted children are treated⁹⁰ for nearly all purposes as the natural born legitimate children of the adopters. Perusal of the legislative history of the provision shows that the main rationale behind this principle⁹¹ is to facilitate the full integration⁹² of the child into the adoptive family because this is believed⁹³ to be in the best interests of the child.⁹⁴

Since the very questions is whether the child should be treated

⁸⁹ For definition, see text accompanying n. 73 supra.

⁹⁰ Full assimilation of treatment was only achieved by the Children Act 1975.

⁹¹ See Houghton Committee Report (1972) at, for example, para. 326.

⁹² Full integration is seen by the judiciary as the main advantage of adoption over other methods of disposal, principally because of the security and stability it provides for the child and the adoptive family. See, for example, Re S [1987] Fam. 98 at p. 107, Re B (MF) (an infant) Re (SL) (an infant) [1972] 1 All ER 898 at pp. 899 - 900, Re L (A Minor) [1987] 1 FLR 400 at p. 403 and Re A (A Minor) [1987] 2 FLR 184, 189.

⁹³ On the basis of empirical research showing that children who are adopted fare better than children who remain in long term foster care. See, Tizard, Adoption: A Second Chance (1977) and Seaglow et al, Growing Up Adopted (1972).

⁹⁴ It is clear that the promotion of the welfare of the child is the main, although not the sole, policy objective in modern adoption legislation. See Adoption Law Review (n. 68 supra) para 7.1 et seq.

as an adopted child, it is not clear how much weight should be attached to the policy of adoption law. However, it is suggested that in the situation where there is some doubt as to the policy of succession or tort law, this may be resolved by application of the 'full integration' principle.

IV APPLICATION OF POLICY

We now need to examine how the policy we have identified applies in relation to cases which have a foreign element and where there is a dispute about the validity of the adoption order between the forum and the lex causae.

A. WILLS

1. 'Adoptive' Parent as Testator

It is suggested that the 'adoptive' parent would normally intend the word 'child' in his will to include a child whom he had adopted, even though there was a dispute about the validity of the adoption order. If (s)he was not aware that the decree would not be recognised in some countries, then (s)he would clearly intend the child to be treated as a legally adopted child. If (s)he was aware of the doubt and did not want the child to succeed, this would surely be stated specifically in the will.

2. Natural Parent as Testator⁹⁵

Similarly, the natural parent will not usually intend a reference

⁹⁵ Assuming that under the relevant law, a valid adoption extinguishes all succession rights between the child and the natural parent. There are a number of legal systems where this is not the case. See Krause, n.39 supra para. 6-184.

to a child to include his/her child who has been adopted even if (s)he believes the adoption order to be invalid. If (s)he wishes to include such a child, (s)he would surely make a specific bequest in order to avoid any doubt.

3. Third Party Testator

The position is perhaps less clear in relation to third parties who are not themselves involved in the adoption process. By analogy with the reasoning adopted above in relation to 'former' spouses,⁹⁶ it could be assumed that the testator intended to benefit a child whose adoption is recognised by the law governing the interpretation of his/her will.

However, it might be argued that the analogy is false since the fact that the adoption is not recognised will not usually affect the de facto relationship⁹⁷ between the adoptive parent and the child or between the testator and the child. Thus, the testator would intend to benefit the child irrespective of the validity of the adoption.

It is suggested that the latter approach should be preferred because it is more consistent with the adoption law policy of 'full integration'.

not the case. See Krause, n.39 supra para. 6-184.

⁹⁶ At chapter 7, IV A 2 supra.

⁹⁷ We saw above (ibid) that the position is more speculative where third parties have made provision for 'spouses'.

4. Adoptive Child as Testator

By analogy with the reasoning in 1. above, where the 'adopted' child has made testamentary provision for his/her parent, it should be assumed that (s)he intended to refer to the 'adoptive' parents, unless contrary intention can be seen from the will.

Again the situation is less clear where the 'adopted' child makes testamentary provision for other relatives. However, unless (s)he actually has a continuing relationship with his/her natural relatives it would seem clear that the intention must be to refer to the 'adoptive' relatives.

The desired results⁹⁸ in each of the four situations can be achieved by use of the differential rule under which the rule which recognises the adoption will be applied.

B. PROVISION FOR DEPENDENTS

1. Discretionary Provision

It will be remembered that in fact the 'conflict of rules' situation will only arise if an English Court is prepared to apply a foreign discretionary provision statute.⁹⁹ It is assumed that the foreign statute only allows claims by adopted children if there is a recognised order and does not allow validly adopted children to claim against the estate of the natural parents.

⁹⁸ It may be noted that these are all consistent with the 'full integration' principle.

⁹⁹ See Chapter 7 I C supra.

We saw above that the policy of the English discretionary provision statute is to ensure that proper provision is made on death for the de facto children¹⁰⁰ of the deceased. Thus, it is clear that the preference rule should ensure that the 'adopted' child can claim against the 'adoptive' parents.

Should the 'adopted' child be able to claim against his/her natural parents? Under English domestic law, where the adoption order is invalid the child would be eligible to claim but would be unlikely to succeed unless there had in fact been a continuing relationship between the parties. It would seem inappropriate to allow the child to claim against his/her natural parents where the lex causae itself recognises the adoption. However, where the lex causae does not recognise the adoption, there would not seem to be any good reason¹⁰¹ not to apply the choice rule and allow the child to claim, even though his chances of success are slim. Since such a right would not affect that child's position in the adoptive family, allowing a claim is not inconsistent with the 'full integration' principle.

The above results could be achieved by applying the differential rule in the case of a claim against the estate of an adoptive parent and the choice rule in a claim against the estate of a

¹⁰⁰ For definition, see text accompanying n. 73 supra.

¹⁰¹ There can be no concern about an unfair result since an award will only be made in a deserving case and the Court will take into account inter alia the possibility of the child having a claim against both parents' estates (which was of concern to the Law Commission, n.84 supra). Allowing the child to claim in this very specific situation will not lead to a proliferation of bogus claims.

natural parent.

2. Fixed Shares

An English Court may be faced with the situation where the lex successionis provides a fixed share for a child,¹⁰² including an adopted child, but there is a dispute as to the validity of the adoption. It was argued above¹⁰³ that the policy of English law in relation to discretionary provision should in principle be equally applicable in relation to fixed shares since the two 'systems' are simply different methods of achieving the same purpose.

Thus, in the present context, the policy of allowing a claim against the adopted parents should apply equally in fixed share cases. This result is supported by the 'full integration' principle.

However, it is more problematic to apply the policy of allowing claims against the natural parents where the lex causae does not recognise the adoption,¹⁰⁴ to 'fixed share' cases. One of the reasons that we gave in favour of allowing a claim against natural parents was that under the discretionary system unmeritorious cases would be rejected. However, in 'fixed share'

¹⁰² This is analogous to the position in relation to spouses. See chapter 7, III B 4 supra.

¹⁰³ Ibid.

¹⁰⁴ There will not be any problem where the lex causae allows adopted children to take fixed shares in both their adoptive parents and natural parents' estates, see Krause, supra n.39 at para. 6-183.

systems there is no such filter mechanism.¹⁰⁵ The result of allowing a claim against the natural parents would be to entitle the child to a full 'fixed share' in the estate of both sets of parents, irrespective of his/her relationship with them.

It is suggested that such 'double succession' is against the policy of English law.¹⁰⁶ Thus, the corollary of allowing a claim against the 'adoptive' parents is to disallow a claim against the natural parents.

The suggested desired results of allowing claims against 'adoptive' but not natural parents can be achieved by use of the differential rule, under which the recognition rule is applied where it recognises the adoption and otherwise the choice rule.

C. **INTESTACY**

It is assumed throughout the following discussion that under the lex successionis where there is a valid adoption this extinguishes the succession rights between natural parents and children. Where this is not the case, there will be succession

¹⁰⁵ It will be remembered that in relation to spouses, the difficulty caused by the lack of flexibility of the fixed share system was to a large extent solved by the use of the doctrine of preclusion (see chapter 7, IV B 2). This doctrine is inappropriate in the case of a claim by an adopted child because the child was not a party to the adoption order.

¹⁰⁶ See Law Com. No. 187 at para. 49. The Adoption Law Review's (n. 68 supra) recommendation that a child whose natural parents have died intestate should not lose his contingent interest under the statutory trusts by virtue of adoption might seem to contradict this. However, this situation is different because the succession rights against the two sets of parents are successive rather than concurrent.

between the natural relatives whether or not the adoption is recognised. The only issue will be whether the 'adopted child' and the 'adoptive' relatives can claim inter se.

1. On Death Of the 'Adoptive' Parents

On the assumption that intestate provision for children is based on the presumed wishes and moral obligations of the intestate, should the 'adopted' child be able to claim against the estate of either his 'adoptive' or natural parents?

It is suggested that the average testator would wish his/her 'adopted' children to take whether or not the adoption is legally recognised by either the lex successionis or the lex fori. Failure to make a will may reflect the intestate's belief that the adoption is legally effective in the relevant jurisdiction(s).

To the extent that intestacy rights are based on a moral obligation does that obligation extend to 'adopted' children? It was suggested earlier that the moral obligation to provide for children on death is a continuation of the legal obligation of support in respect of minor children.¹⁰⁷ Since de facto parents have support duties in respect of children who have been treated as children of the family,¹⁰⁸ such children should be included within the scope of the moral obligation on death.

¹⁰⁷ See III C 1 (b) supra.

¹⁰⁸ See supra n. 74.

We saw above that the Law Commission rejected the idea of giving intestacy rights to de facto children because of the complexity this would cause. It is suggested that their reasoning is inapplicable in the present context. Firstly, the situation where the decree is recognised in one jurisdiction and not in another is unusual and complexity is unavoidable. Secondly, it will usually be beyond doubt that the 'adopted' child has been treated as the child of the family. Thirdly, if the preference rule prevents succession to the estate of the natural parent,¹⁰⁹ there is no danger of a double portion.

Thus, it is submitted that on intestacy of the adoptive parent the doubtfully adopted child should succeed, without having to rely on discretionary family provision legislation.¹¹⁰

2. On Death Of 'Adopted' Children

The presumed wishes and moral obligation principles would seem to require that the 'adoptive' parents should be able to take on the intestacy of their 'adopted' child. If the child did indeed wish to benefit his natural parents, surely he would make specific testamentary provision for them.

If the 'adoptive' parents are no longer living, the child may also be assumed to prefer that his/her adoptive relatives should

¹⁰⁹ See infra at p. 391.

¹¹⁰ The Law Commission (Rept. No. 187 at para. 50) suggested that the de facto child was adequately protected by the Inheritance (Provision for Family and Dependants) Act 1975. However, as this only provides for maintenance, it is difficult to see how it can be equated to intestacy rights.

succeed in preference to the natural family which has rejected him/her.

3. On Death Of Other Adoptive Relatives

It is not so clear that other relatives can be presumed to wish the doubtfully adopted child to succeed on the same basis as if the adoption order is valid. In particular, there may be a situation where the question is whether the doubtfully adopted child or a more distantly related blood relative succeeds to the whole estate. Thus, it might be more appropriate to presume that the deceased wishes to benefit only children whose adoption is recognised in his own country, the law of his domicile. Indeed if moral obligation here is seen as reflecting the notion of family property, it may be argued that a person with a doubtful legal relationship has a weaker claim than a more distant relative, whose relationship is not in doubt.

In relation to movables, the lex domicilii will also be the lex successionis. Thus, application of the choice rule would produce the desired result. However, intestate succession to immovables is governed entirely by the lex situs.¹¹¹ None of the existing preference rules would enable the domicile to determine whether the adopted child could take. Whilst it is possible to create a new rule to the effect that in relation to intestacy by distant relatives, the domicile of the deceased at the time of his death

¹¹¹ It is unlikely that the intestate would expect the situs to determine the validity of the adoption. Moreover, since the use of the lex situs to govern intestate succession to immovables is widely criticised (see chapter 7, n.8 supra) it would seem inappropriate to extend its function.

determines whether the adoption order is valid, this is difficult to fit within the existing conflict of laws framework. A speculative assumption about the wishes of the deceased would not seem to justify such an innovation.

Since none of the approaches based on intestacy policy are satisfactory, we should consider the application of the 'full integration' policy of adoption law. It is suggested that in this context this policy would seem to require that an 'adopted' child be able to claim from distant adopted relatives.

4. On Death Of Natural Parents/Relatives

What is the position in relation to birth relatives?

By analogy with the will situation, the intestate will be presumed not to wish to benefit a natural child/relative who has been adopted. Arguably, any moral obligation is extinguished by the adoption order¹¹² whether it be legally recognised or not.¹¹³

Thus we may conclude that the policy of intestacy law would be to allow claims between 'adopted' children and 'adoptive' parents/relatives. However, claims by and against the estates of natural relatives should not be allowed.

¹¹² Although in a number of countries the natural parents' support obligation is retained, although it is subsidiary to that of the adoptive parents', Krause (n. 39 supra) para. 6-184.

¹¹³ If the natural parent has in fact been maintaining the child before his/her death, there will be a claim under discretionary family provision.

Thus, again the desired results can be achieved by the 'differential rule', which will apply whichever rule results in recognition of the adoption order.

D. WRONGFUL DEATH

Since the policy of English law is to allow claims by de facto children and parents, it seems clear that the 'adopted child' and 'adoptive parent' should be able to claim in respect of the wrongful death of the adoptive parent in the conflict of rules situation.

The more difficult question is whether the 'adopted' child be allowed to claim in relation to the death of the natural parent if he can show dependency and vice versa.

It is suggested that since the purpose of the Fatal Accidents Act legislation is to compensate de facto and de jure children to the extent of their dependence, the 'adopted' child should be able to claim in respect of the wrongful death of his/her natural as well as adoptive parents.¹¹⁴ The claim will only succeed in respect of the natural parent, if the child can show loss of dependency which will be rare. Since the award is in relation to the extent of the dependency proved, the child would not be doubly compensated in unlikely the event that both sets of parents are wrongfully killed.

¹¹⁴ It may be noted that in some countries adopted children can inherit from both adoptive and natural parents. See Krause, (n. 39 supra), at para. 6-183.

What about the natural parent? Usually the natural parent will not be able to show any dependency and thus a claim would fail. It is suggested, however, that given the limited number of cases in which there is a dispute about the adoption decree, no real difficulty would be caused by allowing natural parents to claim in order to provide justice in the rare situation that dependency can be shown. The tortfeasor is not unfairly prejudiced by allowing both sets of parents to claim because the size of the awards are based on the value of the prospective dependency. Thus, there can be no more overlap between the two claims than there is between the claim of a widow(er) and the children of a victim.

The desired results can be achieved by applying the presumption in favour of tort claims.

V RECOMMENDATIONS

1. In relation to testate succession, the 'differential rule' is the most appropriate preference rule.
2. In relation to discretionary family provision:-
 - (a) Where the deceased is the 'adoptive' parent, the 'differential' rule should be applied.
 - (b) Where the deceased is the natural parent, the choice of law rule should prevail.
3. In relation to fixed shares, the 'differential rule' should be applied.

4. On intestacy, the 'differential rule' is also the most appropriate rule.

5. On a claim for wrongful death, the presumption in favour of tort claims is the appropriate preference rule.

APPENDIX

TABLE 1: . CONFLICTS RULES IN STATUTORY FORM IN ENGLAND

A. RECOGNITION RULES (excluding bi-lateral treaties)

1. Administration of Justice Act 1920 (recognition of certain Commonwealth judgments by registration).
2. Foreign Judgments (Reciprocal Enforcement) Act 1933.
(recognition of judgments of specified countries by registration).
3. Arbitration Act 1950 Part II (recognition and enforcement of arbitration awards coming within the Geneva Convention).
4. Arbitration Act 1975 (recognition and enforcement of arbitration awards coming within the New York Convention).
5. Adoption Act 1976 (recognition of certain adoption orders).
6. Child Abduction and Custody Act 1985 (recognition of foreign custody decisions - gives effect to Council of Europe Convention).
7. Family Law Act 1986 Part I (recognition of United Kingdom custody orders).
8. Family Law Act 1986 Part II (recognition of British Isles and overseas matrimonial decrees).
9. Civil Jurisdiction of Judgments Act 1982 (recognition by registration of judgments of EC member countries- gives effect to Brussels Convention).
10. Civil Jurisdiction and Judgments Act 1991 (recognition by registration of judgments of EFTA States - gives effect to Lugano Convention).

B: CHOICE RULES

1. Foreign Marriages Act 1892 (as amended) (Formal validity of Consular Marriages abroad and Marriages of British forces serving abroad).
2. Wills Act 1964 (Formal validity of wills).
3. Legitimacy Act 1976 s.3 (Legitimation by subsequent marriage).
4. Recognition of Trusts Act 1987 (choice of law rules for trusts - gives effect to Hague Convention on Law Applicable to Trusts and on their Recognition).
5. Contract (Applicable Law) Act 1991 (choice of law rules for all contracts to which the Act applies - gives effect to Rome Convention).

TABLE 2: CONFLICTS RULES IN STATUTORY FORM IN ISRAEL.

A. RECOGNITION RULES

1. Enforcement of Foreign Judgments Law 1958.
2. Regulations to Give Effect to New York Convention (Recognition of Foreign Arbitrations) 1978.

B. CHOICE RULES

1. Palestine Order in Council 1922 art. 64(2) (validity of marriage)
2. Family Law Amendment (Maintenance) Law 1959 s.17 (maintenance).
3. Legal Capacity and Custody Law 1962 s.77 (capacity of persons).
4. Succession Law 1965 ss.137-144.
5. Dissolution of Marriages (Special Cases) Law 1969 (divorce in civil Court).
6. Spouses' Property Relations Law 1973 s.15 (matrimonial property).

**TABLE 3: RESULTS OF APPLYING THE POSSIBLE PREFERENCE RULES TO
VALIDITY OF REMARRIAGE**

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	v	x
2. Apply Recognition Rule	x	v
3. Apply Differential Rule	v	v
4. Presumption in favour of upholding validity of marriage.	v	v

v = remarriage is valid
x = remarriage is invalid

TABLE 4: RESULTS OF APPLYING THE POSSIBLE PREFERENCE RULES TO THE FIRST SPOUSE'S RIGHT TO INHERIT.

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	x	v
2. Apply Recognition Rule	v	x
3. Apply Differential Rule	x	x
4. Presumption in favour of upholding succession rights.	v	v

v = 'spouse' can inherit
x = 'spouse' cannot inherit

TABLE 5A: RESULTS OF APPLYING THE POSSIBLE PREFERENCE RULES TO THE FIRST SPOUSE'S RIGHT TO SHARE IN POST-DECREE ACQUISITIONS UNDER IMMEDIATE/DEFERRED COMMUNITY SCHEME.¹

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	x	v
2. Apply Recognition Rule	v	x
3. Apply Differential Rule	x	x
v = 'spouse' can share x = 'spouse' cannot share		

TABLE 5B: RESULTS FROM APPLYING THE POSSIBLE PREFERENCE RULES TO THE FIRST SPOUSE'S RIGHT TO IMMEDIATE REALISATION OF SHARE UNDER IMMEDIATE/DEFERRED COMMUNITY SCHEME.²

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	v	x
2. Apply Recognition Rule	x	v
3. Apply Differential Rule	v	v
v = 'spouse' entitled to immediate realisation x = 'spouse' not entitled to immediate realisation		

¹ On the assumption that there is entitlement to share in post-separation assets.

² On the assumption that realisation is only available on termination of the marriage.

TABLE 6A: RESULTS OF APPLYING THE POSSIBLE PREFERENCE RULES TO DEFENCE OF INTER-SPOUSAL IMMUNITY

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	v	x
2. Apply Recognition Rule	x	v
3. Apply Differential Rule	v	v
4. Presumption in favour of upholding tort claims.	v	v

v = P. can claim (i.e. no immunity)

x = P. cannot claim (i.e. is immunity)

TABLE 6B: RESULTS OF APPLYING THE POSSIBLE PREFERENCE RULES TO WRONGFUL DEATH CLAIMS BY FIRST SPOUSES

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	x	v
2. Apply Recognition Rule	v	x
3. Apply Differential Rule	x	x
4. Presumption in favour of upholding tort claims.	v	v

v = P. can claim

x = P. cannot claim

TABLE 7A: RESULTS OF APPLYING THE POSSIBLE PREFERENCE RULES TO SUCCESSION AND WRONGFUL DEATH CLAIMS BETWEEN CHILD AND ADOPTIVE PARENTS.

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	v	x
2. Apply Recognition Rule	x	v
3. Apply Differential Rule	v	v
4. Presumption in favour of upholding succession and tort claims	v	v
v = child/adoptive parent can claim x = child/adoptive parent cannot claim		

TABLE 7B: RESULTS OF APPLYING THE POSSIBLE PREFERENCE RULES TO SUCCESSION AND WRONGFUL DEATH CLAIMS BETWEEN CHILD AND NATURAL PARENTS

	<u>A</u> English <u>lex fori</u> does not recognise, <u>lex causae</u> does recognise decree.	<u>B</u> English <u>lex fori</u> does recognise, <u>lex causae</u> does not recognise decree
1. Apply choice Rule	x	v
2. Apply Recognition Rule	v	x
3. Apply Differential Rule	x	x
4. Presumption in favour of upholding succession rights.	v	v
v = child/natural parent can claim x = child/natural parent cannot claim		

BIBLIOGRAPHY

- Bromley P.M. and Lowe N.V., *Bromley's Family Law*, 8th. edn. (1992)
- Castel J-G, *Canadian Conflict of Laws* (1977)
- Castel J-G, *Canadian Conflict of Laws*, 2nd edn. (1986)
- Cavers D.F., *The Choice of Law Process*, (1965)
- Cheshire G., *Private International Law*, 7th. edn. (1965)
- Clark H.H., *The Law of Domestic Relations*, 2nd. edn. (1987)
- Clark J.B. and Ross Martyn J.G., *Theobald on Wills*, 15th. edn. (1993)
- Collier J.G., *Conflict of Laws*, 2nd edn (1994)
- Collins L. et. al., *Dicey and Morris' Conflict of Laws*, 12th edn. (1993)
- Committee on the Law of Intestate Succession (Morton Committee) (1951) Cmnd 8310
- Cook W.W., *The Logical and Legal Bases of the Conflict of Laws*, (1942)
- Cretney S. and Masson J., *The Principles of Family Law*, 5th. edn. (1990)
- Currie B., *Selected Essays on the Conflict of Laws* (1963)
- Department of Health, *Consultative Document on Adoption Law* (1992)
- Dewar J., *Law and the Family* (2nd. edn. 1992)
- Dicey A.V., *The Conflict of Laws*, 4th. edn. (1927)
- Edgar S.G.G., *Craies on Statute Law*, 7th. edn. (1971)
- Ekelaar J., *Regulating Divorce* (1991)
- Ehrenzweig A.A. and Jayme E., *Private International Law*, Vol. 1 (1967)
- Freedman J. et al., *Property and Marriage: An Integrated Approach*, Institute of Fiscal Studies Reports Series No. 29 (1988)
- Gordon D.M., *Foreign Divorces: English Law and Practice* (1988)
- Glendon M-A, *New Family and New Property* (1981)

Graveson, *The Conflict of Laws*, 7th. edn. (1973)

Gray K., *Reallocation of Property on Divorce* (1977)

Green D., *Maintenance and Capital Provision on Divorce: A need for precision*, The Law Society (1987)

Hoggett B.M. and Pearl D.S., *The Family Law and Society Cases and Materials*, 3rd. edn. (1991)

Jaffey A.J. E., *Introduction to the Conflict of Laws* (1988)

Kahn Freund O., *The Growth of Internationalism in Private International Law* (1960)

Kahn Freund O., *Problems in Private International Law* (1977)

Law Commission, *The Field of Choice*, Rept. No. 6 (1966)

Law Commission, *Report on Financial Provision in Matrimonial Proceedings*, Rept. No. 25 (1969)

Law Commission, *Hague Convention on Recognition of Divorces and Legal Separations*, Rept. No. 34 (1970)

Law Commission, *Report on Personal Injury Litigation - Assessment and Damages*, Rept. No. 56 (1973)

Law Commission, *First Report on Family Property: a New Approach*, Rept. No. 52 (1973)

Law Commission, *Second Report on Family Property: Family Provision on Death*, Rept. No. 61 (1974)

Law Commission, *Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods*, Rept. No. 86 (1978)

Law Commission Discussion Paper, *The Financial Consequences of Divorce: The Basic Policy*, No. 103 (1980)

Law Commission, *The Financial Consequences of Divorce*, Rept. No. 112 (1981)

Law Commission, *Financial Relief After Foreign Divorce*, W.P. No. 77 (1980)

Law Commission, *Financial Relief after Foreign Divorce*, Rept. No. 117 (1982)

Law Commission Consultation Paper, *Recognition of Foreign Nullity Decrees and Related Matters*, (1983) (unpublished)

Law Commission, *Recognition of Foreign Nullity Decrees and Related Matters*, Rept. No. 137 (1984)

Law Commission, *Choice of Law Rules in Marriage*, W.P. No. 89 (1985)

Law Commission, *Choice of Law Rules in Marriage*, Rept. No. 165 (1987)

Law Commission Discussion Paper, *Ground for Divorce*, No. 170 (1988)

Law Commission, *Matrimonial Property*, Rept. No. 175 (1988)

Law Commission, *Distribution on Intestacy*, W.P. No. 108 (1988)

Law Commission, *Distribution on Intestacy*, Rept. No. 187 (1989)

Law Commission, *Ground for Divorce*, Rept. No. 192 (1990)

Law Commission Consultation Paper, *The effect of Divorce on Wills* (1992)

Law Reform Committee, 9th. Report, *Liability in Tort Between Husband and Wife*, Cmnd. 1268 (1961)

Law Reform Committee's 22nd. Report, *Making and Revocation of Wills*, Cmnd. 7902 (1980)

Law Society, *Maintenance and Capital Provision on Divorce* (1991)

Levontin A.V., *Choice of Law and Conflict of Laws* (1976)

Lord Chancellor's Department, *Looking to the Future (Mediation and the Ground for Divorce: A Consultation Paper)* Cmnd. 2424 (1993)

Lorenzen E., *Selected Articles on the Conflict of Laws* (1947)

Marsh H., *Marital Property in the Conflict of Laws* (1952)

McClanahan W.S., *Community Property Law in the United States* (1982)

McClellan J.D., *Recognition of Family Judgments in the Commonwealth* (1983)

McClellan J.D., *Morris: The Conflict of Laws*, 4th. edn. (1993)

McLeod J., *The Conflict of Laws* (1983)

Morris J.H.C., *Dicey and Morris' Conflict of Laws* 9th edn (1973)

North P.M., *The Private International Law of Matrimonial Causes in the British Isles and the Republic of Ireland* (1977)

North P.M., *Essays in Private International Law* (1993)

North P.M. and Fawcett J.J., *Cheshire and North's Private*

International Law, 12th. edn. (1992)

Palsson L., *Marriage in Comparative Conflict of Laws: Substantive Conditions* (1971) pp. 229 - 232 and 244 - 250

Patchett K.W., *Recognition of Commercial Judgments and Awards in the Commonwealth* (1984)

Piggott Sir F., *Foreign Judgments* (1908)

Rabel E., *The Conflict of Laws: A Comparative Study*, vol. 1, 2nd edn (1958)

Read H.E., *Recognition and Enforcement of Foreign Judgments* (1938)

Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Commission), Cmnd 7054-I (1978)

Scoles E.F. and Hay P., *Conflict of Laws* (1982)

Scottish Law Commision, *Report on Succession*, No. 124 (1989)

Seglow J. et al, *Growing Up Adopted* (1972)

Shapira A., *The Interest Approach to Choice of Law* (1970)

Silberg M., *Personal Status in Israel* (1958) (Hebrew)

Speiser S.M., *Recovery for Wrongful Death*, 2nd. ed. (1975)
Vol. I

Spencer Bower G. and Turner Sir A.K., *The Doctrine of Res Judicata* (1969) 2nd. edn.

Sykes E.I. and Pryles M.C., *Australian Private International Law*, 3rd. edn. (1991)

Tizard B., *Adoption: A Second Chance* (1977)

Von Mehren A.T. and Trautman D.T., *The Law of Multistate Problems* (1965)

Wolff M., *Private International Law*, 2nd. edn (1950)

Articles and Essays

Allen C.K., *Status and Capacity* (1930) 46 LQR 277

Anton A.E., *The Recognition of Divorces and Legal Separations* (1969) 18 ICLQ 620

Baade H.W., *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)* (1972) 72 Col L.R.329

Battersby G. *The Doctrine of Preclusion in Canada* (1977) 16 U.W.Ont. L.R. 163

Baxter I.F.G., *Family Law Reform in Canada* (1987) 35 Am. J. Comp. Law 801

Bellet P. and Goldman B, *Explanatory Report of Hague Convention on Recognition of Divorces and Legal Separations*, translated into English at (1971) 5 Fam. L.Q at p. 321

Berkovits B. (1988) *Transnational Divorces: The Fatima Decision*, (1988) 104 LQR 60

Bishop W., *Choice of Law for Impotence and Wilful Refusal* (1978) 41 MLR 512

Carswell, *The Doctrine of Vested Rights in Private International Law*, (1959) 8 ICLQ 268

Carter P.B. *Recognition of divorces: denial of natural justice and the doctrine of estoppel* (1971) 45 BYBIL 410

Carter P.B., *Capacity To Remarry After a Foreign Divorce*, (1985) 101 L.Q.R. 496

Carter P.B., *Choice of Law in Tort and Delict* (1991) 107 LQR 405

Carter P.B., *The Role of Public Policy in Private International Law*, (1993) 42 ICLQ 1

Castel J-G., *Choice of Law - Matrimonial Regimes - Recognition in Ontario of Foreign Express or Implied Marriage Contract or Settlement* (1982) 60 Can. Bar. Rev. 180

Cavers D., *The Choice-of-Law Problem* (1933) 47 Harvard LR 173

Cohn E.J., *The Form of Wills of Immovables* (1956) 5 ICLQ 395

Collins L., *Vicarious Liability and the Conflict of Laws* (1977) 26 ICLQ 480

Comment, *United States Recognition of Foreign Nonjudicial Divorces* (1969) 35 Minn. L.Rev. 612

Clarkson C.M.V., *Marriage in England: favouring the lex fori* (1990) 10 Legal Studies 80

Davie M., *Matrimonial Property in English and American Conflict of Laws* (1993) 42 ICLQ 855

Deech R., *Financial Relief - Retreat from Precedent* (1982) 98 LQR 621, 630 - 632

Dickson B., *The Reform of Private International Law in the Federal Republic of Germany* (1985) 34 ICLQ 231

Downes T.A., *Recognition of Divorces and Capacity to Remarry* (1986) 35 ICLQ 170

Engdahl D.E., *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law* (1969) 55 Iowa L. Rev. 56

Fasberg C., *The Intertemporal Problem in Choice of Law Reconsidered: Israeli Matrimonial Property* (1990) 39 ICLQ 856

Fawcett J.J., *Is American Governmental Interest Analysis the Solution to English Choice of Law Problems?* (1982) 31 ICLQ 150

Fentiman R., *The Validity of Marriage and the Proper Law* [1985] CLJ 256

Forder C., *Might and Right in Matrimonial Property Law: A Comparative Study of England and the German Democratic Republic* (1987) 1 Int. J. of Law and the Family 47

Forsyth C.F., *Section 7 of the Matrimonial Property Act 1976: A Choice of Law Rule?* (1977) 7 NULR 397

Frank R., *Family Law After Unification* (1991) 30 J. Fam. Law 335

Goldberg G.D., *The Assignment of Property on Marriage* (1970) 19 ICLQ 557

Goldwater C.I., *Some Problems Relating to Choice of Law in Matrimonial Property* (1981) 16 Isr. L.R. 368

Goodhart A.L., *The Doctrine of Divisible Divorce* (1957) 73 LQR 29

Gottlieb A.E., *The Incidental Question in Anglo-American Conflict of Laws* (1955) 33 Can.Bar Rev. 523

Gottlieb A.E., *The Incidental Question Revisited* (1977) 26 ICLQ 734

Hancock M., *Three Approaches to the Choice of Law Problem*, in Nadelman K. et al (ed), *Legal Essays in honour of H.E. Yntema* (1961)

Harper F.V., *Torts, Contract, Property, Statute Characterization and the Conflict of Laws* (1959) 59 Col.L.R. 440

Hartley T.C., *Bigamy in the Conflict of Laws* (1967) 16 ICLQ 680

Hartley T.C., *The Policy Basis of the English Conflict of Laws of Marriage* (1972) 35 MLR 571

Jaffey A.J.E., *Recognition of Extra-Judicial Divorces* (1975) LQR 320

Jaffey A.J.E., *The Essential Validity of Marriage in the English Conflict of Laws* (1978) 41 MLR 38

Jaffey A.J.E., *The Foundations of Rules for the Choice of Law* (1982) 2 OJLS 368

Jaffey A.J.E., *Recognition of Foreign Nullity Decrees* (1983) 32 ICLQ 500

Jaffey A.J.E., *The Incidental Question and Capacity to Remarry* (1985) 48 MLR 465

Khan Freund, *Law Reform (Husband and Wife) Act 1962* (1962) 25 MLR 695

Karsten I.G.F., *Chaplin v Boys: Another Analysis* (1970) 19 ICLQ 35

Karsten I.G.F., *Capacity to Contract a Polygamous Marriage* (1973) 36 MLR 291

Kegel, *Fundamental Approaches*, International Encyclopedia of Comparative Law, Vol. III, Chapter 3

Kennedy G.D., *Adoption in the Conflict of Laws*, (1956) 34 Can. B.Rev. 507

Krause H.D., *Creation of Relationships of Kinship* International Encyclopedia of Comparative Law (1976) Vol. IV Chapter 6

Levontin A.V., *Foreign Judgments and Foreign Status in Israel* (1954) 3 Am.J. Comp. Law 199

Levontin A.V., *Two Paradoxes in the Recognition of Foreign Judgments* (1967) 2 Isr. L.Rev. 197

Lipstein K., *Adoption in Private International Law* (1963) 12 ICLQ 835

Lipstein K., *Conflict of Laws 1927-71 - the Way Ahead* [1972B] CLJ 67

Lipstein K., *Recognition of Divorces, Capacity to Marry, Preliminary Questions and Depeceage* (1986) 35 ICLQ 179

Llwelllyn Davies D.J., *The Influence of Huber's De Conflictu Legum on English Private International Law* (1957) 18 BYBIL 49

McClellan D. and Patchett K.W. *English Jurisdiction in Adoptions* (1970) ICLQ 1

McGregor H., *The International Accident Problem* (1970) 33 MLR 1

Miller J.G., *Provision for a Surviving Spouse* (1986) 102 LQR 445

Miller J.G., *Family Provision on Death - the International Dimension* (1990) 39 ICLQ 261

Morris J.H.C. *Intestate Succession to Land in the Conflict of Laws* (1969) 85 LQR 339

Nott S.M., *Capacity to Marry Following Foreign Divorce or Nullity Decrees* (1985) 15 Fam. Law 199

Palsson L., *Marriage and Divorce in Comparative Conflict of Laws* International Encyclopedia of Comparative Law, Vol III Chpt. 16

Pearl D.S., *Capacity for Polygamy* [1973] CLJ 143

Pearl D.S., *Family Law Act 1986 Part II* [1987] C.L.J. 35

Pederson I.M., *Matrimonial Property Law in Denmark* (1965) 28 MLR 137

Pilkington M., *Transnational Divorces under the Family Law Act 1986* (1988) 37 ICLQ 131

Rafferty N., *Matrimonial Property and the Conflict of Laws* (1982) 20 U.W.O.L. Rev. 177

Reese W., *Marriage in American Conflict of Laws* (1977) 26 ICLQ 952

Rheinstein M. and Glendon M-A., *Interspousal Relations* (1980) International Encyclopedia of Comparative Law. Vol. IV, Chapter 4

Robertson A.H., *The 'Preliminary Question' in the Conflict of Laws* (1939) 55 LQR 565

Russell M.J., *Fluctuations in Reciprocity* (1952) 1 ICLQ 181

Schreter H.H., *Quasi-Community Property in the Conflict of Laws* (1962) 50 Calif. L.R. 206

Schuz R.G., *Section 30 Law of Property Act 1925 and Unmarried Cohabitees* (1982) 12 Fam. Law 108

Shaki A., *The Criterion 'Domicile' and its Preference over the Criterion of Nationality in Israel Private International Law* (1966) 16 *Scripta Hierosolymitana*, Studies in Israel Legislative Problems (eds Tedeschi and Yudin) at p.163

Shava M., *Connecting Factors in Matters of Personal Status in Israel* (1983) 5 Tel Aviv University Studies in Law 144

Shava M., *The Dissolution of Marriage (Special Cases) Law* (1970) 26 Hapraklit 302 at p. 304) (Hebrew)

Shava M., *Israeli Conflict of Laws Relating to Matrimonial Property - A Comparative Commentary* (1982) 31 ICLQ 307

Stone O., *Ninth Report of the Law Reform Committee (Liability in Tort Between Husband and Wife)* (1961) 24 MLR 481

- Symes P. *Indissolubility and the Clean Break* (1985) 48 MLR 44
- Taintor C.W., *Adoption in the Conflict of Laws* (1954) 15 U.Pitts.L.R. 222
- Vitta, *Codification of Private International Law in Israel* (1977) 12 Isr. L.Rev. 129
- Voegeli W. and Wilenbacher B., *Property Division and Pension-Splitting in FRG* in Weitzmann L. and Maclean M. (eds.) *Economic Consequences of Divorce. The International Perspective* (1992)
- Von Mehren A.T. and Trautman D.T., *Recognition of Foreign Adjudications: A Survey and A Suggested Approach* (1968) 81 Harv. L. Rev. 1601
- Von Mehren A.T., *Choice of Law and the Problem of Justice* (1977) 41 Law and Contemporary Problems 27
- Waters D., *Matrimonial Property Entitlements and the Quebec Conflicts of Law* (1970) 22 McGill LJ 315
- Wengler W., *The Law Applicable to Preliminary (Incidental Questions* International Encyclopedia of Comparative Law, Vol. III Chapter 7
- Wright A., *Financial Provision, the Clean Break and the Search for Consistency* [1991] Fam. Law 76
- Young J., *The recognition of extra-judicial divorces in the United Kingdom* [1987] Legal Studies 78
- Young J., *Foreign Nullity Decrees: Perrini v Perrini* (1980) 29 ICLQ 515

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