

**Professor Joseph Barrett's International Private Law CaseBook**

**Introduction**

***Winkworth v Christie & Woods:*** Slade J “security of title”; Stolen works of art sold in Italy in form that allowed valid title to pass. Example of ‘statute real’ governing lex situs, acquisition of moveables.

***Reid v Skindependence:*** Warsaw Pact, Illustrates the interpretation process, Damage and Solatium.

***Shetland Times v Wills:*** Technology

***Callwood (1960):*** Foreign law is a question of fact on which the forum will determine their own view.

***Saxby v Fulton:*** Cof App; Party leant money to allow other to gamble. Foreign Law held so infamous that no need to prove it, that Gambling is legal in Monaco.

***De Reneville v De Reneville:*** Divorce, no attempt to prove foreign law, held presumed to be the same as domestic law. Englishman married French wife in France, she sought nullity for willful refusal, if she had proved french law she might have got it.

***Duke of Wellington:*** If expert witnesses disagree as to foreign law the judge may select the evidence he prefers. Wynn-Parry J’s ‘lament’.

***Bumper Development Co v Commisioner of Police:*** If experts agree as to foreign law the Court cannot instigate it’s own investigation. Holy indian statue stolen, issue whether temple had capacity to sue for return.

***Pryde v Proctor & Gamble Ltd:*** At time of double actionability rule in delict. Defender should have proved that no recovery for solatium in England. He did not and English law was assumed to be the same as Scots, allowing recovery.

***Rodden v Whatlings Ltd:*** The burden on establishing the content of foreign law lies with the party averring it’s differing content.

***Bonnor v Balfour Kilpatrick:*** Involved Oman, should have proved differing content, Court had discretion to admit it, attempt was made to late.

**Extraterritorial Effect**

***Bank Voon Handel v Slatford:*** Involved the Netherlands, decree affecting Gold held no territorial effect.

***Sussex Peerage Case:*** Duke married in Rome. Royal marriage Act held to affect status, it had territorial effect.

***Pugh v Pugh:*** 15 year old Austrian married in that country. Statute prohibiting held territorial effect. Double requirement of antenuptial dom created a ‘limping marriage’.

***Fox v Lawson:*** HOL decision, Whether statute driving offence applied to driving occurring abroad.

***R v Atakpu:*** Car theft occurring abroad. Statute creating crime, held that the one off act occurred abroad so no offence.

***Re Seagull Manufacturing co Ltd:*** IA 1966 s.133, Order to examine affairs of Co given extraterritorial

effect on the basis of justice.

**Re Paramount Airways Ltd:** IA s238, liquidator reversing transaction given extraterritorial effect as just and proper.

**Dublin Finance Corp v Rowe:** Irish debtor skipped the border to avoid paying. N.I forum said statute not extraterritorial.

**Yorke v Continental Steamship:** Fell down hole in Gibraltar. No signs. Held statute had no extraterritorial effect, remedy in delict

### Theory & Enforceable Law

**In re Bettison:** Property squabble, property in London, Californian dom. If right vested there then enforce it. This supports the local law/vested right theory.

**Phrantzes v Argenti:** Lord Parker; Greek marriage dowry agreement. Enforceable, but failed as no sum stated. The forum had no public policy objection.

**Shahnaz v Rizwan:** Indian marriage dowry agreement, stated sum and was enforced.

**Holman v Johnson:** Lord Mansfield; pay no notice to revenue laws of other states.

**Gvt of India v Taylor:** Business in India remitted sum to England. Effort to recover was unsuccessful.

**Re Visser:** Dutch attempt to claim unpaid succession duty in England failed on this basis.

**Brokaw v Seaman UK Ltd:** US-UK sea trip, furniture. Tried to tax on UK arrival. L Denning held no enforcement.

**A-G of Canada v Schultz:** Expenses unpaid, effort recover tainted by revenue law.

**Metal Industries (Salvage) Ltd v The Harle:** L Cameron; The forum defines what constitutes revenue law. Claim for contribution to French health insurance. 'Substance not dressing'.

**Peter Buchanan Ltd v McVey:** Kingmill Moore J; classification, look to substance not title of action. Whisky Co skipped, Eire. Action to 'recover illegal dividend', actually revenue.

**Re Helbert Wagg & Co:** German moratorium, pay all debts in German currency genuine action in Currency protection is permissible.

**Re Emery:** Attempted to register shares in W's name to avoid tax. The forum will not connive to defraud another state. Evidence was allowed to be taken.

**SNO Society v Thomson's Ex:** Executor paid Swedish IHT as only way to fulfill directions to pay beneficiaries 'net'. Others challenged, unsuccessfully.

### Confiscatory Laws & Extraterritorial Effect

**Princess Paley Olga v Weisz:** Russia, widow of Grand Duke, revolutionaries stole property then adopted by the new government. Sold to W and original owner attempted to sue for return in England. Held failed as valid de jure confiscation.

**Luther v Sagor:** No distinction made between de jure and de facto. Soviet revolutionaries seizure of property.

**Cammell v Sewell:** Forum will respect the acts of a state within its own borders. Shipwreck, timber

cargo sold validly by law of the Norwegian Situs.

**The Jupiter:** Soviet Union, Merchant Navy requisition. Ship registered at Odessa, docked at UK at time of order. Not within control at time of order. Held ineffective.

**Lecouturier v Rey:** Wine making monks. Property confiscated in France, question of English trade marks and reputation as manufacturer's. HOL; Lord McNaughten stated will not enforce territorial effect.

**The Rose Mary:** Rogue decision, held confiscation only valid if property of its own subjects. Iran carried out oil nationalisation. Lasted 3 years before overruled.

**Re Helbert Wagg:** Disapproved the Rose Mary.

**Frankfurter v Exner:** Tradesman, Jewish, forced out of Germany by Nazis. Returned at end of war they had exhausted a debt he was owed. Held that debt still existed as in effect was issue of confiscation which could not apply outside Germany; Romer J

**Oppenheimer v Cattermole:** Jewish German national. Generally give nationality laws extraterritorial effect, perhaps not if of 'sufficiently evil' character.

**Williams & Humbert Ltd:** Classification by wickedness.

**Banco de Vizcaya v Don Alfonso:** Penal measure but given extraterritorial effect.

#### Public Policy etc.

**A-G of N.Z v Ortiz:** Statute to prevent smuggling out artefacts, 'forfeited'. CoApp interpreted as purported extraterritorial effect, failed. Lord Denning classified as other public law. At 1<sup>st</sup> Instance Slaughter J thought this was penal, The HOL judgement turned on statutory interpretation.

**Ragazzione v Sethia:** Jute, Apartheid trade ban, Indian prohibition. Court gave effect to Indian provision on the basis of public policy. They will not connive to harm.

**Grell v Levy:** Agreement to work for a contingency fee not enforced as contrary to public policy.

**Rassilian:** Agreement in restraint of trade not enforced as contrary to public policy.

**Huntington v Attrill:** Lord Watson; Criminal law of other states not enforced with extra territorial effect. 1) Classification as penal is for the forum 2) In this case for the director's fraud what was being sought was actually a private remedy.

**Raulin v Fisher:** Illustrates it is possible to separate and enforce the civil part of a judgement.

**SA Consortium General Textiles v Sun & Sand:** Lord Denning said penal awards of damages are not penal laws.

**Inkley v USA:** Action to recover unpaid bail money failed as considered penal.

**FMC Corp v Russell:** Oil rig, bolt kills man, mistress sues. Title to sue is matter of substance. Texas and Aberdeen. Conflict reasoning.

**De Nicols v Curtliert:** French, community of property. Classification as succession or matrimonial property. Result either England or France applicable law.

**In re Goenaga:** Died with French dom, English will. After 3 years French law had not completed version of notice of title. English forum classified as procedural and granted title.

**In re Wilks:** Succession, died dom in Ontario, shares in England. Law of Ontario that must sell them. If

substantive then must sell as law of dom at death if procedural not as law of the situs applies. Held procedural, English law applied.

**Re Maldonado:** In this case the forum appears to yield the classification role to Spain

**In re Cohn:** Common Calamity, German law of Succession applied, different line of succession as a result.

**Re Annesley:** Forum preeminent in determining domicile.

**Starkowski v A-G:** Retrospective Austrian legislation given effect in curing defects in form.

### Domicile I

**Spence v Spence:** A Jewish man with a Scots domicile of origin moved to Spain. He was registered as married in Spain and had two children there. The marriage subsequently broke down but at the time of proceedings he had another girlfriend there. Held that had not obtained Spanish domicile of choice, Scots domicile of origin persisted. 1) Social circle consisted mainly of British (in particular Scots) friends 2) Onus is on party averring a change of domicile to establish it 3) Illustrates lairs or burial instructions but this was not decisive in this case (He had resigned membership of Glasgow burial society).

**Whicker v Hume:** “Domicile is the permanent home, if you don’t know what this means no amount of writing helps”; this is unhelpful.

**Arnott v Groom:** Lord Jeffrey; Every party must always have a domicile even if they have no proper residence, eg domicile of origin will revive or subsist. Dom of origin in India. Illustrates easy to lose dom of dependency. Location character of residence is not determinative “many old bachelors never have a house they can call their own”.

**Re Annesley:** A parties domicile is always determined by the forum.

**Lord Advocate v Brown:** Scot in Ceylon obtained that place as his domicile of choice. Spent his working life there, built a house, entered into society fully and only had six short visits home. 1) Satisfied the requirement of animus et factum 2) Onus to establish dom of choice lies with party averring change 3) place of death, not usually determinative 4) domicile conclusion is a factual matter, authority may only be a guide.

**Rev Commrs v Mathews:** Party left possessions on Sark in course of fleeing world war. 1) Location of moveables may be a relevant factor 2) If party leaves under duress unlikely to lose domicile until after it is safe or practical to return.

**Smijth:** Children of a putative marriage take the domicile of the innocent party as origin. Man and mistress, 13 children and 2 after marriage. Held kids took domicile of innocent party so Scots dom.

**Bell v Kennedy:** Man immigrated into UK but no fixed animus for any one particular legal system. Held that domicile of origin remained. 1) continuance of domicile of origin 2) Need animus and factum to obtain dom of choice 3) dom of origin will revive to fill any gaps.

**Re Willar:** Inner House case; Man left dog and belongings at a friend's house in Scotland. LJC Thomson stated to obtain dom of choice residence is required not wishful thinking but if intention is clear a minimum of residence will be sufficient.

**In re Capedeville:** Frenchman lived in Manchester for 29 years, had taken lodgings but retained home in France and stated he was going back. New stricter approach to intent. Now require intent to stay permanently, lingering wishes or doubts important, this is a high bar.

***In re the estate of Fuld:*** Determined domicile at death for the purpose of Succession. Extraordinary life, Jew with German dom of origin, interred in Canada, student there fought in war and obtained dual nationality. Later split time between London and Frankfurt, married and divorced in Germany. Bequests where related to particular sources, stated location. Held at all times his dom of origin had remained. Limpet like quality must lose intent and residence, 'complex hesitant mind' 'exist between legal systems'.

### **Domicile II**

***Haldane v Eckford:*** Scots dom of origin, spent 33 years in France where he had 2 kids and was buried. Intention may grow as residence lengthens.

***Jopp v Wood:*** 25 years residence did not suffice to found a domicile of choice as the party retained their intent for Scotland.

***Liverpool Royal Infirmary v Ramsay:*** Lord Buckmaster, Viscount Dunedin, Lord MacMillan; Validity of will depended on Scots or Eng dom. Scots dom of origin. Resided in Glasgow for long period, had retained property in Glasgow but had no wish to return. He had lived in isolation and not entered into life of the place, he had retained a subscription to a weekly Glasgow newspaper. Did not return even for mother's funeral and made arrangements for own burial in Liverpool. Will declared 'a Glasgow man'. Held no intent to acquire new dom of choice so dom of origin persisted.

***In re Furse:*** American who resided for many years on his Sussex farm. Subject to vague condition about returning to states that he repeatedly qualified and delayed on enacting. Held that qualification was so vague and uncertain as to not preclude his obtaining a new domicile of choice in England.

***Doucet v Geoghegan (1878):*** Resolution to leave when 'make your fortune' is vague and ambiguous. It will not prevent acquiring domicile of choice.

***Elmquist:*** Scots dom of choice obtained after only 4 year period.

***In re Raffanel:*** English woman was domiciled in France. Embarked on ship but death in itinere before reaching destination. Held domicile persisted as had had new intent but no new residence.

***In re Jones:*** US approach that domicile of choice persists till new one acquired, but this is contrary to our rule. Use as contrast.

***In re Flynn:*** Errol Flynn; Suggests that withering of intent is sufficient to lose domicile but this is incorrect.

***Labacianskas:*** Lithuanian origin but had Scots domicile of choice. Left on ship for the USA to look for work but then disappeared. Held that merely leaving had no effect and retained Scots dom of choice. Illustrative of contrast with US where there citizens children of those who emigrated in search of work.

***In re Bianchi:*** Italian with dom of choice in Brazil. Departs in final manner with intent never to return but dies *in itinere*. Held dom of origin revives to fill the gap.

***May and Cruh cases:*** Involved possible deportation. Held that intent to remain as long as allowed to was sufficient to obtain domicile.

***Re Puttick:*** Fugitive from German justice entered on a forged passport. But if enter a country illegally then cannot acquire domicile.

### Domicile III

**Re Martin:** Refugee from French justice, stayed in England for period of criminal prescription. Married wife. 1) unitary concept of domicile 2) Held acquired Eng dom of choice even though a fugitive.

**Udny v Udny:** Fleeing from creditors is insufficient to retain dom of choice. Lost dom of choice then domicile of origin revives. 1) Legitimate children take dom of father as origin 2) Illegitimate child takes the dom of the mother.

**Winans v A-G:** Lord MacNaughten; 'sojourner and a stranger', 2-1 majority in HOL; Hated the English and continued plotting to overthrow their naval supremacy and return to the US till his death. Isolated stranger who never acquired a dom of choice as no animus.

**Tee v Tee (1976):** Revival of domicile of origin. Left US dom choice and lived in Germany, no animus for there so at the point in Germany when he lost his intent for the US his English domicile of origin revived.

**De Reneville v De Reneville:** Wife retains dom of husband till acquires new dom of choice after divorce.

**IRC v Bullock:** Dom of origin in Nova Scotia, Spent 40 years in England, joined RAF and was married. Did not acquire dom of choice as always intended to return home when his W died.

**IRC V Duchess of Portland:** Dom origin in Quebec. Married and obtained English dom of choice. Frequent return visits and lots of other connections. At no point was the chief residence moved.

**Harrison & Williams cases:** Dom of dependency is easiest to lose upon attaining majority.

**Brown v Brown:** There is a duty on the legal representatives to inform the court of all the relevant circumstances pertaining to domicile.

**Drevon v Drevon:** Even the smallest factors can be relevant in determining a parties domicile.

**Hoskins v Mathews:** When a party is confined to a territory by reason of ill health the matter turns on whether the residence is voluntary (for his comfort) or enforced (necessitated by his condition). If the former a domicile of choice may be acquired there.

**Re James (1902):** Invalid moving to a place that is more comfortable due to an illness will not prevent acquisition of a dom of choice.

**Re Ross; Wahl v A-G:** see Lord Buckmaster in Ross; Statement may be tactical or ignorant, they cannot be relied upon.

Re McKenzie (1951): Foundling acquires dom of origin where found.

Re Sellars: Soldier could possibly acquire a dom of choice where he is stationed.

### Legitimacy

***Smijth v Smijth***: If child is legit by the law of the dom of the innocent party in a putative marriage then they are legitimate.

***Shaw v Gould***: Till mid century Eng retained harsh rule that only legit if the marriage of parents recognised as valid by English forum.

***Re Biscoffheim***: Eng breakthrough; recognised as legit if so by law of parents domicile.

***Biswhirter v Vardil***: Succession, may also need to be recognised as legit by the law of the lex situs.

***Fenton v Livingston***: Succession, may also need to be recognised as legit by the law of the lex situs.

***Re Grey's Tr***: Approach may be less strict if property is conveyed through a will.

***Mitchell's Tr v Rule***: Scots position, for succession looks to law of beneficiaries dom to determine if legit for purpose of succession.

***Smith's Tr v Macpherson***: Scots position, for succession looks to law of beneficiaries dom to determine if legit for purpose of succession.

***Re Ferguson's will***: Eng position; looks to law of testators last dom to determine if putative beneficiary is legitimate.

***Udny v Udny***: Legitimation by subsequent marriage. Need only be possible at the date of the subsequent marriage.

***In re Goodman***: In other cases the law of dom must allow the legitimation at the date of the birth + the date of the subsequent marriage.

***Re Luck's Settlement Tr***: In other cases the law of dom must allow the legitimation at the date of the birth + the date of the subsequent marriage.

### ***Child Abduction: Hague***

***Cameron v Cameron(No 5)***: Not an experiment, sufficient to establish habitual residence.

***Urness v Minto***: Best efforts to maintain contact with the child are sufficient. 12 year old child is old enough for their views to be taken into account.

***Re H***: Retention of the child is identified in terms of a specific act and time.

***Re S***: Order to return should be obeyed in orderly, reasonable manner.

***Perrin***: The fact the child has been retained over 1 year is not a sufficient excuse, it is the child's care not location which is of importance.

***Re A***: agreeing not to contest for 'sake of children' held to constitute acquiescence, flawed decision.

***Re H***: Visiting a child who is being wrongfully retained does not constitute acquiescence.

***Zenel v Haddon***: Allowed conditional reconciliation, held to constitute acquiescence.

***Cameron v Cameron(No 2)***: 7 year old child's views not considered.

***Singh***: The child's view was taken into account in reaching the decision.

***Re F***: The first case in which the Article 13 'grave risk' to the child was used successfully. The H in this case had been ejected from the matrimonial home for being violent and drunken.

**Viola:** Article 13 'grave risk' to the child was used unsuccessfully. Tried to claim on basis that care of child was responsibility of grand parent of uncertain health.

**McMillan:** In circumstances when a parent was an alcoholic and depressive it was held there could be a grave risk to the child.

**C v C:** The mother claimed that if the child had to suffer returning to the hab res without her presence this itself would cause a grave risk. Held that the mother could not seek to benefit from a risk her own wrongful actions had created.

### Marriage CaseList 1

**Hyde v Hyde and Woodmansee:** Lord Penzance; 1) Famous statement on nature of marriage 2) Statement that no consistorial remedies are available to poly marriages.

**Mahmood v Mahmood & Mahmud v Mahmud:** Scots forum applies Scots law but in this case with reference to the cultural background of the parties which made it more likely will would be overborne.

**Nachimson v Nachimson:** Russian ceremony, Held ease of dissolution of marriage does not mean the marriage is invalid.

**Corbett v Corbett:** Scots requirement that parties must be of opposite biological sexes.

**Lee v Lau:** H-K extra judicial divorce aka 'the chop'. Court recognised capacity to remarry. Stated merely recognising foreign divorce nothing else.

**The Sinha Peerage case:** New trend. Originally potentially poly marriage, change of religious sect renders it mono. Held son entitled to succeed to peerage as at time came before the Court it was mono.

**Ali v Ali:** In time of H and W unitary domicile. H unilaterally changed the character of the marriage by change of dom.

**Cheni v Cheni:** Jewish Uncle and niece married in Egypt. Consanguinity is an essential governed by cumulative ante-nuptial dom. Marriage originally potentially poly but rendered mono by birth of child within first 10 years, this occurred. Held character of marriage at date it comes before the court is determinative.

**Drammeh v Drammeh:** H of Gambian dom. Married in England to W1 in christian form. Returned to Gambia and married W2 in poly form. Held W1 entitled to divorce even though later marriage valid by law of Gambia. H could not unilaterally act to alter character of the original marriage.

### Marriage II

**Muhammed v Suna:** Lord Walker, CoS; traditional view that no consistorial remedies in cases of polygamous marriage.

**Chaudry v Chaudry:** Example of the new approach. Extended the remedy division of property remedy not covered by 1972 Act to poly couples.

**Re Sehota:** New approach. Allowed to wives of poly H to claim rights in intestacy. H had cut W1 out of the will.

**Hussain v Hussain:** English dom entered potentially poly marriage in Pakistan. English forum held that character of marriage was mono as man had no capacity for a poly marriage under his personal law. Widely and correctly criticised.

**Radwan (No 2):** authority in favour of the IMH as governing capacity and essentials. This case is much criticised and has never been followed but also has never been overruled.

**R v Sagoo:** English position that no conviction for bigamy when entering an actually polygamous marriage.

**Shafi:** Sheriff Ct; Scots position is to the contrary.

**Nessa v Chief Adjudication Officer:** Poly marriages are not recognised for purposes of social security.

**Brook:** Lord Campbell; Married deceased W's sister in Denmark. Authority for the use of antenuptial domicile as governing premarital capacity and essentials.

**Mette:** favours ante nuptial dom, though in this case this coincided with the IMH.

**Webster v Websters Tr:** Authority in favour of the ante nuptial domicile.

**Re Bozzelli:** Married deceased H's brother. Valid as acceptable by the personal law of both parties.

**De Wilton:** Jewish marriage acceptable by religion but not by the parties domicile. Held invalid as the secular law is supreme.

### Marriage III

**Sottomayor v De Barros(No 2):** Inelegant exception. Ratio that English law will not recognise an incapacity that is unknown to English law, this may only be applicable if the marriage is celebrated in England.

**Chetti:** A penal incapacity, in this case a restriction on marriage based on colour, caste or religion will not be given effect by English law

**MacDougall v Chitnavis:** Prohibition on Hindhu marrying outside religion held penal incapacity and given no effect.

**Warter:** Prohibition on remarriage lasting only a short period given effect as for legitimate purpose of avoiding confusion over paternity.

**Bliersbach v McEwan:** LP Clyde, Lord Sorn; Dutch rule that parties under 21 require parental consent, the marriage could be annulled within 6 month period if not obtained. Held this is a matter of form governed by the lex loci celebrationis. Also offers dicta in support of Cheshire's IMH theory.

**De Reneville v De Reneville:** Lord Green MR; Offers some authority in favour of the IMH theory.

**Kenward v Kenward:** Lord Denning thought consortium an essential aspect of marriage; Russian ballet cases. Supports the IMH theory.

**Lawrence v Lawrence:** Offers some authority in favour of the IMH theory. See particularly the speech of Anthony Lincoln J. At the least this suggests a *favor matrimonii* approach and the use of the domicile of real and substantial connection.

**Vervaeke v Smith:** Offers some authority in favour of the IMH theory.

**Reed v Reed:** Canadian case. Illustrates depeceage. Consanguinity as essential to ante nuptial dom, parental consent as form to celebrationis . by this *favor matrimonii* approach the marriage was valid.

**Breen v Breen:** Jurisdictions which do not offer and are antagonistic to divorce should allow remarriage if they recognise the antecedent divorce.

#### **Marriage IV**

**Berthiaume v Dastous:** Viscount Dunedin; matters of form are governed by the lex loci celebrationis. Mistake by the Priest as to the existence of a marriage certificate, existence of certificate was a matter of form.

**Simonin v Mallac:** Parental consent or its lack is a matter of form governed by the lex loci celebrationis.

**Ogden v Ogden:** Parental consent or its lack is a matter of form governed by the lex loci celebrationis.

**Apt v Apt:** Proxy marriage is an issue of form. If acceptable by the celebrationis it will be generally acceptable.

**McCabe v McCabe:** Marriage at which neither party present at the marriage celebrated in Ghana. Valid by the celebrationis, as a matter of form it is acceptable.

**Walker v Roberts:** For the purpose of marriage by cohabitation and repute only periods of residence within the celebrationis, which must be Scotland, will be considered.

**Starkowski v A-G:** Austrian statute retrospectively validated marriage. HOL held that the validity of the marriage must be considered at the time it came before the Court. Thus the marriage was valid. Criticism indicates the result would have been different if a subsequent prima facie marriage had occurred.

**In Re alison's Trusts:** Marriage invalid as failed fulfill the religious requirements of the lex loci celebrationis.

**Lord Cloncurry's Case:** Protestant marriage in territory where no marriage other than Catholic form was permissible. Held that the marriage was valid.

**Hooper v Hooper:** Marriage in Iraq. Parties were aware they had failed to obtain the necessary marriage banns. Held invalid.

**Penhas v Tan soo Ehg:** Hybrid ceremony in Singapore. Acceptable to the celebrationis and acceptable to Scotland. Held valid.

**Gray v Formosa:** Maltese marriage induced by coercion. Court refused to implement.

**Taczanowska v Taczanowska:** Marriage in time of belligerent occupation. Held no need to conform with the celebrationis.

#### **Consistorial Causes I**

**Shaw v Gould:** Jurisdiction, represents the old view that only the Ct of the H's dom was competent to grant divorce.

**Jack v Jack; Shields v Shields:** Illustrates the development by the Scots Ct's of the doctrine of 'matrimonial domicile'.

**Le Mesurier v Le Mesurier:** privy Council in appeal from Ceylon destroys concept of matrimonial domicile.

**R v Barnet LBC ex p Shah:** Indicates habitual residence is to be determined on a broad common sense basis.

**Cruse v Chittum:** contra, indicates 'habitual' must have a stronger meaning than ordinary residence.

**Zannelli v Zanelli:** The forum will always apply its own law in 'choice of laws' in divorce.

**Sealey v Callan:** at common law an extremely strong case would have to be made out before the forum would stay its proceedings.

**De Dampierre v De Dampierre:** French H & W move to England for 1 year where they have a kid. W flees to NY. H begins proceedings in France, W in England. Stay granted as W had only transient connection with UK which she herself terminated. 1) Fairness and convenience 2) personal advantage is unimportant.

**Shemshadfar v Shemshadfar:** Choice of forum is often the first area of dispute. Ct will decide on balance of fairness and convenience.

**Thyssen- Bornewissza v Thyssen- Bornewissza:** Forum Conveniens; first area of conflict. May refuse stay if litigant has little hope of remedy in the other jurisdiction.

**Mitchell v Mitchell:** Scots couple who had lived in France for one year. H began in France, W in Scotland. 1) Lex situs always has strong claim to be forum 2) choose place of closest connection, in this case Scotland 3) Convenience for witnesses, priority of process is largely unimportant.

**Butler v Butler:** Couple with marital home in Florida, H dom Scot, W dom Florida. W was the one with the money. H began in England. CofApp held that grant stay as overwhelmingly connected with Florida, couple's only matrimonial residence was there, lex situs. Sir Steven Brown "all their life together had been centred in Florida".

### Consistorial causes II

**Salvesen Von Lorang v administrator of Austrian Property (1927):** Divorce decree of the Ct of the H's dom is treated as a decree in rem.

**Arnott v LA; McKay v Wallis:** Preferable to seek decree of status rather than directly on validity of foreign divorce.

**Smart v Registrar General:** Cannot register a foreign divorce by virtue of the Register of Births, Deaths and Marriages.

**Armitage v A-G:** Old view, the Ct would recognise a decree issued by a Ct recognised by the Ct of the H's dom.

**Mountbatten v Mountbatten:** but this far and no further.

**Travers v Holley:** Ct would recognise a Ct decree by a Ct which exercises Jurisdiction on similar grounds to its own. Even if on a different ground in the actual case.

**Indyka v Indyka:** High point of creativity, recognised Polish decree when H was English domicile. Variety reasoning 1) matrimonial home 2) proper law of closest connection 3) Law of the W's nationality.

**Galbraith v Galbraith:** OH; confirms the validity of Travers v Holley in Scots law.

### **Consistorial Causes III**

**Kendall v Kendall:** Divorce obtained in Bolivia by fraud and deception of W who could not read Spanish. Refused recognition on the basis of Public Policy.

**Newmarch v Newmarch:** Lack of notice and representation at divorce proceedings in Australia caused by solicitor negligence. Decree still recognised as no significant prejudice caused.

**Joyce & Joyce v O'Hare:** contra; recognition denied.

**Perrin v Perrin:** Divorce recognised when unknown ground of mental cruelty.

**Re Meyer (1971):** Nazi divorces of Jew and Gentile by duress and coercion are not recognised.

**Igra v Igra (1951):** Divorce at Gestapo insistence. Recognition granted as some representation was given by agent and H accepted and acted upon the divorce.

**Krengel v Krengel (1993):** German decree of divorce, procedural irregularities and insufficient notice, recognised as no prejudice.

### **Consistorial Causes IV**

**Padolechia (1968):** suggests capacity to remarry after divorce is governed by personal law, old position that the forum would defer to the personal law. Results in a limping marriage.

**Perrini v Perrini (1979):** But here Sr George Baker after holding the nullity worthy of recognition immediately says free to remarry.

**Schwebel v Ungar (1964):** Guidance that if personal law would allow remarriage and forum not then it should be allowed.

**R v Hammersmith Superintendent Registrar (1917):** At time purported talaq performed in England declared invalid.

**Qureshi v Qureshi (1972):** Position developed, arguably to far. Talaq held valid when it and the marriage occurred in England.

**Quazi v Quazi (1979):** HOL; Talaq obtained in accordance with Muslim Family Ordinance 1961. Held to constitute 'proceedings'. Required notification of W and public, 90 day reconciliation period and say talaq 3 times. Motivation was financial. Divorce remained an essentially unilateral process.

**Chaudhary v Chaudhary (1984):** Involved a 'bare' talaq that was held not to constitute proceedings. Oliver LJ attempted to define 'proceedings' "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 not simply probative, although Quazi clearly shows that it need not have power of veto.

**Di Rollo v Di Rollo (1959):** Non judicial annulment granted by RC Rota in Italy, on basis of no true consent on part of W. Not recognised in this country.

**R v Sec of State ex p Fatima (1984):** Man living in England pronounced talaq against W in Pakistan. Taylor J held that as the divorce took place partly in each country, the UK, it was invalid.

**Berkovits v Ginsberg (1995):** 'Transnational' non judicial divorce is ineffective.

**Torok v Torok:** Illustrated that lack of power to make property order if recognised a foreign divorce was a major problem. Resulted in unseemly race to the Courthouse.

**Tahir v Tahir (1993):** H deserted to Pakistan to avoid financial obligation to his W. Lord Sutherland used the 1984 Act remedy to grant an additional property remedy. May result in the validity of foreign divorces being contested less.

**M v M:** If foreign result is realistic the forum will not intervene.

**Hewitson v Hewitson (1995):** Held inappropriate to use the 1984 Act remedy.

**Holmes v Holmes (1989):** Held English Ct should not intervene when foreign Ct has made satisfactory provision. of 'matrimonial domicile'.

### Consistorial Causes V

**Prawdzicarska v Prawdzicarska (1954):** Scots Cts would only take juris in nullity if marriage void rather than voidable. Result that problem approached backwards, deciding substance before jurisdiction.

**Ross Smith v Ross Smith (1963):** Lord Reid; wilful refusal to consummate/physical incapacity. Suggests law of the dom as appropriate.

**Buckland v Buckland (1968):** Father threatened Man with jail unless wed daughter. Issue of defective consent by force and fear. Forum applied own law without discussion.

**Kassim v Kassim (1962):** Nullity claimed on basis of mistake. Forum applied own law without discussion. Held insufficient to vitiate consent.

**Ponticelli v Ponticelli (1958):** Valuable discussion, physical incapacity, favours dom of the aggrieved party.

**Szechter v Szechter (1971):** Poland, man married W to let her get out of prison where she was in considerable danger. Valuable discussion favouring the law of the dom of both parties at the time of the marriage.

**H v H:** W married in Hungary in fear of life at the time. Forum considered applying law of Hungary or England. Held (honestly) to apply law of England as that with which it was most familiar.

**Akram:** Lord Dunpark applied the law of the forum to hold that marriage celebrated in Scotland between 2 Muslims was null on the basis of defective consent. Both parties did not consider the ceremony to constitute a binding marriage.

**Mahmood & Mahmud:** Defective consent, applied the law of the forum but with a strong respect for the distinct cultural background from which the litigants came. Made consent more likely to be vitiated by family pressure.

**Orlandi v Castelli:** Defective consent not sufficient to grant nullity of the marriage.

**Vervaeke v Smith (1983):** HOL; robust English view, unilateral mental reservation will not create nullity. Parties will be held to the marriage.

### Contract I

**De Nicols v Curtlier:** Lex Fori determines what will constitute a contract.

**Re Bonacina:** a promise of payment but no consideration. Illustrates that need not fulfill all doestic

requirements only broadly.

**Rutherford v Milne:** Contractus, cabbage farm in Midlotian, easily ascertained.

**Benaim v Debono:** Postal contact, lex loci contractus is where the acceptance is posted.

**Entores v Miles Far east Corp:** Instantaneous means of communication, contractus is where the acceptance is received. HOL; Lord Wilberforce, relevant factors are 1) intent of the parties 2) business practice 3) where the risk should lie

**Albecko v Kamborian Shoe Machine CO:** Formation of contract and agreement is governed by the putative proper law.

**Vita Foods Products Inc v Unus Shipping Co:** Lord Wright; parties choice abides provided 1) bona fide 2) legal 3) not contrary to public policy.

**Golden Acres v Queensland Estates:** Australia, only example of choice being struck down as not in good faith.

**Queensland Estates v Collas:** Australia, only example of choice being struck down as not in good faith.

**Chatteney v Brazilian submarine Telegraph Co:** Implied choice, favours solutionis, map onto art 4(2).

**MacIntosh v Ray:** Presumption that immovables governed by the lex situs.

**James Millar & Partners v Whitworth Street Estates:** Arbitration clauses may be influential but not determinative, may be severable.

**The Armar:** Every contract will have a proper law from the outset, it cannot float.

**Egon Oldendorff v Liberia Corp:** Clark J; Arbitration clause still relevant, indicated choice of law under Art 3.

## Contract II

**Bank of Baroda v Vysca Bank Ltd (1994):** Defines 'characteristic performance'; manufacture over payment, service over payment, banker over customer. Illustrates the branches of the Art 4(2) provision.

**Robinson v Bland:** Lord Mansfield 'presumptions'; Solutionis more influential than the contractus.

**Male v Roberts:** Old view indicated capacity to contract is governed by the lex loci contractus. Involved a circus boy.

**McFeetridge v Stewarts & Lloyds Ltd:** Old view indicated capacity to contract is governed by the lex loci contractus.

**Bodleyhead Ltd v Flegon:** Russian writer, disagreement with Swiss agent over power of attorney. Held that capacity governed by the putative proper law.

**Jacobs v Credit Lyonnais:** Contract sale & purchase of grass to make paper. Supervening impossibility caused by Algerian Civil War. Held that the proper law of the contract governs issues such as impossibility.

**Metlios v National Bank of Greece:** Greek moratorium to excuse one of their nationals with a debt under English proper law. Held statutes other than English proper law are irrelevant.

***Kleinmort v Ungarische:*** Held that a statute of the solutionis when not coincident with the proper law is irrelevant.

***Kahler v Midland Bank:*** Contra; czech proper law if neither penal or revenue in nature must be applied by the forum.

***Heriz v Riera:*** If a term of the contract is illegal by the proper law it is not enforceable.

***Ralli Bros v Compana Naviera:*** English proper law so if illegal by the solutionis it will not be enforceable.

***Re United Railways of Havana:*** Contractual discharge is governed at common law by the proper law.

### **Delict I**

***James Burrows Distillers v Speymalt Distillers:*** 2 Petitioners. Enforcing in respect of two separate TM's in the UK and Italy respectively, whisky. Lord Coulsfield held failed as result of double rule, TM strictly territorial, two separate rights and actions so test not satisfied.

***McElroy v McAllister:*** Illustrates double rule in delict, rejected the use of the flexible exception, actionable in the strict sense is required, illustrates the absence of actionability under the lex fori as a defence.

***Mitchell v McCulloch:*** Double rule governed heads of damages and remoteness but not quantum(measure) of damages.

***Convery v Lanarkshire Tramways Co:*** Scots alw always applied Scots law to delicts within Scotland. Unclear whether coincidence for double rule or as lex fori alone.

***Scott v Seymour:*** Defences usually available from either law. Unless purely procedural, such as the Neopolitan rule that criminal proceedings must occur first.

***McKinnon v Iberia Shipping:*** McK injured on Scottish ship in territorial waters of West Indies. Claims solatium but not recoverable as not available under the delicti.

***Boettcher v Cannon Co:*** Delicts on High seas, appear to use maritime law.

***Esso Malaysia:*** Actuality may use own law by any other name.

***Sayers v International Drilling Co:*** Eng man working for Dutch Co in Nigerian territorial waters. Injured and Co relied on exemption clause in contract to exclude liability, UK Act prohibited such exemption clauses. Held valid on sole basis of dutch law of the contract.

***Brodin v A/R Seljan:*** Lord Kissen; Approach of considering whether defence available under tort law and only then if allowed under applicable law of the contract, delict part taking precedence. Norwegian with Scots dom killed on rig within Scots territorial waters, wife sued. Coincidence of lex fori and delicti. Norwegian proper law of the contract excluding liability, but void by Scots statute. CoS Held Scots law applicable, mandatory rule, no defence available.

### **Delict II**

***The Haley:*** Origin of double rule. Decision was cos there was a new Merchant Shipping Act they did not want to vary. Much criticised since.

***Phillips v Eyre:*** Willes J(Penzance); Repeated double rule. 1) Actionable by the lex fori and 2) Not justifiable by the delicti.

**Boys v Chaplin:** Maltese traffic accident, 2 English servicemen. Head of damage unavailable under the delicti. Displaced with flexible exception based on policy.

**Johnson v Coventry Churchill:** CC Employment agency, arranged work for Joiner in Stuttgart. He fell into a trench and was injured. No duty on employer under German delicti but was under English fori. Court held on the basis of justice and policy that a flexible exception could be used to sever an issue.

**Red Dea Insurance v Bougyes:** Privy Council, K-K. Flexible exception extended to even displace the lex fori.

**Coupland v Arabian Gulf Oil Sea (1983):** Scots resident working for co in Libya. But no conflict involved.

### Property

**McDonald v McDonald:** Lex Situs governs the classification of property as moveable/immoveable.

**Donnie v Donnie's Tr:** Lex Situs governs the classification of property as moveable/immoveable.

**Duc de Frias v Pichon:** Sacred vessels stolen in Spain, resold in France. Lex situs governs marketability.

**BSA Corp v De Beers:** Personal rights relating to land may be governed by a law other than the Situs.

**Hamilton v Wakefield:** Distinction between the contract for the sale of land and the conveyance itself. Auctioneer's hammer.

**Bank of Africa v Cohen:** Capacity to deal/convey land is governed by the situs. Here the woman was permitted to convey land by the South african Situs even though she had previously agreed sale with another.

**Carse v Copen:** Floating charge, rare of example of Situs being displaced by forum in this area.

**Mcmillan Inc v Bishopgate Investment:** Transfer of moveables is governed by the Situs

**Cammell v Sewell:** Transfer of moveables is governed by the Situs

**Todd v Armour:** Transfer of moveables is governed by the Situs

**Luther v Sayor:** Transfer of moveables is governed by the Situs

**Groetschius v Brightman:** same.

**NW Bank v Poynter & Son & McDonald:** Competition between transfers; lex situs normally governs but exception if both transactions share the same proper law.

**In re Helbert Wagg:** Intangibles, Situs is where debt may be payed.

**Scottish Provident Institution v Robinson:** If competitors share the same law of transfer then it will apply.

**Kelly v Selwyn:** Trust right consignment, the lex situs governs.

**Pender v Commercial Bank of Scotland:** Assignability is governed by the proper law of the property

**Joseph Barrett 2000**

**Law Student,  
University of Glasgow**