ASPECTS OF THE SCOTS INTERNATIONAL PRIVATE LAW OF PROPERTY: TOWARDS A COHERENT GENERAL THEORY OF CHOICE OF LAW.

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Abstract.

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ABSTRACT

Selected issues in the Scots international private law of sale, securities and insolvency are considered, with a view to establishing a tentative general theory of choice of law relative thereto, which could in turn be applied to further issues in the Scots international private law of property and that of other legal systems. The traditional analytical distinction between real and personal rights is applied in a specialised concrete manner in order to ascertain by each consecutive *lex situs* the real rights which have been created and extinguished in a given item of property. In a situation in which it becomes necessary to rank several rights in and to such an item of property, all extant rights therein and thereto are compared and evaluated relative to each other in accordance with the *lex situs* at that time, having been 'translated' for such purpose. This simple structure derives from the requirements of third party certainty in property law.

The basic choice of law structure is qualified in situations in which it is appropriate to do so, without detracting significantly from requirements of third party certainty. Thus, for example, property issues arising between the parties to transactions are characterised in personal terms and subsidiary choice of law rules are suggested regarding 'mobile' property and in situations such as import transactions and in which several rights derive from the same legal system, concerning all of which the straightforward *lex situs* rule appears inappropriate. Such subsidiary rules preserve third party certainty by operating after initial permissive reference to the *lex situs*. Similar rules provide for coherent analysis of funds in an international context, and, in particular, funds arising on insolvency. Property is thus analysed initially in terms of individual items of property rather than in terms of ideal funds, with integration of funds analysis taking place at a later stage in the choice of law process. Further practical methods are discussed whereby differing objectives of laws, such as insolvency laws, may be attained without undue prejudice to third party certainty.
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CHAPTER 1

INTRODUCTION

The two main objectives of this thesis are stated in its title. It is intended, firstly, to examine a number of fields and issues within the Scots international private law of property using, mainly, Scots sources and considering, principally, choice of law issues. The fields and issues examined have been selected because they appear central to the Scots international private law of property. Many are also contentious, or in doubt, or of commercial importance. The matters examined are, principally, property issues in insolvency, sale and securities.

The second objective of this thesis is to set out a tentative general theory of choice of law relative to some major issues of property law, as a result of the examination carried out of the selected issues in insolvency, sale and securities.

It has proved difficult in the analysis of insolvency law to isolate issues relative to incorporeal property from those relative to corporeal property, reinforcing the need for a general theoretical approach. Issues relative to most types of property have accordingly been examined in the field of insolvency. The discussion of sale and securities is, however, concentrated on issues relative to corporeal moveable property. There are several reasons for this approach. Firstly, incorporeal property does not give rise to particularly contentious issues in these fields, secondly, corporeal moveable property does and it is, thirdly, apparent that the detailed position regarding sale of and security over incorporeal property is sufficiently unsettled and underdeveloped that full analysis thereof may best await full consideration of the position regarding corporeal property.

One matter which tends to fragment coherent general analysis of the international private law of property is the conceptual distinction between funds and individual items of property, which is discussed in Chapter 6.A. This distinction gives rise to two distinct analytical methods by which to deal with problems of property law. Traditionally certain problems of internal property law are analysed in terms of the individual items of property involved and others are analysed in terms of ideal funds comprising such individual items of property. Generally, it would be possible to adopt the other analytical approach to each of such problems, as analyses in terms of funds and individual items of property are merely two different ways of looking at the same problems.

Internal analytical divisions into funds and individual items of property tend to be projected into international private law. This leads to analysis in an international context by some legal systems of, for example, insolvency in terms of funds and sale and security in terms of individual items of property. In a purely internal context analysis in terms of funds and individual items of property may be integrated relatively coherently when a situation involving both types of analysis arises. Such coherent integration is very much more difficult in an international context, largely as a result of comparative differences in the analytical methods adopted in both internal laws and systems of international private law and as a result of comparative differences in the laws ultimately applied in a given situation. Indeed it is not always easy to integrate the choice of law rules of a single legal system, which may, perhaps, refer issues of diligence to the *lex situs* and issues of insolvency to the law of
the commercial domicile of the insolvent person, without expressly providing for the integration thereof.

It is therefore suggested that the analysis of property in an international context does, to a certain extent, and should, in the first instance, proceed in terms of individual items of property rather than funds. At later stages the effects of funds analysis under different legal systems may be integrated with such initial analysis in terms of individual items of property, by means of some of the methods outlined below. This approach is favoured firstly because greater difficulties arise in the analysis in terms of funds of fields traditionally analysed in terms of individual items than vice versa and secondly because analysis in terms of funds is not always practically effective in an international context.

A further central issue in the international private law of property which is seldom adequately addressed is comparative differences in basic property theory. It may be said, for example, that Civilian property theories of dominium are fundamentally incommensurable with Anglo-American theories of relative and equitable title or the apparent abandonment of distinct property concepts by Scandinavian legal systems and the US Uniform Commercial Code. International private law has, however, to reconcile these differences and attempt to construct a fair and rational structure for the integration of these theories, as it has to in other fields such as marriage.

It is suggested that the distinction of iures in re, or real rights, and iures in personam, or personal rights is adopted for the purpose of integrating dominium theories with the other theories noted above. This distinction is clearly more appropriate for use in relation to Civilian than other legal systems, but is not wholly unknown in such systems. It also appears to optimise the integration of the different theories and to address quite directly what is suggested to be a central issue of property law: the incidence of the validity relative to third parties of rights relating to property. As noted below, the position of third parties should be central to the establishment of choice of law rules relative to real rights in property.

The distinction favoured between real and personal property rights in this context is a specialised distinction, devised for the purposes of the international private law of property. Such specialised approaches are not unknown elsewhere in international private law. It is thus suggested that a court should consider a given property right in the context of the legal system from which it is derived and attempt to determine the incidence of its validity against third parties under such legal system. Such a right should be considered a real right for the purposes of choice of law if it is valid, at a concrete level, against a significant number of persons or categories of persons against whom such right is not valid for a reason particular to such person or category of persons.

It is likely that such a right will be valid against some persons irrespective of whether or not another related right is valid for a particular reason against such persons, as when a purchaser of goods may demand delivery thereof from a seller both because he owns the goods and because he has a contractual right to delivery thereof. Here the right of ownership against the seller may be considered real on the above analysis. As the main rationale for the real rights choice of law rule outlined below does not apply to such a person, it is
suggested that such rights between the parties to a transaction, in this example ownership, are best classified as personal for the purposes of choice of law.

There are several criteria which are important in the determination of basic choice of law rules relative to property rights. Firstly, the position of third parties should be central thereto, as it is central to all property law. Secondly, such rules should be capable of comparing several property rights and evaluating such rights relative to each other, as this process of the ranking of rights is also central to all property law. A third criterion is the international effectiveness of such rules. This third criterion is important in relation to all choice of law rules, but is particularly important in relation to rules relative to property law as the economic importance of property is such that legal systems are prone to insularity in this area. It is suggested that respect for the concerns of other legal systems best achieves effectiveness in this field, through co-operation.

These criteria appear to be optimised, relative to corporeal property, by the application, in the first instance, of the lex situs of such property to the creation, alteration and extinction of real rights therein and by the application of that law to the ranking of all rights relative thereto. It is probable that the analogous law relative to incorporeal property should be that under which the property in question has come into existence, for example the proper law of contractual rights. It is suggested that these rules should apply to issues of capacity, form and essential validity, as the criteria favouring their application apply with similar force to all of these aspects of choice of law. Discussion below is, however, concentrated on issues of essential validity.

Thus, at least as regards corporeal property, it is suggested that the legal system having the power to take be given what it can take, in the hope that co-operation with other legal systems may ensue. More importantly, third parties are provided with the most effective means by which to ascertain the existence of rights relative to property which may be valid against them. Ranking of rights relative to a given item of property can only credibly take place, in the first instance, under a single legal system. Choice of law criteria relative to the existence of rights also appear relevant to their ranking and the lex situs thus appears also to be the most appropriate system by which to rank property rights, in the first instance.

Such simple choice of law rules are rigid and give rise to problems as a result of such rigidity. Their simplicity also gives rise to problems as property law is a broad and subtle division of law, giving rise to further potential criteria of choice of law. These problems seem, however, best resolved by exceptional and subsidiary methods.

The proposed choice of law rules are basically static and this gives rise, in relation largely to corporeal moveable property, to the so called conflit mobile. Corporeal moveables move and accordingly successive leges situs may apply to a given item of property. The only solution to this problem is the harmonisation or unification of substantive internal laws or the conscious application of internal laws to international situations. In the interim, third party certainty in each consecutive situs and the security of real right holders requires the creation, alteration and extinction of real rights to be considered under each consecutive lex situs and for rights created by one lex situs to be respected by subsequent leges situs unless there is a specific reason to alter or extinguish
such rights. Problems of foreign securities, for example, should thus be addressed rather than such securities being extinguished or otherwise refused effect as, perhaps, not falling within the closed internal categories of real rights of a subsequent lex situ. Provisions of consecutive laws relating to time, such as conditions attached to rights, give rise to particular problems in this context.

The conflit mobile emphasises the fact that real property rights may arise in relation to a given item of property under different legal systems. This is even more true in the ranking of both real and personal property rights. It is inevitable therefore that rights will have to be 'translated' for the purposes of other legal systems. It is suggested that such translation is acceptable for two purposes. The first is the interpretation of a subsequent lex situ when it is argued that that subsequent lex situ has had some effect on the right translated. The second is in a ranking process. It is critical on both occasions that the right to be translated is considered initially in the context of the legal system from which it is derived and a broadly equivalent right sought in the legal system to be applied to it. The lack of an equivalent right in the second legal system should not nullify a foreign right as reference should be made to the general theoretical structure of the property law of the second legal system.

This choice of law structure distinguishes quite clearly between the existence and subsequent ranking of rights. The relationship between and the emphasis on the existence and ranking of rights varies between legal systems. Thus, for example, the ranking of rights appears more complex in Scandinavian and Anglo-American legal systems than in many Civilian or mixed legal systems, apparently leading the former legal systems to resolve some issues by ranking existing rights where the latter would extinguish rights. Equitable rights, relative title and the limitation of actions under English law are examples of this phenomenon. It is important that foreign approaches to these matters are not excessively distorted by, nor permitted to distort, the effects of differing legal systems.

As noted above, the basic choice of law rules proposed are rigid and other choice of law criteria are relevant to certain fields of property law or types of property. Exceptional choice of law rules may be appropriate in some situations, but it should be borne in mind that such exceptional rules detract from a coherent general approach to property law. Thus it may be appropriate to apply the law of the place of registration to rights in certain types of registered property. This is particularly appropriate for ships and aircraft as they give rise to an acute conflit mobile. Similarly, in a situation of insolvency it may be appropriate to apply the law under which a given insolvency process was instituted to the ranking of creditors whose claims do not relate to specific assets.

However, exceptional rules operate better in relation to specific types of property than in relation to specific types of transaction or situation, and great care is necessary in the integration of both with general rules. Difficult problems can arise if, for example, a ship, subject to securities registered in its home port, is arrested in a foreign port to enforce a lien available only there.

It therefore seems preferable to use methods subsidiary to the main choice of law rules rather than those which are exceptional. Thus renvoi and the
incidental question, far from being undesirable by-products of the choice of law system, may be of positive benefit in the creation of a coherent and flexible choice of law system.

A slightly novel renvoi system is suggested, whereby reference may be made to a given legal system either to ascertain whether its laws prohibit or affect the effects of a different legal system or to ascertain whether its laws positively facilitate the effects of a different legal system. Under this renvoi system the choice of law rules of the legal system to which initial reference is made are largely irrelevant. A flexible and coherent approach to the problem described above concerning a ship arrested in a foreign port might therefore comprise an initial reference to that lex situ in terms of the main choice of law rule to ascertain whether or not the arrestment affected the securities created by the law of the port of registration, to which a subsidiary reference is made. Presumably, in the absence of such an arrestment, presence in a foreign port would have no effect on a subsidiary reference to the law of the port of registration.

A similar choice of law structure is possible in insolvency and other fields in which funds analysis predominates. Reference may be made to the lex situ to ascertain, for example, whether a transfer of a fund comprising a bankrupt’s property effected by the law of his commercial domicile is to be allowed effect in relation to a given item of property situated within the territory of that first legal system. Such effect may be allowed by the lex situ in terms of the law of the commercial domicile without further ado, no such effect may be allowed, or the lex situ may prescribe some intermediate course. Unity and universality of the administration of international funds, an important choice of law criterion in such fields, may then be constructed on a practical co-operative basis.

A similar structure may also operate when ranking rights. Thus initial reference may be made to the lex situ to establish preliminary rankings relative to some or all rights and thereat reference may be made to the ranking rules of a main ranking process, as perhaps the law under which a liquidation has taken place, or even a law common to the holders of several rights, to rank or re-rank rights relative to parts or the whole of a fund.

Additionally, application to incidental questions arising under the main lex situ choice of law rule of the law considered appropriate by that lex situ provides flexibility to that rule. Thus the transfer of ownership on sale may or may not be linked to the validity of a contract of sale. It is suggested that the lex situ should determine the relevance of this issue to ownership transfer in a given instance, but need not itself determine the crucial incidental question. Furthermore severence of property issues as they arise between the parties to a transaction from issues relating to third parties should help to ensure that the main rule for issues relating to real rights in property only applies where necessary.

Further subsidiary methods, such as the declinature or assumption of jurisdiction in insolvency, can be used to attain further objectives in particular fields which are not addressed by the main choice of law rules. Ultimately, however, as in other fields of international private law, many solutions appear to lie in the harmonisation and unification of choice of law rules and substantive law.
It is hoped that the remaining chapters develop and illustrate the issues discussed above in a manner which goes some way towards the establishment of a coherent general theory of choice of law in this field.
PART A
A GENERAL RULE FOR REAL RIGHTS: THE LEX SITUS

CHAPTER 2
ANALYTICAL PROBLEMS

As mentioned in Chapter 1, many of the propositions made in this thesis revolve around certain traditional structures of analytical jurisprudence; to be more precise, around the distinction between real rights (iures in rem) and personal rights (iures in personam). Traditional analytical jurisprudence, and particularly this fairly narrow type, is hardly fashionable; it is however useful.

A. The utility of traditional general legal concepts.

Some philosophers and jurists have argued that concepts such as rights and duties do not exist, or do not exist in any way that is not purely psychological. Thus Hägerström argues that rights and duties are "mystical" and Lundstedt rejects the "false notions of legal relations". There are of course many who would dispute their thesis, and indeed, even if Hägerström and Lundstedt are correct, it is scarcely helpful to abandon such concepts just because they may be figments of our imagination.

Alf Ross argues in precisely this way. In "Tu-Tu", his celebrated study in the fallacy of legal concepts, he argues that a legal concept is "nothing at all, merely...an empty word devoid of all semantic reference", and might easily be replaced by the word 'tu-tu' or 'old cheese'. Ross' main argument has been convincingly criticised by AWB Simpson, but his own qualification is incisive: these imaginary concepts might be useful! He asks "whether sound, rational grounds may be adduced in favour of the retention of a 'tu-tu' presentation of legal rules, a form of circumlocution in which between the juristic fact and the legal consequence there are inserted imaginary rights. If this question is to be answered in the affirmative, the ban on the mention of rights must be lifted". He answers this question in the affirmative, arguing that "tilt is the task of legal thinking to conceptualize the legal rules in such a way that they are reduced to systematic order and by this means to give an account of the law in force which is as plain and convenient as possible."

This shows important insight. The importance of legal concepts, above all else, lies in their utility. The concomitant of this is that legal concepts ought to be abandoned or modified when their utility disappears, as they are the tools and not the purposes of the law. Thus Ross says: "although the 'tu-tu' formulation may have certain advantages from the point of view of technique, it must be admitted that it could in certain cases lead to irrational results if against all better judgement the idea that 'tu-tu' is a reality is allowed to exert its influence". This is an important warning to those who approach the law differently from Oliver Wendell Holmes: as logic rather than experience. Most people, however, prefer their 'experience' to be as logically coherent as possible.
The crucial point is the nature of the utility of such legal concepts: for what purposes ought they to be used? Ross would appear to suggest that their only tenable purpose is formal and descriptive: to render a mass of juristic facts and legal consequences systematic. While this might be their primary purpose, it ignores a possibly useful secondary prescriptive purpose: the solution of the 'hard', or 'new' or unforeseen case, particularly where such a case does not have an obvious 'equitable' solution. As Lord Fullarton has said: "adherence to theory is indispensable for the best of all practical reasons, that the theory affords the only means of solving with certainty and consistency, those numerous questions which would otherwise become the subject of loose and arbitrary adjudication".

This of course involves assuming the 'reality' of a concept and applying logical reasoning to it. If it is remembered that the answer reached is not a necessary answer little harm is done, and at least there is some answer to which other criteria of acceptability may be applied. Indeed it does not seem too preposterous to suggest that the conceptual structure of a legal system reflects the values of that system to a certain extent, and so a presumption may legitimately be drawn that the coherent application of that conceptual structure to a 'hard', 'new' or unforeseen case would be likely similarly to reflect these values? If it does not the remedy lies with the legislature or the bold court to create logical anomalies or to reformulate a more acceptable descriptive conceptual structure.
If the justification of analysis via traditional legal concepts is taken to be their utility, how useful are they? Ross stresses that the important facet of legal concepts is their ability to systematise complex and numerous legal situations, and it was pointed out above that they are also very useful in the decision of 'new' cases, provided that they are not applied dogmatically. There has however been a movement this century away from such traditional conceptual classification towards functional analysis, particularly in the U.S.A. where the influence of Karl Llewellyn and the Uniform Commercial Code has been profound. In Britain functional analysis has been advocated, with some reservations, by Professors Atiyah and T.B. Smith and with fewer reservations in the Report of the Crowther Committee on Consumer Credit and by Professors Goode and Diamond.

This movement is itself based upon utility. Thus while Ross would maintain that traditional legal concepts are untenable in strict theory but useful, many others would argue for the emasculation of traditional legal concepts which they might otherwise accept, in favour of the functional analysis which they maintain is more useful.

Functional analysis does of course involve legal concepts. At one level functional analysis looks to the purpose and practical operation of legal transactions, regardless of their traditional conceptual form. Thus Article 9 of the American Uniform Commercial Code regulates transactions which operate as securities, regardless of their form. This involves a new legal concept, that of the functional security.

There has also been a related movement away from the traditional unitary analysis of some transactions of relatively clear and simple function. Thus the traditional concept of ownership in sale has been practically removed from Article 2 of the Uniform Commercial Code, and replaced by a number of detailed functional rules governing risk, insurance, delivery and such like matters. Similar changes have been considered desirable in the various British laws of sale and security.

While there is little doubt that these movements towards general functional concepts and detailed functional rules are of great utility in many circumstances, it is questionable whether their value is such as completely to exclude traditional legal concepts. There are several related reasons for this. First there is the vagueness of a general functional concept. What, for example constitutes a functional security? Would a position as a monopoly supplier, or the subrogation of insolvency preferences be such functional securities? It is, secondly, clear that many transactions have multiple functions; a sale under retention of title is as much a sale as it is a security. Thirdly there is the difficulty involved in the integration of functional rules with each other and with any remaining "non-functional" parts of that and other legal systems. White and Summers note, for example, that the interaction of the functional security rule of Art.9 of the U.C.C. with the law of fixtures has given rise to "turbulent waters...upon which Section 9-313 sails only with difficulty". Lastly there is the relative inability of narrow functional concepts and rules to provide a basis upon which to decide 'new' cases. These reasons may explain why the Crowther and Diamond Reports have yet to be implemented in their full rigour.

B. Traditional concepts and functional analysis.
Thus, while functional analysis is useful, it may be argued that it should not be allowed to remove the residual value of traditional general concepts of classification, either generally or in international private law.
C. Concepts in international private law

The equivalent in international private law to functional analysis in internal law is probably the American "policy evaluation" school. There can be little doubt that such doctrines have, as yet, had minimal effect on Scots international private law, which operates by means of traditional choice of law rules. While such functional doctrines in international private law have certain attractions, they also appear subject to similar criticisms to those applicable to functional analysis in internal laws.

It interesting that Fitzgerald uses situations involving several systems of law to illustrate the importance of precise analytical concepts. This seems to be because he considers the complexities of international private law to require particular conceptual precision. This may be so from the point of view of clarity of thought, given the complexity of international private law, but it ought not to lead to clear but dogmatic thought. Legal concepts are important if they are useful, and the uses to which they ought to be put in international private law are its systematic organisation and, perhaps more importantly, the just and convenient resolution of disputes between individuals in cases containing foreign elements.

However, one false impression which Fitzgerald gives by this stress upon the necessary precision of legal concepts in an international context is that the resolution of disputes involving several potentially relevant legal systems is purely a matter of the use of precise legal concepts. This is not so. Even within a single legal system many precise legal concepts will not be completely tenable. This is not important if their limitations are well known, as legal concepts are merely tools with which to organise a legal system and legal reasoning.

In the context of international private law the limitations of concepts are even more evident. This is because different legal systems have different conceptual structures, largely as a result of different historical development. Indeed it may be said that the coherent and satisfactory resolution of many problems of international private law is impossible short of substantive unification of laws, and certainly impossible via simple conceptual analysis. Roscoe Pound certainly viewed the comparative analysis of several legal systems in this way. He observed that "we have come to recognise the plurality of situations and relations...and the futility of attempts at analytical universal theories of such subjects". So too Henri Batiffol has acknowledged the difficulties presented by comparative differences in the conceptual structures of legal systems. In his "Réflexions sur la coordination des systèmes Nationaux" he considers the integration of legal systems to be a major purpose of international private law, and the differing conceptual schemes of various legal systems a major difficulty facing such integration. He sees the application of simple concepts, and particularly those of the internal lex fori, as rather unhelpful.

However it is even less helpful to say that legal concepts are of no use at all in the resolution of the problems of international private law; and indeed it would be inaccurate to say that the limitations of conceptual analysis are substantially different in an international from an internal context. As within a single legal system, so among several legal systems legal concepts are tools, to be employed according to their utility: as means to the organisation of legal rules and to the resolution of legal disputes.
It is possible then to construct useful legal concepts for the specific purposes of international private law. Thus many legal systems contain different analytical divisions of property for internal purposes and for international purposes: for example in Scots internal law that of heritable and moveable property, and in Scots international private law that of immovable and moveable property. Each conceptual tool is directed towards its specific purpose, albeit that the purpose of the distinction of Scots internal law lies largely in the past.

This example illustrates two points: first that a concept of international private law may be similar to one of internal law, but altered in such a way as to make it more compatible with other systems of law, translated as it were into a metalanguage. Secondly, it shows that individual legal systems are willing to renounce their eccentric internal classifications in the interests of relatively coherent international private law. This international outlook is the more abstract equivalent of Batiffol’s suggestions in the article mentioned above on the one hand that choice of law rules be adapted to the substantive results of conceptual variations, and on the other hand that a given rule of internal law be interpreted in the light of its international context. It might usefully be added to that armoury.

There may therefore be hope that some conceptual solutions may exist for many seemingly intractable problems of international private law, or even that large parts of the international private laws of many legal systems could be unified. There could thus be at least some degree of formal justice, to which more substantive values may then be applied.

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P. Real and personal property rights

The theoretical structure outlined below concerning the choice of law for property problems revolve around the theoretical distinction between real rights (iures in rem) and personal rights (iures in personam). This abstract distinction is used in a specialised way: as a tool with which to reconcile various disparate legal concepts which are used by various disparate legal systems. These legal concepts and legal systems are probably strictly incompatible in their own terms, and so this distinction of real and personal rights ought to be seen as a specialised concept of international private law, a meta-concept or bridge as it were. These concepts may be considered civilian, to the detriment of Anglo-American legal systems. This may be so, but they are concepts with an international outlook which are based upon doctrines present in both civilian and Anglo-American systems. If they contain a civilian bias this may be justified on the ground that in this context the accident of the Reception gave rise to more useful analytical concepts than did the accidents of the English Writ system and the severance of Equity and Law; English law is clearly more amenable to analysis in terms of real and personal rights than civilian systems are to equity and relative title. In fact more radical theoretical difficulties may arise in the integration of Scandinavian property laws with other legal systems, given their apparent rejection of real and personal property rights. Some of the special problems raised by Anglo-American and Scandinavian property theories are discussed in more detail in sections G and H below.

The distinction between real and personal rights probably dates from the time of the Post-Glossators and has been heatedly discussed in Anglo-American jurisprudence since at least the time of Austin, although it is of considerably greater antiquity both in English and Scottish law. It seems to have developed from the Roman distinction of actions 'in rem' and actions 'in personam' through various stages, to the modern distinction according to the persons against whom a right is valid. This modern distinction is concisely put by Holland as that between rights of determinate and indeterminate incidence.

It is not a completely happy distinction, and has been criticised by many. These criticisms arise at two levels. First there are those who maintain that it is untenable to distinguish rights according to the incidence of their validity, and secondly there is much argument as to how a distinction of rights on the basis of such incidence ought to be made.

For example, the theories of Alf Ross and Shalev Ginossar challenge the distinction of rights according to their incidence. Both criticise a failure to distinguish the content and protection of a right, and maintain that what are considered real and personal rights are equally protected against the interference of third parties. Thus they consider that no difference exists between the protection afforded to an owner of a car against a third party taking possession of it, and that afforded to a party contracting therefor against a third party inducing the other party to the contract to break it. They accordingly maintain that the traditional distinction of real and personal rights is fundamentally misconceived.

While it is true that the protection afforded to the holders of personal rights against third party interference is increasing, it surely cannot be said that the stage has been reached where the protection of an owner and a contracting party from third party interference can be considered identical. The central reason
for this is one which is mentioned further below: the emphasis of the protection. Thus a real right is protected against everyone apart from those persons against whom it is not protected for a specific reason, personal to those individuals. On the other hand a personal right is only protected against those persons for whom there is a specific personal reason so to protect it. Accordingly a personal right may exceptionally be protected against a third party, if, for example, that third party is in bad faith\(^7\), whereas a real right may exceptionally not be protected against a third party, if there is a specific reason to protect that third party, as, for example, where a purchaser in good faith from a non-owning seller in possession is protected from the owning buyer\(^8\). The function of bad and good faith in each is different\(^9\).

The theories of Ross and Ginossar are rather more complex than this brief criticism suggests, but this is not the appropriate place to analyse them in detail. It suffices to note that both, and particularly that of Ginossar, are substantially weakened when it is realised that real and personal rights are not protected against third parties in the same way. It must however be admitted that Ross' theory in particular has an intriguing elegance and plausibility, and a radical nature which cannot be ignored. It has clearly had considerable influence, along with the theory of Vinding Kruse\(^10\), upon Scandinavian property law. It is accordingly discussed further in section H below.

There have been numerous debates upon the appropriate method of distinguishing rights according to their incidence. Many of these have been summarised by Kocurek (Chap.13) and Hohfeld (pp. 74-114), and only those which appear most important are discussed below.

Traditionally real rights have been explained as rights which are 'good against the world' and personal rights as those which are good only against a specific person or persons. Quite apart from the arrogance which Paton notes\(^11\) in this expression of the distinction, it is insufficient to enumerate the persons against whom a right is valid in order to classify it as real or personal. If, as Paton notes (at p.301), the owner of a piece of land were to agree to contractual rights of passage across it with everybody bar one person, the owner's right to exclude that one person would still appear to be based upon his real right of ownership.

Kocurek may have posed the most workable definition available. He defines (at p. 201) a right in rem as "one of which the essential investititive facts do not serve directly to identify the person who owes the incident duty", which he terms an "unpolarised relation". This is of course a negative definition of a real right, as a right which is not "polarised", but it conveys the essential distinction, which is substantially one of approach or emphasis. Thus for a personal right you can list the persons who are bound, and for a real right you can only list the persons who are not bound\(^12\).

Thus a contract identifies the persons bound as the legal relations come into existence; an English equitable right, Maitland maintains\(^13\), identifies the persons bound by it as their 'consciences' are affected by individual notice; and a Scots inhibition identifies each individual affected, as its basis is a warning to each individual not to deal with the debtor's heritage or to expect any preference therein for debts contracted with him\(^14\).
The inhibition, as an aggregate list of determinate personal rights, contrasts well with the indeterminate real right invested in the creditor by a Scots adjudication of land\(^1\). Both would appear to be valid against 'the world', and both so valid on the basis of registration. However, the "investititative facts" of inhibition, according to historical theory, are a series of warnings to a list of persons, identified by their notice of the inhibition. On the other hand the registration of an adjudication invests an indeterminate real right in the creditor. The registration in adjudication constitutes the right without any theoretical notice to anyone. This is different in theory from the function of registration in inhibition, which constitutes notice to everyone, which in turn constitutes an aggregate of personal rights.

Of course this may mean that inhibitions ought to be recategorised as real rights, but this does not detract from the point of emphasis. The rationale of the 'real' effect of adjudication is of policy: creditors who have completed diligence in execution ought to have the advantages of a real right. This right is then constituted by registration so that other parties do not act to their prejudice by ignorance of it. On the other hand, the purpose of inhibition, although it is a complete diligence in itself, is essentially that of temporary protection or sanction. Therefore it may not in theory justify a real right, but only the lesser power of a fault based personal right, since the interests of the inhibitor may arguably not be more worthy of protection than those of any other person, unless that person is at fault. The idea of fault in inhibitions has however developed to the point where a person is at fault for not checking the register of inhibitions.

This distinction of real and personal rights according to the rationale of their investiture may seem to be at odds with Hohfeld’s contention\(^1\) that a real right is in fact an aggregate of similar ‘personal’ rights. However, Hohfeld’s analysis of real rights as aggregates of ‘personal’ rights does not adequately reflect the rationale of the relevant “investititative facts”. In inhibition, for example, a large number of personal rights are invested against a large number of persons who may potentially be at fault. Their investiture is, to abuse Kocourek's terminology, “polarised”. In adjudication the investiture of the real right is not directed towards the attributes of any individual. In Kocourek’s terms it is “unpolarised”.

Hohfeld’s views on real rights can, in fact, be reconciled with this view of their investiture, and had he lived longer he may have made this clearer. It does not follow from the analysis of real rights, as jural relations, and in terms of an aggregate of ‘personal’ rights, that their investiture has a similar rationale. It is not credible to view their investiture as the multiple investiture of identical personal rights, as the rationale of the investiture is that the right has indeterminate incidence: a beach, by way of analogy, comprises many grains of sand, but it is still a beach.

Salmond seems to have raised the most substantial criticism of the simple dichotomy of real and personal rights. He maintained\(^1\) that it did not take account of rights which are good against classes of persons. As stated above, Hohfeld argued that a right which is ‘good against the world’ is actually the aggregate of many rights which are good against individual persons. Kocourek (pp. 196–?) used this argument to dispute Salmond’s point about rights against classes of persons, arguing that duties are owed by persons and not by classes
of persons, and so the persons comprising Salmond's class could either be identified or not.

However, Salmond's point about rights which are good against classes of persons remains, since Kocourek's counter-argument is not without its problems. Real rights may be aggregates of identical legal relations between individuals for the purposes of analysis as legal relations, but it does not accurately reflect what Kocourek himself would have termed their "essential investititive facts" so to describe their investiture. The same must surely be true of rights against classes of persons.

Accordingly it seems no answer to Salmond that Kocourek would classify rights which are good against classes of persons on the basis that the persons comprising those classes can either be identified or not from the relevant "investititive facts". The reasoning underlying the investiture of an "aggregate of rights" against a class of persons is not the identification of the persons but the identification of the class, just as the reasoning underlying the investiture of an "aggregate of rights" "against the world" is not the identification of every person against whom such a right is valid but the identification of persons against whom such a right is not valid. The identification of the class will then identify the persons bound by the aggregate of personal jural relations in a "class" right, just as the elimination of persons not bound will identify the persons bound by the aggregate of jural relations in a real right.

So, in returning to Kocourek's definition of a right in rem as "one of which the essential investititive facts do not serve directly to identify the person who owes the incident duty", a problem is encountered with regard to rights against classes of persons. According to this definition such rights are rights in rem because the identification of the person owing the duty is not direct, but indirect, via the identification of the class and the interpretation of the classification. This does not seem credible, as the incidence of a right against a class of persons is not indeterminate, but determined by the definition of the class.

It may therefore be possible to divide rights into three types according to their incidence: those of directly determined incidence, those of indirectly determined incidence and those of indeterminate incidence. This position is doubtless open to attack, perhaps on the ground that rights of indeterminate incidence are merely a type of rights of indirectly determined incidence: a large class.

However this argument, which would seem to be another form of that of Kocourek against Salmond mentioned above, can be countered on the ground that the definition of a (large or small) class by exclusion of other classes is different from the sum of the classes not excluded: the whole is not the same as the sum of the parts.

In summary, the utility of conceptual analysis lies in its ability to organise legal rules and legal reasoning. Is it useful to have any distinction of rights according to their incidence? It is suggested that it is, if for no other reason than the fact that most legal systems claim to be so organised. The alternative theories of jurists like Alf Ross are of course illuminating, but mostly of the limitations of analysis in terms of real and personal rights than for themselves, since they have their own weaknesses and are not generally accepted in the organisation and reasoning of many legal systems.
Is a distinction of real and personal rights useful? Is such a distinction more useful than a tripartite distinction of real, personal and class rights? History has shown that the power of a clear distinction of real and personal rights is very useful for the purposes of resolution of awkward problems, particularly in insolvency, and in the development of a relatively clear and simple analytical structure for a legal system. Thus if the possible limitations of such a distinction are borne in mind it may be a very useful conceptual tool. In addition, class rights perhaps raise more problems than they solve, because a class must be defined and this definition interpreted. Salmond rather weakly argued that class rights "either do not exist at all, or are so exceptional that we are justified in classing them as anomalous". However, class rights are probably not as exceptional as Salmond maintained, as demonstrated in section G below. It seems preferable to argue that the distinction of real and personal rights is more useful than a tripartite distinction of real, personal and class rights.
E. Real and personal rights in international private law

If it is accepted that the analytical distinction of real and personal rights is useful in the purely internal context of a legal system, whether or not such a distinction is tenable in pure theory, the question arises whether or not such a distinction is useful in an international context? It is suggested that it is, in a slightly amended form, because the institutions of many legal systems are expressed in terms of such an analytical structure, and the institutions of many other legal systems are potentially amenable to such analysis. This makes the distinction of real and personal rights a potentially useful bridging concept for the purposes of international private law.

It is probably too much to expect international private law to be completely coherent, or to expect it to produce no anomalous results, or to expect it not to distort the legal systems it is designed to integrate. Indeed only the last would be eliminated by the complete substantive unification of all legal systems, the supposed panacea for all of the ailments of international private law. However coherence and lack of distortion and anomaly are important aims of international private law, though not of course the only aims.

The distortion of the concepts of the various legal systems involved is inevitable when the concepts of one legal system are used to resolve the problems arising when systems with differing conceptual structures interact. This is also so when a hybrid concept is used to resolve these problems, though it might be hoped that the distortion would be less. Thus the distinction of real and personal rights rests more easily in a civilian system than in an Anglo-American system: dominium is more amenable to analysis in terms of real and personal rights than is relative and multiple title, and equitable interests lie rather uneasily in the category of either real or personal rights. A distinction of real and personal rights in international private law should endeavour to take account of these problems.

Accordingly a distinction of real and personal rights in international private law ought to be fairly practical. A practical distinction of real and personal rights may then be a useful tool with which to provide better answers to questions which cannot be completely answered.

It is suggested that the distinction between real and personal rights in international private law be made at the stage of the characterisation of a problem. A court ought to examine an alleged right and assess its practical operation, in the context of its own legal system. A real right would then be one operating in a 'real' manner. It is suggested that the practical operation of a right as a real right is not a matter of whether the reasoning underlying its "investititive facts" gives rise to the indeterminate incidence of that right, but with whether or not its incidence is credibly related to the personal attributes of the person or persons against whom it is valid. This, of course, is another negative definition of a real right. A personal right is one which derives its incidence from some personal characteristic of the individuals against whom it is valid. A real right is valid against persons without such a type of "polarisation". This analysis involves ignoring or distorting "class" rights, where a class characteristic would polarise the incidence of the right. As explained in section D above and later in this section, class rights seem to create more problems than they solve, particularly in an international context.
It was maintained in section D above that the rights of the creditor in an inhibition in Scots internal law are personal, as the reasoning underlying their investiture is fault. However, the practical operation of an inhibition in Scots law is real, since the knowledge of a person against whom an inhibition is valid is irrelevant, since a duty to check the register of inhibitions is imputed to everyone^2. Similarly many equitable interests in English law should probably be considered real in international private law, since the extent of the doctrines of constructive notice of an equity or an equitable interest make a mockery of its analysis as notice^3. As discussed in Chapter 5,E,2) below, the Scots courts appear to have adopted such an approach to equitable securities in some circumstances.

Similarly the "property" effect of a transaction may be considered not to be real for the purposes of international private law when it arises in a context where a personal factor exists between the relevant parties. Thus in situations similar to the property consequences of a sale, when they arise between the parties to that sale, the rights involved may credibly be considered personal rather than real for the purposes of international private law^4.

The crucial issue would thus be the effect of a right against a third party. If there is a reason, personal to that party, to consider a right valid against him in the system of law under which that right arises, that right may be considered personal for the purposes of international private law. If there is no such credible personal polarisation that right may be considered real.

Who then should be considered a third party? In most cases this is not a difficulty, although a third party may be difficult to define without reference to real and personal rights. A third party would seem to be a person who is not directly bound by a principal personal right, such as a contract of sale. That third party may then be bound by a subsidiary personal right, perhaps based on fault, which protects a principal personal right, or by a principal real right such as ownership^6.

There are however some peripheral difficulties, such as the position of successors on death, or administrators in insolvency. There can be few legal systems under which the debts of the deceased or insolvent person, the paradigm personal rights, are not normally valid to some extent against successors or insolvency administrators. Indeed the payment of these is a major function of both administration on death and on insolvency. Yet both administrators may be considered third parties, as they were not directly bound by these personal rights at the time of their creation. Both might be considered bound as a result of a transfer of liability, or as a result of the acceptance of office or estate, as it were by personal factors. However it is more useful to examine the nature of their liability to the holders of such rights in order to assess their status as third parties. This liability is normally very different from that of the deceased or insolvent person; potentially resolving to a fraction of its erstwhile value and being altered in form to a monetary claim. On the other hand a paradigm real right, such as ownership or security, does not normally operate in a substantially different way against successors or insolvency administrators from the way it operates against a paradigm third party, such as a purchaser. Accordingly successors and insolvency administrators may be considered third parties, against whom personal rights are valid in a special limited manner, on the basis of their acceptance of office or estate^6.
There is nevertheless an alternative analysis of successors and insolvency administrators. This involves a doctrine of English law, discussed further in section G below, which appears to give rise to class rights. According to this doctrine a right, such as that between seller and buyer under a contract of sale, is valid between the principal parties to that legal relation and also against any person traceable "through" one of the principal parties. Accordingly when a principal party dies his successor, traceable through the deceased, is liable in the same manner as the deceased. Similarly when one of the principal parties becomes insolvent his insolvency administrators are traceable through that party. This leads to the situation where all of the creditors of a principal party are similarly traced through that party. This doctrine is different from that explained above, according to which property rights between the parties to a contract may be analysed in personal terms. Both may be expressed as relations "as between seller and buyer". This is an accurate expression for the doctrine explained above, but is better expressed as relations "as between seller and buyer...and all of the parties traceable through each" when applied to such English class rights.

While it is not entirely convincing to analyse successors and insolvency administrators as third parties according to the paradigm of the purchaser, it is suggested that it is more useful in an international context to analyse them in this way than to use a system of class rights, since that system seems to be based upon idiosyncratic extensions of the originally personal system of Equity, and possibly also upon extensions of the concept of relative title under English law. Neither does it adequately reflect the substantial differences in the operation of paradigm personal rights against principal parties and against persons traced through those parties to use such a class analysis. Accordingly creditors should be considered to be third parties in much the same manner as the paradigm purchaser, and successors and insolvency administrators should be considered third parties in a similar way, with the caveat that both real rights and personal rights are normally valid against such administrators, but that real rights are so valid in substantially the same way as they are valid against other third parties.

Thus a right may be considered to be real for the purposes of international private law if it would be valid in the legal system of its alleged creation, in a substantially uniform way, against most persons for whom there is no credible individual reason for such validity.
P. Further analytical issues.

There are a number of analytical issues which arise in the formulation of useful choice of law rules for real rights in property. There is firstly the problem of what counts as property or as a property right, and what constitutes corporeal or incorporeal property. There are also problems in the operation of property rights: such as whether the transfer of rights is actually the extinction of one right and the creation of an identical right, and whether concepts such as ownership are the contents of "bags" of Hohfeldian rights, powers, liberties and immunities, or whether the bag is included as well. Further issues still are discussed in Chapter 3 and Part B below as they arise, concerning, for example, effects of time upon rights, interdependence of different types of rights and the analysis of property in terms of ideal funds.

1) Property and property rights.

The definition of property should not be a great problem in this context. The arguments over whether a person owns his reputation, or whether an action for infringement of copyright is proprietary are well known and the problem of what is or is not property is essentially similar in all systems of law. Thus while systems may vary as to what is characterised as property, they conduct their characterisation on the basis of similar criteria. Thus if two systems disagree as to whether a given phenomenon is property or proprietary, it is likely that they disagree as to the appropriate weight to be given to similar criteria of decision. In this circumstance a court might be expected to favour the decision of its own system. However, as elsewhere in international private law that court ought to be willing to take note of the international perspective of the case.

The classification of a right as a property right is probably similarly uncontroversial. Salmond listed five characteristics of a right: the person entitled, the person bound, the substantive content, the reason for its vesting and the 'object' or 'subject matter' or 'res' of the right. The terminology of the last characteristic is sometimes used misleadingly. Its part in the formal structure of a right is not however misleading. A property right is therefore one of which the subject matter is an item of property.

2) Corporeal and incorporeal property.

The distinction between corporeal and incorporeal property also seems largely uncontroversial. An item of property either has physical dimensions or it does not, and this would seem to be a readily verifiable fact. However, a document such as a bill of lading or a bill of exchange or a banknote has physical dimensions, but largely incorporeal attributes. As with the definition of property, the approach of different systems to the classification of property as corporeal or incorporeal seems largely similar, and thus not of great moment in international private law, though again an international outlook might be expected.

There are some oddities however. The English doctrine of estates led to the rather peculiar position where it would not have been impossible to classify every important interest in land as incorporeal. This is not the classification of internal English law, though the actual classification of tangible and intangible property, like that of real and personal property, can probably only be readily understood historically. English international private law does not
seem to make arbitrary and eccentric distinctions of corporeal and incorporeal property.  

3) Transfer, creation and extinction of rights.

There has been much discussion in textbooks of analytical jurisprudence of the issue of the creation and extinction of rights, and particularly over whether or not the "transfer" of a right involves its extinction and the re-creation of an identical right. Kocourek (pp.229-231 & 242-244) found it "quite impossible to conceive of the process of transfer", considering transfer a convenient but potentially misleading metaphor. Salmond, drawing on Bentham, was adamant that the transfer of rights was in fact a transfer, and not the extinction of one right and the creation of another right. Both views contain persuasive elements.

Salmond's five characteristics of a right are listed above. These are: the person entitled, the person bound, the content, the reason for vesting ("title") and the subject matter. Salmond stressed the difference between an original right, where nobody had had such a right before, and a derivative right, where someone like a seller had previously had such a right. This lays emphasis on his fourth characteristic of a right: the reason for its vesting, original and derivative title. In laying this emphasis upon title, Salmond did not take sufficient account of his first characteristic: the person entitled. In this way Salmond seems to have ignored Kocourek's point: the legal relation is different in a basic respect after transfer. However in derivative acquisition the remaining three characteristics remain unchanged, whereas in original acquisition all are new. What then is sufficiently fundamental change to the characteristics of a right to justify calling it a new right?

These arguments are of some significance in an international context. When a person has acquired ownership of an item of property under one legal system, and sells that property in a situation where all of the significant links of the case are with another system, does he transfer the substantive content of his right under the first legal system or does the second legal system determine the substantive content of the buyer's right? If rights are transferred the first legal system may determine the substantive content of the purchaser's right; if rights are extinguished and created the second legal system may determine this content.

This may be Ross' "Tu-Tu" exerting its influence, or what Hart would call "theory on the back of definition". The answer in international private law should not depend upon the niceties of the logic of systems of internal law, but on theories of international private law. If it may be tritely assumed that the purpose of international private law is the just and convenient resolution of disputes between individuals in cases containing foreign elements, then choice of law rules ought to reflect this purpose. In this situation, which may, as discussed in Chapter 3,B,2), be termed a "conflict mobile", interests under the first and second systems ought to be balanced. This, as discussed below, may be achieved in this context in two stages. Firstly the content of the right under the first system should be maintained intact, to the extent that this is not repugnant to the second system. Secondly, the second system should have the power to alter the content of the right under the first system, but ought not to exercise it to the unnecessary prejudice of interests under the first system.
Clearly Kocourek's model of the transfer of rights is more appropriate in an international context than that of Salmond, as the extinction and creation of rights more clearly focusses the mind upon the crucial issue: the content of the right. However it must also be remembered that this model leads to the false assumption that that content should change.

4) 'Bags' of rights.

The issue of the transfer of rights is connected to the analysis of concepts like ownership as "bags" of Hohfeldian rights, liberties, powers and immunities. Is the bag distinct from the sum of its contents? As with the transfer of rights, international private law puts a strain upon the traditional arguments. Different systems of law have bags with the same name, but varying contents, or differently tagged bags with roughly the same contents. In the conflit mobile, when the second system so decrees, should the contents of the bag change with the name of the bag or should the name of the bag change with the contents? There is, for example, the power of alienation. Under one system of law certain types of property may be incapable of alienation, but may be freely alienable under another system of law. If property acquired under the first system is alienated under the second, and the second system has altered the content of the seller's right, has that second system imposed its type of ownership, or has it conferred a power of alienation?

As with the transfer of rights the crucial issue is the content of the right. Accordingly an analysis of the individual rights comprising the contents of the bag leads to more thoughtful results: it is all too easy to "translate" a bag tagged "ownership" without even realising that any change is taking place in its contents. Having said this, there may be very good reason for the second legal system to translate the bag wholesale. Similarly it ought to be remembered that such a translation may not have a radical effect upon the contents of the bag.

It ought also to be remembered that a small alteration in the contents of a bag may render its tag inappropriate, as for example when hypothec becomes pledge by imposing a requirement of possession on a security holder. If that small alteration is well reasoned by the second legal system the alteration of the tag on the bag is not so radical as it may appear at first sight.

It is suggested in Chapter 3,F below that rights should only be translated in limited circumstances, consciously, in order to integrate the application of different legal systems.
6. Real rights, personal rights and English law.

There are substantial theoretical differences between Anglo-American property laws and those of civilian systems, although there is much force in Buckland and McNair's comment1 that "in the end... it seems that there is not much to choose between the Roman and English conceptions of ownership, in so far as the absolute nature of title is concerned, and indeed much of the technical detail is very similar". What is true of Roman law seems similarly true, in this context, of modern civilian systems. However Buckland and McNair appear to be speaking of the practical rather than theoretical operation of the two systems.

The distinctiveness, and to a civilian oddity, of Anglo-American property law can probably be traced, like many of the quirks of Anglo-American systems, to two major institutions of English legal history: the Forms of Action at Common Law and the system of Equity. These two institutions and their interaction have given rise to a complex and perplexing, yet flexible, system of property law2.

1) The Forms of Action.

The Forms of Action have given rise to several distinctive features of English property law: its great emphasis on possession, the system of relative and multiple title, the large distinctions between real and personal property, the classification of much personal property law as tort and the theoretical difficulty in obtaining recovery of personal property in forma specifica.

The Forms of Action were very rigid, entitling a plaintiff only to a specific narrow remedy for a specific narrow legal issue, by a specific mode of procedure. The mode of procedure appears to have been the crucial factor in the development of this writ system. Thus various writs were manipulated or avoided on account of their mode of procedure, and also to take account of the some gaps which existed among the narrow issues which the writs permitted.

Accordingly, early cumbersome "proprietary" writs relating to land were gradually superseded in practice by a series of gradually less cumbersome "possessory" writs of varying types, which could not, however, formally replace the pre-existing writs as they became increasingly obsolete. Probably as a result of this increasing emphasis on possession the resolution of disputes relating to land has become relative, with the plaintiff claiming earlier and "better" possession than the specific defendant, rather than invoking the best of all possible rights. This relative title seems to lead to multiple title since that defendant, if he had himself been dispossessed, would have made a similar claim against the current possessor.

There is however the complication of the "ius tertii". In some circumstances the defendant can argue that despite the fact that the plaintiff has a better right than him, there is someone else who has a better right than the plaintiff. The scope of the ius tertii in English land law is controversial3, and even if it were generally applicable it would not completely eliminate relative and multiple title, as the plaintiff's case would still rest upon his earlier possession and the defendant's upon the even earlier possession of the third party.

English personal property law has the added quirk that specific recovery of an item of personal property could very seldom be demanded as of right. The rigid Forms of Action separated actions relating to land and actions relating to other
property, given the narrow definitions of their scope. This is not surprising in
the light of the relative importance of land in feudal theory and economics and
the development of the doctrine of estates in English land law. The treatment
of both real and personal property together by Lawson in 1958 was in fact quite
radical, given the degree of severance of real and personal property law.

Debt-Detinue was the old English form of action by which a sum of money or an
item of tangible personality was recovered. This action later separated into a
broad division of Debt to recover a sum of money, and detinue for a specific
item of tangible personality. Neither clearly distinguished between the recovery
of property lent or taken and the "recovery" of property owed: the defendant
"unjustly detained" the property. Thus the same action lay against a person
refusing to perform a contract to deliver property as lay against a person
refusing to return something he had borrowed. Crucially for the development of
a tort-based analysis of English personal property law the defendant had the
option to pay damages rather than to "return" the item of property.

Detinue was gradually supplanted, though never completely eliminated, by one of
the many offspring of Trespass: Conversion, largely because of the procedural
advantages of the more modern torts. The history of Conversion, from Trespass
through Case and Trover, is complex, as is the development of its relationship
with Detinue. It has however clearly not lost its essential basis in tort.
Despite the trite saying that Trespass (to goods) is about possession and Trover
about property, it is clear that Conversion has had much more to do with the
assertion and denial of the immediate right to possession than with property
rights like ownership, or even actual possession. Thus in Conversion the
plaintiff alleges an immediate right to possess which is preferable to that of
the defendant. Although there is an important distinction between possession
and the immediate right to possession this argument quite strikingly resembles
that in real property: of the plaintiff's prior possession being preferable to
that of the defendant.

Accordingly both English real and personal property law are based upon the ideas
of relative and multiple title, which are in turn related to an emphasis on
possession rather than ownership. As in real property, the defendant in an
action of conversion can plead the ius tertii. This appears to have been given
general effect by s.8 of the 1977 Tort (Interference with Goods) Act. Again,
however, the ius tertii concerns a relative title; a further preferable immediate
right to possession.

It was noted above that Detinue permitted the defendant the option of paying
damages rather than delivering the specific item of property in question. Many
reasons have been advanced for this rule in Detinue, but the most convincing is
that the emphasis of the whole Common Law system was upon damages rather than
upon specific remedies, unless damages would be insufficient as a general rule,
as in the recovery of land. The Forms of Action did not possess the flexibility
and discretion which was initially possessed by Equity. Conversion took this
matter further, by allowing only damages, reflecting its basis in tort. This led
to a paradox of English personal property law: an owner often cannot recover his
property and his claim of ownership is often altered to a claim for damages.

It might then be doubted whether there is an English law of personal property;
as Baker commented in the 1st edition of his Introduction to English Legal
History (at p.313) "the elusive 'law of personal property' [is] so submerged in
the law of tort and contract as to be almost denied an independent existence." Hohfeld is doubtless correct to maintain (at pp. 102-4) that the inability to recover a specific item of property does not mean that the person attempting recovery has no right in rem relating to it, but it does seem odd that the assertion of a right like ownership leads, on success, to its extinction®. Since the Common Law Procedure Act 1854 (s.78), the court rather than the defendant has had the option of awarding recovery in forma specifica in Detinue, and these Detinue remedies have been extended to the expanded "Conversion" of the 1977 Torts (Interference with Goods) Act. Nevertheless the history of Detinue and Conversion remain only too relevant, and the restoration of property in forma specifica remains residual, as a result of this history.

Thus the Forms of Action appear to have led to several peculiarities in English property law. In particular the emphasis on possession and the system of relative and multiple title lead to some difficulties in an international context.

2) Equity.

The system of Equity has given rise to other distinctive features of English property law: in particular the trust, the distinction between legal and equitable title, the extensive use of fund concepts and the extended concepts of tracing. It has also given rise to large vague powers which can have the practical effect of undermining general legal rules, and other legal systems. Great controversies have raged over the relationship of Equity to Law, Equity's overt or covert supplemental or corrective function and the theoretical and practical harmony or conflict existing between them. Two things are however clear about the original theory of Equity: it concerned, firstly, the conscience of individuals and, secondly, the Chancellor's discretionary powers over such individuals. Over time the conscience and discretion may have become rigid even in theory, by the development of strict and narrow rules, and may have looked incredible as such in practice; this did not mean that these origins had disappeared, or that theoretical lip-service was not paid to them in the development of rigid rules of Equity. Accordingly Maitland maintained® throughout that Equity acts in personam.

Thus Equity compels a trustee to perform his "obligation" in Equity. The English trust has of course developed to the point that it now prevails over everyone except for the hackneyed "bona fide purchaser for value without notice". As a matter of historical development this expression is the misleading shorthand of an inaccurate negative definition. It would be theoretically more accurate to say that a trust is valid against people in bad faith, or with notice, whether constructive or not, or against people receiving gratuitously. There is a specific reason, personal to each of these parties, to prefer a trust beneficiary to them: the conscience of each is affected. There are of course other parties affected by a trust, such as a trustee's personal creditors, his trustee in bankruptcy and his successors. It is not impossible to argue that their consciences too are affected by trust, and that once they become aware of the trustee's altruism they ought not to take advantage of their position®. Accordingly the beneficiary's right in trust was originally personal, in the civilian sense, and may still be analysed in this way in accordance with the original personal theory of Equity. The analysis of the beneficiary's right in rem or as a right sui generis is clearly a reformulation of theory, albeit perhaps a justifiable reformulation.
The distinction between legal and equitable title is related to the ideas underlying trusts. Thus in conventional theory a trustee owns trust property at Law, and the beneficiary owns that same property in Equity, or is said to have an equitable interest in it. A similar division of legal and equitable title occurs in other situations, as on the sale of land. At Law, a purchaser of land has only a personal right, in almost the civilian sense, against the buyer between the time of contracting and the conveyance of legal title (i.e. "ownership"). However the buyer becomes "owner" in Equity at the time of the sale contract. This is the result of one of the "maxims of Equity", which states that "Equity looks on that as done which ought to be done". Thus in a court of Equity the contract was treated as if it had been performed, that is to say the purchaser was treated as if he had legal title, to the extent that a court of Equity was capable of doing this without incurring the wrath of the courts of Law. This meant that a court of Equity could give this effect only in "conscience", as it gave effect to ordinary trusts. Accordingly Equitable interests are valid against all but the worthy "bona fide purchaser for value without notice". Indeed this situation may be not inaccurately described as a type of bare trust, with the seller becoming trustee for the purchaser without any specific exercise of volition on his part. In a similar way equitable estates were glossed onto legal estates in land.

Fund concepts have also been extensively developed in English law, probably as a result of their convenient usage in the law of trusts. Funds are not unique to Equity nor to English law, and seem to have been present in Roman law in the distinction between res and universitas rerum. A fund is a convenient expression for a collection of individual items of property which have an important characteristic in common, like their owner. Thus a person's "estate" on death or insolvency may be described as a fund, as can a "flock" of sheep. When an individual item is added or removed from the fund, that fund maintains an essential unity: a one sheep flock is still a flock. English law probably deals with funds, as opposed to their component parts, more frequently than do most other legal system.

Thus much trust law deals with trust funds rather than with individual trust assets, making it very easy to ignore the other characteristics of the items comprising the trust fund, and making it seem natural, for example, that the proceeds of the sale of a trust asset fall into trust, or that the trustee can freely dispose of individual items of trust property provided their value is replaced: the fund after all does not change. Funds analysis is also used outside the traditional trust field. An English floating charge can be best understood in terms of funds. Thus prior to its crystallisation a floating charge is "attached" to a fund, and after crystallisation it "attaches" to the individual items comprising that fund.

The difficulty with funds is that they add a second approach to a single property problem; is a flock of sheep truly a flock, or does treating it as a flock not ignore the individual sheep? When is it to be treated as a flock, and when as a number of individual sheep? This is a problem which is not peculiar to English law, and one which arises more urgently in the idea of the "universal transfer" which is considered to arise on death or insolvency. It is discussed further in Chapter 6A below.

More peculiar to English law is the concept of tracing. This concept exists both at Law and in Equity, although it is rather more extensive in Equity than
at Law, and analytically they may share only the name. Very roughly, tracing applies in two ways: of an item of "your" property to its proceeds on sale, perhaps reflecting some funds analysis, and of the item itself against its recipient.

At Law the first is apparently rather limited by the difficulties of identifying mixed proceeds, as a result of inflexible legal remedies. However, once identified, the proceeds are regarded almost as if they are the property sold. Thus the owner of a converted car is regarded as owner of the money paid for it, or more accurately his right to immediate possession of the car becomes a right to immediate possession of the money. This does not limit in any way the owner's right to immediate possession of the car, which he can accordingly "trace" to the recipient and assert in an action for conversion. Similarly a recipient of the proceeds can be sued for conversion, on the basis of the newly acquired immediate right to possess. This could lead, in theory, to a geometric progression of liability!

Tracing in Equity goes to far greater lengths than law to identify the proceeds of the property being traced, although it seems to make this effort only when the person hiding the proceeds is in a fiduciary position. This accords with Equity's conscience: it will try hard to remedy the misdemeanours of persons abusing a "trustworthy" status. This is aided by the analysis of fiduciary relations which are also ordinary Legal relations, such as agency, in terms of implied or constructive trust, and the strength of the fund concept in trust. Thus an agent holds a fund in trust for his principal, and the disposal of its constituent parts automatically impresses the trust on the proceeds. The principal may also be able to trace the individual item, in equity, to its recipient, if that recipient does not have a good "defence", like being a "bona fide purchaser". This very much resembles, in outline, the position of a recipient from a trustee in breach of an express trust: both may be explained in terms of the presence or absence of a reason, personal to that recipient, to impose upon him a "constructive" trust: is his conscience affected? Another matter which reflects the "conscience" basis of equitable tracing is waiver of tort. Accordingly if the principal wishes to trace an item of property to its proceeds he must ratify his agent's ultra vires act, and thereby "waive" his right to damages for conversion. Equity, unlike law, does not let the principal have his cake and eat it too!

The large vague powers of Equity to upset the results of general legal rules and other legal systems, are mentioned above. It may be argued that one of the major purposes of Equity was to upset Law, or at least to ameliorate the effects of its general rigid rules in specific circumstances, by compelling people to use or not use their Legal rights in specific ways. Thus trusts and equitable interests, despite protestations to the contrary, clearly turned the law of property upside down in practice. This power of Equity to compel certain "voluntary" results can also have international effects, some of which are discussed in Part B below.

Thus Equity, similarly to the forms of action at Law, gives rise to several difficulties in an international context, particularly via the concepts of trust and equitable title, and the destructive power of coercive personal jurisdiction.

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3) Some international problems from English theory.

It will be clear that English law cannot be easily analysed in terms of real and personal rights, despite the history of Equity and what might be regarded as the procedural character of the history of relative and multiple title. The practical theory of real and personal rights which is outlined in section B above might lead to a workable solution, yet several difficulties remain. Some of these are practical, like the sheer number of possible relative titles in existence or the methods by which to curb excessively coercive actions of Equity; others are more fundamental, like the classification as real and personal of rights which are really class rights.

Relative title is based upon possession, and is in a sense rather easy to acquire. How then ought a foreign court to deal with possession, or even more importantly the right to possess, when acquired in circumstances leading that court to apply English law to that acquisition? It would distort English law to regard possession and the right to posses as merely the procedural guise in which disputes about real rights arise, yet if possession, or the right to immediate possession, is regarded as a real right in itself, the power of this readily acquired real right is potentially destructive of other legal institutions with which it interacts. Thus a person could maintain that he acquired possession or the right to possess under English law and ask that a foreign court treat it like dominium. However, as explained in Chapter 3, choice of law rules governing real rights in property should operate in two separate stages: first to decide which real rights exist, and secondly to rank them. It would not be difficult for a foreign court to recognize the existence of English possession as a real right, and then to determine its value at the second stage. Another result of relative title is the tendency of English law to alter the ranking of valid rights rather than to extinguish them. This prevents the deminution of the glut of possible real rights which possession has created. The classic example of this is of course the marked tendency of English law towards the limitation of rights rather than their extinctive prescription, but this ranking alteration is also clear in the favour shown to purchasers of goods in "market overt" under s.22 and particularly under ss.24 and 25 of the Sale of Goods Act 1979. A civilian would normally extinguish the (former) owner's right or forcibly transfer it to the favoured third party. This is not the issue for English law, which maintains all of the relative titles intact and ranks them, creating an issue which does not arise for a civilian: the protection from the "ex-owner" of a sub-purchaser from the favoured third party purchaser. The doctrine of "sheltering" behind that third party's favoured title does not occur to a civilian, since there is nothing to shelter from because the threatening right has been extinguished. This is not a different problem from the treatment of possession as a real right, it just increases its scale.

More important problems perhaps arise in the characterisation of many of the rights of English law as real or personal. The trust is of course the classic example of this difficulty, and that on which there has been most debate. The trust is not, however, the only example, and indeed has the advantage of being severable from most of the others, since trust does not exist as such in civilian systems.

Other examples are provided by the sale of land and of goods, prior to conveyance of the legal estate in the first, and after payment but prior to
delivery of the goods in the second. The buyer of the land owns it in Equity and the seller owns it at Law; ownership of the goods is in the buyer "as between seller and buyer". Which rights should be considered real for the purposes of international private law? This problem should be resolved by deciding against whom the rights of each are valid, and by determining the presence or absence of credible personal factors relating to that validity.

A bona fide purchaser for value without notice of the legal estate in the land prevails over the equitable owner of the land, once he has legal title. Had the equitable owner been preferred to this third party there would have been little doubt that his right is real. It does not, however, follow that the equitable owner's right is personal. He clearly prevails over the seller's successors, ordinary creditors and his trustee in bankruptcy or liquidator.

The position of the buyer of goods is identical, for most practical purposes. The passing of property, under section 17 of the Sale of Goods Act 1979, "as between seller and buyer" is also effective as between the buyer and persons claiming "through" the seller, such as his successors, creditors and trustee in bankruptcy or liquidator. The effect of sections 24 and 25 of the Sale of Goods Act is to protect "bona fide purchasers with possession". This effect is not, in English law, the exceptional protection of such persons from the buyer's absolute ownership, but the result of the development of English contract and personal property law within the writ system.

Accordingly in each situation, broadly speaking, the buyer's right is a class right, valid against persons claiming "through" the seller, his representatives as it were, but not against any other third party, unless that third party was in bad faith, or possessed of a similar damning personal characteristic. In the ultimate analysis, the same may be said of the beneficiary's right in trust. These rights ought all to be characterised as real for the purposes of international private law, because there is no specific personal reason why the seller's creditors, insolvency administrators, or successors ought to be bound by them. Indeed, it might be said that the major importance of the distinction between real and personal rights is that real rights maintain their value in insolvency processes, though care is of course necessary to avoid circular argument from insolvency preference to real right to insolvency preference!

There are, of course, further difficulties arising in this context from English legal theory, like the characterisation as real or personal of the equitable charge, the major importance of fraud in English law, the apparently retrospective operation of the rescission of contracts for defects of formation, the effect of proprietary and other types of estoppel and the distinction between "inchoate" and "perfected" securities. Some of these further difficulties are discussed in Part B below.
H. Real rights, personal rights and other legal systems.

As previously mentioned, the analysis of property law in terms of real and personal rights seems most at home in purely civilian legal systems, and most uneasy in Anglo-American legal systems. This does not mean that civilian systems do not give rise to difficulties in this context, but that these difficulties tend to be matters of detail rather than structure. The tendency of certain civilian systems to contain a closed list of possible real rights is, however, counter-productive in an international context, since that list will sometimes be unable to take account of the real rights of other legal systems. Such systems should therefore be willing to extend their categories of real rights to take account of foreign real rights, rather than resorting automatically to distorted "translation" or non-recognition of foreign real rights.

The Scandinavian legal systems fall into a category of their own when it comes to property law. This is largely the result of the writings of some of the so-called "Scandinavian Realists", like Alf Ross and Vinding Kruse. A central point in their arguments was that ownership is not a useful concept from which to draw conclusions about the results of cases, but that such conclusions ought to be drawn by considering which party ought to prevail in certain situations of competition. This might seem to preclude analysis of Scandinavian property law in terms of real and personal rights, but it does not, particularly in an international context. This is because the results which are obtained for these competitions are largely amenable to analysis in terms of real and personal rights, and if so analysed, these results can be readily integrated with other legal systems.

A brief résumé of the general approach of Scandinavian thought in this field is appropriate. Ross, for example, distinguishes "rights of claim" and "rights of disposal" rather than personal and real rights. These distinctions are economic, a right of claim being to a "generically determined performance" and a right of disposal being to an "individually determined object". These may be exemplified by a buyer's right to a quantity of fungibles under the UK Sale of Goods Act 1979, on the one hand prior to ascertainment, and on the other hand after ascertainment. This distinction may thus be dynamic, a right of claim becoming a right of disposal, in this example on ascertainment.

There is then a distinction between the content of the right (of claim or disposal) and its protection. The protection of each type of right is not linked to its content, but is independantly determined. This protection is of two types: "static" and "dynamic". Both types of right are statically protected in the same way: by a general negative duty incumbent upon everyone (i.e. in rem) not to interfere with that right; that is to say the remedy for the inducement of breach of contract is the same as the remedy for the recovery of a car from a thief. It is in their dynamic protection that rights of claim and disposal differ, not by derivation from the nature of the rights in question, but according to the type of interaction of rights. However, even then the dynamic protection of rights is not a matter of the application of relentless logic to these types of interaction. Dynamic protection is what is found in Morison's Dictionary voce "Competition", what might be termed ranking in more modern Scots terminology, or what Ross describes as the "collision" of these rights in situations of "succession".
While adamant that there is no necessary link between the content of a right and the result of a "collision", or even between types of collision and their results, Ross observes some general trends, subject to exceptions, for the three possible collisions. Thus when two rights of disposal collide the earlier in time prevails; when two rights of claim collide neither is protected from the other; and when a right of disposal and a right of claim collide the right of disposal prevails. A cynic might observe that these results bear a remarkable resemblance to conventional ranking of real and personal rights. He would be correct, but miss Ross' principal point: the result of the collision should not derive from the content of the right or the type of collision. This point has clearly led to thoughtful rules of ranking in Scandinavian legal systems, but in turn misses another important point: how ought a court to resolve an unforeseen collision? If Ross is correct it cannot have great faith in his general rules of ranking, as they do not derive from the content of the rights involved or even the type of collision. No doubt empirical method can lead to the inducement of (fallible) general principles such as those of Ross.

The distinction between Scandinavian legal systems and those normally subject to conventional analysis in terms of real and personal rights would thus seem to be more apparent than real. It is clear that the terminology of real and personal rights is not dead in Scandinavian legal writing4. It is equally clear that the arguments of the realists have given rise to fairly numerous and ingenious exceptions to Ross' ranking rules, by drawing attention to the need for intelligent rather than dogmatic ranking. It does not seem that these specific rules cause greater difficulty in an international context in theory than do the exceptional ranking rules of legal systems containing broad general ranking rules based upon real and personal rights. Accordingly, each right of claim or disposal may be characterised as real or personal for the purposes of international private law, considered to subsist or not according to the first stage of the choice of law rule proposed in Chapter 3, and then be ranked according to the second stage of that choice of law rule.

An example seems appropriate5. If S sells land to B1 and then sells the same land to B2 a potential collision of rights of disposal arises. The ranking of these two rights of disposal under the Finnish Act of February 28, 1930 (s.21(2)) is as follows: B1 is normally preferred to B2 on Ross' general rule. However, if B1 has not recorded his title and B2 has recorded his title and taken possession in good faith, B1 has one year in which to challenge B2's "title", after which B2 is preferred. This might be seen as a short positive prescription of ownership, to which complex conditions have been attached. It does not seem to be viewed in this way in Finland, but rather as a specific ranking rule, designed for a specific collision, and so the dynamic protection of both B1 and B2 from the creditors or successors of S or each other are separate issues. Similarly in a normal sale the protection of buyer and seller from the creditors of the other are separate issues, depending upon various criteria of preference5.

One problem in an international context is clearly the characterisation of any given right of claim or disposal as real or personal for international purposes, since once so characterised its subsistence may follow from one choice of law rule, and its ranking from another. However, if the real or personal nature of a right is assessed from its practical incidence, and this incidence is assessed largely by means of its ranking behaviour in the context of its own system, Scandinavian property rights are awkward since their ranking is ad hoc! The
resolution of this difficulty may lie in what Ross induces empirically as a
general trend, but which may be more usefully employed as a set of residual
rules: his general "rules" of ranking. Thus in the example in the last paragraph
the specific ranking rules may be seen as a gloss upon Ross' general rule for
the collision of two rights of disposal, since it is clear that outwith that
specific collision B1 would be preferred to B2, and that both would (normally) be
preferred to the seller's creditors or successors. Both may then be considered
to have real rights for international purposes. A glut of real rights, as in
English law, might then be ranked according to the relevant system, whether
Scandinavian or not. This doubtless distorts Scandinavian ideas of ranking, but
not it is suggested excessively, since it is not unrealistic to regard specific
narrow rules of ranking as being based upon personal characteristics, even if
they operate outwith the bases of volition (e.g. bad faith or notice) or economic
balance (e.g. gratuitous recipients) used by certain other legal systems.

Thus, despite some rather radical differences between Scandinavian property
theory and that of other legal systems, it seems that their integration is far
from impossible, and it is heartening to note that Swedish commentators do not
see grave difficulties in this context.

As discussed in Chapter 4,D below, differences between Scandinavian and other
property theories have caused difficulties in formulating international
conventions in this context. The arguments of Scandinavian theorists have,
however, certainly influenced the development of specialised approaches to choice
of law in this field, and in particular the suggestions made in Chapter 3 and
Part B that different choice of law rules may apply to the operation of "real"
rights generally from those applying to their operation between the parties to a
transaction from which they derive.
CHAPTER 3

THE LEX SITUS CHOICE OF LAW RULE.

A. The rationale and inherent tensions of the lex situ's rule.

A legal system is obviously free to choose any choice of law rule which it considers appropriate, or to deal with cases containing foreign elements in any other way it wishes. It may indeed choose completely to ignore such foreign elements. However, if a choice of law rule is adopted, it should have some rational basis. In Part B below it is argued that the choice of law rule which is outlined in this chapter is broadly reflected in the Scots international private law of sale, securities and insolvency. It is suggested that a similar choice of law structure may perhaps be adopted more generally regarding property rights, where it has not already been adopted. The rationale for this choice of law structure is therefore of increased importance.

1) Certainty and pragmatic necessity.

Why then ought the existence and ranking of real rights in corporeal property to be governed by the lex situ's at the time of creation, extinction and ranking? The answer seems to be the utility of certainty in property transactions, and the promotion of this certainty, as regards third parties, by the choice of the lex situ's to govern issues relating to these third parties; as Wolff says: "real rights should be as manifest as possible". This certainty is coupled with the practical realisation that the courts of the situs have ultimate control over what happens to the property in question. Therefore the avoidance of worthless judgements, and needless disputes between courts, is best achieved by conceding some legal validity to those with practical control.

Certainty is doubtless important in most situations. It is crucial in property transactions, since these are at the centre of much economic activity. It is a legitimate desire to be able to know your legal position, in order to regulate your actions. The fulfilment of this desire is of great commercial importance. It seems best achieved by the application of the lex situ's. Certainty can also be promoted by applying systems other than the lex situ's, but when the interaction of the rights of a large number of possibly unidentifiable people is being considered, and these rights relate to a specific item of corporeal property, the lex situ's would seem to provide the greatest certainty for the greatest number.

If the plethora of potential third parties were asked to predict the connecting factor governing the consequences of their actions in relation to a given item of property, they would doubtless indicate the attribute of the property which is most obvious to them when they know little else about it: its situation. It will be of little consolation to a creditor attempting to attach his debtor's property to discover that ownership of that item of property has passed to someone else in accordance with a proper law which has been selected by people about whom he knows very little, in a contract of which he knows nothing. He cannot, as a general rule, be expected to know about these things, while he ought surely to be aware of the situation of the property in question. A seller and buyer clearly have the requisite
knowledge to place their contractual relationship under a different system: its proper law; and it is equally comprehensible to place their property relationship under the same legal system. It is, however, rather prejudicial to the seller's creditors to place their relationship with the buyer under this proper law, when they would not have the means by which to protect their position. The lex situs will therefore usually give third parties the certainty which they need to regulate their actions.

Usually the situs also has the ultimate practical control over a specific item of property. There are, of course, limits to such control, since many items of corporeal property move from one state to another, giving the possibility that a judgement which is initially worthless may subsequently become enforceable. Similarly a court of one state may have the ability to give indirect effect to its judgements in another state by coercive means. Nonetheless a worthwhile spirit of co-operation can be acheived by giving the situs what it can usually take. It may not then take so jealously. This co-operative approach to practical necessity has an important side effect: the uncertainty of "limping" judgements and coercive enforcement may be reduced, reinforcing the main reason to favour the lex situs: certainty.

2) The conflit mobile.

Such a co-operative ideal is also necessary to the satisfactory resolution of a major problem for the lex situs rule: the conflit mobile. "Conflit mobile" is the rather apt French term for a traditional difficulty of international private law: the alteration in time of the legal system indicated as appropriate by a static choice of law rule. The conflit mobile is probably inevitable in this field, but its problems may be largely overcome by taking account of it within the choice of law structure, and by some relatively tolerant behaviour by the legal systems involved in a dispute.

A conflit mobile would occur when an item of property moves from one state to another. The forum would be faced with the difficulty of deciding which of the two leges situs to apply to the case. This difficulty should be resolved by applying each in turn, the first to decide which real rights were created or extinguished by the first lex situs, and the second to decide whether any of the real rights existing at the time it became relevant have been extinguished, including those created by the first lex situs, and to decide whether or not any other real rights have been created. This structure exposes the tension implicit in the lex situs rule; each lex situs has the power to destroy the effect of any previous lex situs, and the duty to exercise such power to the minimum. This duty is necessary to protect the reliance of third parties upon the validity of the rights which have been vested in them by the first lex situs. It is obvious that the certainty which underlies the main lex situs rule would be seriously undermined were the second lex situs to extinguish foreign rights as a matter of course. It is equally necessary for the protection of third parties relying upon the second lex situs that such extinction be possible. It causes as little prejudice to the third parties of the first lex situs to leave them open to the risks of change of situation as it does to the third parties of the second lex situs to leave them open to the risk that the property had previously been situated in another state. The resolution of the conflit mobile accordingly relies largely upon the internal laws of each state.
acknowledging international situations, and rejecting insular solutions. It is discussed further in sections F, G and H.

3) Vested rights.

It might be said that this choice of law rule contains echoes of the "vested rights" theories of Dicey and Beale, or Pillet's similar theory of "droits acquis". It is not, however, contended that this structure is necessary, or that such a vesting argument may be appropriately applied in other fields; merely that it is the most appropriate, convenient and just compromise available for the resolution of the problems of the international private law of property.
B. The basic scope and structure of the lex situs rule.

The proposed lex situs rule concerns, broadly, the existence and ranking of real rights, in an international sense, in given items of property, when the issue involves a third party. Thus a distinction is suggested between issues of property rights which arise between parties to a transaction, and issues involving third parties. Each may have a different choice of law rule. It is, furthermore, third parties and real rights in an international sense, to which the proposed lex situs rule is applicable. There is thus an important distinction suggested between rights which are real, personal or neither in terms of an internal legal system, and those which are real or personal for the purposes of that system's international private law. A relatively concrete approach is suggested to the assessment of such rights and the identification of third parties. So too, as discussed in Chapter 6, A, the suggested choice of law structure ignores, in the first instance, ideal funds of individual items of property, concentrating instead on such individual items of property themselves.

One of the most important structural feature of this proposed lex situs rule is a basic separation of issues concerning the existence from those concerning the ranking of rights'. Thus a court may determine whether or not an alleged real right came into existence according to the lex situs at the relevant time, and whether or not that right was later extinguished according to the lex situs at the time of alleged extinction. This process may then be followed with regard to every alleged real right, and then all of the extent real and other rights may be ranked, according to the lex situs at the time of the ranking. Another important feature of this lex situs rule is the suggestion that there should be no division of the laws applicable to form, capacity and essential validity in a situation of the creation and extinction of real rights in property: all should be governed by the lex situs.

1) Scope of the rule: real rights, parties and third parties.

In chapter 2, E it was argued that there is a distinction of real and personal rights which could be used as a special tool of international private law. This distinction is slightly different from that normally drawn in analytical jurisprudence, since it is made in a practical way, at a concrete level. Thus it was suggested that a right ought to be considered real for the purposes of international private law if it is valid in the legal system of its creation, in a substantially uniform way, against most persons for whom there is no credible individual reason for such validity. It is suggested that the creation, extinction and ranking of such rights are, or should be, governed by the lex situs.

It was also argued that when the property aspect of a transaction arises between the parties to that transaction, the property relations of these persons could be characterised as personal rather than real, for the purposes of international private law. This characterisation distinction might then lead to separate choice of law rules for issues involving parties to transactions and for issues involving third parties. Thus on sale the issue of whether ownership has passed may arise between the parties to the sale. It is not difficult to characterise ownership rights as personal in this context, since there is an obvious personal reason for the validity of the property rights in issue and no third party is involved. The property issue
might then be resolved by a law such as the proper law of the relevant contract. If a third party is involved, such as the creditors or successors of each, the issue of ownership may then be characterised as real, and the lex situs applied with regard to these persons. Cheshire proposed an analogous distinction of issues concerning third parties, governed by the lex situs, and issues concerning the parties to a transaction, or any party deriving title from a party to a transaction, to which he applied the proper law of the transaction. Later Cheshire gradually withdrew from this position, arguing that only "representatives" of the original parties to the transaction could be regarded as "deriving title". Cheshire's argument doubtless arose from English theories of relative title.

It might be wondered why any special distinction of real and personal rights is necessary for the purposes of international private law, and why the distinction may not be drawn by the lex fori in its conventional way. The lex fori could then, if it wished, apply separate choice of law rules governing real rights to situations involving the parties to a transaction and to situations involving third parties. The characterisation distinction would then principally be between parties to a transaction and third parties, each having its appropriate choice of law rule.

Such an initial characterisation of real and personal rights would, however, fail to take account of rights which are usually analysed as personal even in their own systems, but which operate in a manner which casts doubt on such analysis, such as occurs in relation to the inhibition in Scots law. Choice of law rules indicate the legal system considered appropriate by the lex fori to govern a given issue and the peculiar classifications of individual legal systems, including that of the internal lex fori, can needlessly prevent the selection of an appropriate system. Many legal systems have a special classification of property as moveable or immovable for the purposes of international private law, because of the needlessly inappropriate results which might be derived from peculiar internal classifications. Similar inappropriate results could derive from peculiar internal classifications of rights as real or personal, or indeed as neither. A specialised classification of real and personal rights for international private law accordingly seems useful.

Is there then any need to characterise the property relations of the parties to a transaction as personal, since it is possible to apply different systems of law to different real issues, and so real issues between the parties to a contract might be governed by the proper law of the contract while real issues concerning third parties might be governed by the lex situs? It is suggested that there is such a need to characterise the property relations of the parties to a transaction as personal, if only because of the possible ill effects on a specialised distinction of real and personal rights were such relations not to be considered personal.

This is because the suggested distinction of real and personal rights in international private law concerns, as discussed in Chapter 2, the practical operation of rights against persons, and the presence or absence of a reason, individual to each person, for that validity. It is therefore confusing to characterise the property relations of the parties to a transaction as real just because the right in question affects third parties, since the transaction itself provides an obvious individual reason for the
validity of the property rights between these parties. If the real or personal nature of a right is assessed on the basis of its validity or invalidity against third parties, its validity among the parties to the transaction is a confusing red herring.

The importance of real rights in situations involving third parties explains the possible distinctions in choice of law rules relating to real rights issues concerning third parties, and personal rights issues arising between parties to transactions. Parties to transactions often have the power to determine which law applies to their transaction, or the knowledge upon which to base their actions. There is therefore no need to apply the *lex situs* to their property relations, since the application of other legal systems will not generally be detrimental to the certainty of their position. It might indeed be unnecessarily restrictive to apply the *lex situs* in such circumstances. On the other hand, the certainty of the *lex situs* is, as explained in section A above, crucial to a third party.

The distinction between the parties to a transaction and third parties was discussed in Chapter 2,E, where it was suggested that, broadly speaking, a third party is a person who is not a party to the main transaction in issue. Parties to transactions are bound by personal rights arising from such transactions and third parties are not bound by such personal rights. Third parties are, on the other hand, bound by real rights arising from such transactions.

There is of course some difficulty in deciding whether or not certain persons, such as successors or insolvency administrators, are third parties, since it would seem that both real and personal rights are valid against them. It is suggested that they are normally third parties, since personal rights are usually valid against them in a substantially different way from the way in which they are valid against the principal parties originally bound. Real rights, on the other hand, are valid against persons such as successors and insolvency administrators in substantially the same way that they are valid against other persons. Therefore, when there is genuine doubt, a third party may be said to be a person against whom paradigm real rights, like ownership, are valid in a substantially similar way to the way in which they are valid against paradigm third parties, like purchasers in good faith.

2) The existence and ranking of real rights: existence.

The suggested two stage process of the determination of the existence of real rights and their subsequent ranking has two central features: the characterisation of an alleged right as real, and the "translation" of all extant real rights to a common basis for ranking. The characterisation of real rights is discussed in section 1) above and in Chapter 2,E. Accordingly a real right in international private law need not necessarily be a real right in the terms of the internal law of any legal system, since such a characterisation as real is for the specific purposes of international private law. Nonetheless, most rights which are real in international private law are likely also to be real in most internal legal systems.

A court is required to characterise a given right as real or personal. It must apply the concepts of its own analytical jurisprudence, with the
international outlook which a problem containing foreign elements requires. It should apply this enlightened system to the practical behaviour of the right in question in the context of that right's own internal system. Accordingly, if that right is valid, in a substantially uniform way, against most persons for whom there is no credible individual reason for such validity, that right should be considered real. It may then be the case, for example, that a right to rescind a sale contract on the grounds of fraud might be considered real in an international context. If a right is considered personal rather than real for international purposes, it should be dealt with at a later stage in the choice of law process. Such personal rights are discussed further in section D below.

The question of whether or not such a real right has been created should then be referred to the law of the place of situation of the relevant item of property at the time when it is alleged that the right has been created.

If a real right is considered created, the court must then turn to the question of whether or not this real right has been extinguished, by the law of the place of situation of the item of property at the time of any alleged extinction. This legal system may, of course, be different from that under which the right was created.

Problems of characterisation of the lex causae then arise. It is suggested that Batiffol's internationalist approach to the integration of legal systems be adopted in this context. Is the second system to be taken to extinguish rights which are alien to that system, and if that system does purport to extinguish the right in question, need it purport to extinguish a real right? If, for example, an antique clock, which is part of a completely English trust fund, is lent by the trustee to his brother, and the brother takes the clock to France and sells it, the doctrine that "possession vaut titre" will probably protect the buyer from the claims of both the trustee and the beneficiary. French law, however, has no trust concept. Can it then be seen to extinguish the beneficiary's equitable interest? This, it is suggested, depends upon the interpretation of French law, and the translation of the beneficiary's right into that system, to see the effect of French law upon it. If the doctrine that "possession vaut titre" obliterates all prior real rights relating to a given item of property, the beneficiary's right, and that of the trustee, will probably have been extinguished.

A similar situation may occur in the passing of property "as between seller and buyer" in the English law of sale of goods. This may give the buyer a real right for international purposes, prior to delivery. If the goods are moved to Germany before delivery has taken place, and a period of German prescription then runs in favour of the seller, need this prescription consider itself to divest real rights? This, as in the previous example, is a matter of characterisation, here of the German law of prescription. That law may not purport to extinguish real rights in property, but consider itself to extinguish only personal contractual rights, given the fundamental distinction of obligations and property law in the German legal systems. The translation of the English right into the German system, and an enlightened interpretation of that system ought to resolve this problem adequately.
The tendency of English law to re-rank rights rather than to extinguish them gives rise to similar problems of characterisation. Suppose an item of property, which has always been in Germany, is stolen, sold in England in "market overt" and returned to Germany. German *dominium* does not exist as such in English law, and the market overt rule may not extinguish rights, but re-rank them15. However, the practical effect of the market overt rule is extincive of prior rights because of the doctrine of "sheltering" later rights therefrom, and it would clearly distort this effect to consider German *dominium* still to exist, along with the English relative title, and to rank these rights by the final German *lex situs*.

There are, perhaps, greater problems with the characterisation of a ranking provision of the *lex causae* as extincive or vice versa than there are with the characterisation of the scope of application of an extincive law in the context of alien rights or rights of differing internal classifications. This is because such characterisation affects the structure of the choice of law rule itself. A court should accordingly be very hesitant to characterise an extincive a law which considers itself merely to alter ranking16. The value of a right which is postponed should therefore be truly negligible for it to be considered extincive rather than postponed.

3) The existence and ranking of real rights: ranking and remedies.

Once it has been established which real and other rights exist, they must then be ranked, or if the remedy required does not involve a ranking process, the entitlement of the holder of a given right to the requested remedy must be assessed. It is conventional to assume that remedies are governed by the *lex fori*, as part of the procedure of that *lex fori*17. Such an assumption may be criticised on the ground that the favour for the *lex fori* in procedural matters is excessive, since the reason for applying the *lex fori* to procedure is convenience, and this reasoning does not apply to everything which is considered procedural by the internal *lex fori*18. Accordingly many procedural matters ought to be governed by systems other than the *lex fori*, when such a choice of law is convenient and appropriate. Therefore the issue of choice of law in proprietary remedies and processes ought to be considered on its merits rather than be left by default to the procedure of the *lex fori*.

The ranking of rights is not in itself a remedy, but a process by which to arrive at a remedy. Thus when there are two competing claimants to an item of property the process of ranking decides which of the two prevails over the other. That party then obtains a true remedy, like the recovery of the item of property, or an award of damages. Ranking is thus very much substantive, concerning, as it does, the comparison and relative evaluation of rights. Some common basis for comparison and evaluation is necessary for the ranking of two or more rights. An obvious common basis, when the rights in question derive from different legal systems, is the *lex fori*, and so it is often said that "priorities" are governed by the *lex fori*19. This is possibly the choice of despair, or more likely the unthinking application of the *lex fori* to "procedure".

Ranking is in fact more complex than it initially appears. There are several different types of ranking rules. There are, for example, special ranking rules which have been designed to govern the preference of a particular
narrow type of right over other rights or types of rights in certain situations and general residual rules of ranking which determine the preference of one general category of right over another. The difference between these two types of ranking rules is the level of abstraction at which they operate, and so the distinction is probably merely one of degree. It may, however, be possible to discern significant practical differences in degree in order to establish different categories of ranking rules for the purposes of international private law.

Thus there are certain preferences in ranking which occur only in certain insolvency processes, such as that of employees for a certain amount of the wages which they are owed by their insolvent employer. This is clearly a special rule of ranking, which occurs to a certain defined extent, only in certain defined circumstances. In the absence of insolvency, employees' wages claims have no greater ranking than any other claim upon the employer. On the other hand there is a clear general rule of Scots law that real rights in most types of property rank by the dates of their creation. The first rule is clearly a special ranking rule and the second a general ranking rule.

Degrees of abstraction between these two extremes could cause difficulties of characterisation. There is, for example, a ranking rule of Scots law which prefers the holder of a personal right to the later holder of a conflicting real right, if the holder of the later real right ought to have been aware of the personal right at the time of the acquisition of his real right. This ranking rule is of fairly widespread application, but can probably be classified as a special ranking rule because of the specific narrow nature of the contingency of preference. There are also various ranking rules of various legal systems which prefer the holders of certain types of maritime liens and mortgages in various different orders, when the basic ranking rule of many systems is to prefer real rights by date. These rules do not seem to be special exceptional ranking rules, because the reason for the ranking relates to the type of property in question, and not to any external contingency. It would therefore seem to be a general ranking rule, applying to ranking processes regarding ships. A rough distinction between special ranking rules and general ranking rules might then be made by assessing whether or not any circumstance outwith the general type of right or type of property determines the result of a ranking process. Such a circumstance might then indicate a special ranking rule.

Legal systems containing a large number of special ad hoc ranking rules might cause problems in this context. The Scandinavian legal systems, under the influence of Ross and Kruse, contain many special ranking rules, although it is arguable that they also contain general residual rules of ranking. Similarly English ranking appears to operate on an ad hoc basis, largely, it would seem, as a result of relative title, although the ability to plead the "ius tertii" strengthens the fairly generalised basis upon which the relative priorities of the titles of the parties to the case are determined.

The large numbers of ad hoc ranking rules in Scandinavian systems may be partially avoided by characterising some of these ranking rules as rules of the extinction and creation of rights, just as some of the tendencies of English law to alter rankings rather than extinguish and create rights may be characterised in practical terms as the extinction and creation of rights. Thus in chapter 2, a ranking rule of Finnish law was outlined as follows.
If S sells land to B1 and then to B2, B1 is normally preferred to B2. However, if B1 does not record his title, and B2 does record his title and takes possession in good faith, B1 has one year in which to challenge B2’s title, after which B2 is preferred to B1. Finnish law appears to view this process as a sophisticated special ranking rule. On the other hand, if B1’s eventual postponement to B2 is of negligible value, it is quite intelligible to characterise this ranking rule of Finnish law as a subtle negative prescription of B1’s title and positive prescription of B2’s title.

The English doctrine of “sheltering” behind a title obtained in market overt is discussed in Chapter 2,6,3). It too may be a matter of ranking in internal law. As suggested in section 2) above, this sheltering doctrine plausibly renders the sale in market overt extinctive of previous rights for the purposes of international private law.

Nevertheless, the ad hoc ranking rules of the Scandinavian legal systems and the relative rankings of the English system cannot and ought not to be distorted, as a matter of course, by such creative and extinctive analysis. A subtle approach to ranking in international private law may minimise the effects of such distortion.

It is sometimes suggested that when two competing rights arise under the same legal system, they ought to be ranked according to that system26. This suggests that the lex fori does not have a monopoly in “procedural” priorities, and that the lex fori is probably normally applied to provide a common basis for ranking. It was explained above that there are several types of ranking, broadly divisible into special rules and residual general rules. It is suggested that there should be a similar distinction in the choice of law rules by which competing rights are ranked. Thus special rules of ranking, such as exist in favour of selected personal creditors or insolvency, may quite reasonably be left to the lex fori27, as they are a specific narrow part of a specific type of ranking process. On the other hand residual general rules, in effect, resolve the major issues in most ranking situations; by perhaps preferring a security holder to a later owner or a person holding a personal contractual right to the property in question.

If a major requirement of choice of law in this context is a common basis for ranking, the lex fori is a potentially useful choice, albeit an easy option. It is, however, suggested that the appropriate system is the lex situs at the time of the ranking28, with the possible exception of the situation where all of the rights to be ranked have arisen under a different system, the exception being to apply that system. It might be wondered how different this would be from the application of the lex fori, since litigation regarding the ranking of rights in a particular item of property is likely to take place at the situs. However it is not true that all such litigation arises at the situs, and indeed much litigation regarding corporeal property resolves, by agreement, to ranking on the proceeds of the sale of the property in question, which may have been situated abroad at the crucial time. Application of the lex situs as a common ranking system has the advantage of consistency with rules applicable to the extinction and creation of the main rights ranked. It must also be said that the same arguments of third party certainty apply to the ranking of rights as apply to their existence. In addition, in a ranking context even holders of personal property rights will wish to assess their relative positions, giving them too
an interest in the general application of the *lex situs* to ranking issues. The *lex situs* accordingly appears the optimum common system by which to rank rights in and to a specific item of property. It is clear from the cases discussed in Part B below that the *lex situs* is often applicable to such ranking issues.

Once any common system has been selected it is necessary to "translate" the extant real and other rights so that their comparison and relative evaluation may take place. This ought to be done by analogy, where no precise equivalent exists in the ranking *lex situs*. As discussed in section C,4) below and Chapter 4,B,5),g), such an approach to translation was taken by the English court in *The Colorado* (1923) P 102 to a French hypothèque and by the Canadian courts to foreign liens. When analogy is difficult reliance should be placed upon the general theories of ranking under the *lex situs*, such perhaps as a preference of earlier rights over later rights.

It seems perfectly permissible on this basis to re-characterise as personal, for the purposes of its final ranking, a right which has been characterised as real for the purposes of the creation and extinction of rights. This is merely one facet of the translation of the right into the ranking system: the situation where the translation crosses the characterisation distinction of real and personal rights. As mentioned in section F,3) below, such a re-characterisation is fairly well established in the analysis of property as immovable for the purposes of choice of law and then as personal or moveable in the final application of the *lex causae*.

There are two further refinements of this ranking structure. The first concerns the possibility that several, but not all, of the rights to be ranked derive from the same system, and the second concerns the interaction of residual general rules of ranking, which it is argued are governed by the *lex situs*, and special ranking rules, which would seem to be governed by the *lex fori*. If all of the competing rights bar one derive from the same legal system, it seems unfair to the majority to determine their ranking inter se by the basic *lex situs* rule rather than by a subsidiary rule which would apply their common system. One remedy for this unfairness would be to rank all such cases in two stages. Firstly all of the rights would be ranked by the *lex situs*, and secondly all of the rights arising under the same legal system would be re-ranked amongst themselves on the proceeds of the first ranking, on the basis of their common legal system. This method of ranking appears to work well in the internal Scots law of inhibition.

A similar system of ranking may be applied in order to integrate the general residual ranking of rights, by the *lex situs* and common legal systems, with the special ranking rules of the *lex fori*. The *lex fori* could thus retain the ability to alter initial rankings, if sufficient reason, in the form of a special rule of ranking, existed for such alteration. The forum, however, ought always to be wary of undermining foreign rankings in an insular manner. The potential operation of this approach to ranking is discussed further in Chapter 6,C,6),d).

A further possible subsidiary approach to ranking is discussed in Chapter 4,B,5) and e) in relation to liens arising during the course of sale transactions. Further subsidiary rules may no doubt be capable of insertion into this proposed ranking structure.
The nature of the remedy eventually available to a party preferred in a ranking process is normally considered to be governed by the *lex fori*. The same is true of the nature of the remedies available to a real right holder in a case involving no ranking process. Indeed Anton (p. 748) considers such propositions "so elementary that they need no authority to support them". It would not, however, always be too inconvenient for a court to apply foreign remedies. Anton's proposition cannot be considered immune from challenge.

Assuming the *lex fori* to govern the nature and availability of remedies, the availability of a given remedy to the holder of a foreign right must be decided. If that right is alien to the *lex fori* the scope of application of the *lex fori* must be assessed in its international context. As in the characterisation of the *lex causae* in its application to the extinction of alien rights, the translation of the right in question into the terms of the *lex fori* is helpful. Thus if a beneficiary under an English trust wishes to obtain delivery of specific items of trust property from a third party in France, a French court should attempt to translate the beneficiary's right into French law and then interpret the French law of remedies in its international context. If the French court is sufficiently inconvenient by the prospect of applying a foreign remedy to apply its own, it should at least attempt to adjust its own remedies to their international context.

4) *Form, capacity and essential validity.*

It is conventional in international private law to divide issues of form, capacity and essential validity, and sometimes to resolve each type of issue by means of a different choice of law rule. There are compelling reasons to decide all by means of the same rule when the issues concern the creation and extinction of real rights in property. Just as the certainty of third parties requires the essential validity of the creation and extinction of real rights in property, and their ranking, to be governed by the *lex situs*, so that same certainty requires the form of any vesting and divesting of real rights to be governed by the *lex situs*, and the capacity of those creating, extinguishing, transferring, receiving and holding real rights to be governed by that *lex situs*. The certainty of third parties is no less damaged by referring these issues to a different law than it is by the reference of essential validity to a law other than the *lex situs*.

Dicey and Morris, Falconbridge, Zaphiriou and Lalive quite clearly support the application of the *lex situs* to issues of capacity and form arising in property disputes concerning both moveable and immovable property. Wolff (pp. 523-525) favoured referring capacity issues to the grantor's domiciliary law or the *lex loci actus* as regards moveables in accordance with much continental opinion, particularly in France, and indeed with regard to immovables.

The Scottish position is rather obscure. Anton does not discuss the issues of capacity and formal validity in the context of moveable property. It may be possible to argue, from the *obiter dicta* of Lord President Cooper in Carse v Coppen 1951 SC 233, that the capacity of natural persons to grant real rights in moveable property is governed by the grantor's domiciliary law, although it may equally be argued that Lord Keith considered this issue to be
governed by the lex situs. Similarly it can be argued that Inglis v Robertson & Baxter (1898)25 R(HL) 70 is authority to the effect that the formalities of transfer of moveable property are governed by the lex situs. Morris cites Inglis as authority for the reference of matters of form to the lex situs. However, no judge in the House of Lords, and only Lord Young in the Court of Session, mentions the possibility that the intimation of the assigment of a delivery warrant, the main issue in Inglis, might be characterised as a matter of form. This quite neatly illustrates Lalive's assertion (p. 123.) that "[t]he would appear difficult, if not to say impossible, when acts purporting to create property rights are concerned, to draw a precise and rigid delimitation between the sphere of formalities and that of essential validity". This is another reason to apply the lex situs to both of these matters.

Capacity and form are also rather obscure in the Scots international private law concerning rights in immovable. Erskine (iii,2,40.) was adamant that the lex situs governed the forms of deeds concerning immovable, though Anton (pp.606-608.) is more hesitant, pondering whether or not compliance with the lex situs is necessary or merely sufficient. Anton's doubts seem to rest largely upon Story's reference to the "masculine vigour" of the Common Law (para. 436 n.3.) and its ability to treat a failed conveyance as a contract to convey. Erskine's approach seems to miss the issue, which is the formal validity of the conveyance as a conveyance and not as a contract to convey. Story (para. 435.) did not deny that a deed required to be formally valid according to the lex situs in order to operate as a conveyance; he merely considered Erskine's views on the operation of a failed conveyance as a contract to convey to be overly pernickety. Such an issue must surely be referred to the laws governing various aspects the relevant contract.

Anton notes several difficulties in the straightforward application of the lex situs to capacity regarding immovable (pp.603-605). Some have argued that it is absurd that a person may be too young to make a contract to sell an item of property, yet be old enough to convey it. Anton noted that the cumulative application of both laws to the conveyance is the safest solution. It is not, however, absurd to apply the lex situs to the conveyance and another law to the contract. The law of contract and its choice of law rules are directed towards the the interests of the parties to the contract. Property law and its choice of law rules, on the other hand, are also directed towards the interests of third parties. Accordingly in this situation the interests of third parties may prevail over those of the person conveying. This situation is likely to arise relatively infrequently anyway, given the frequent dependence of a transfer of real rights upon the validity of a contract to transfer them, the possible applications of various types of renvoi in such circumstances, and the lessening comparative differences in ages of capacity. If it happens it is unfortunate, but not absurd.

Accordingly, while this thesis, and in particular Part B below, concerns largely the essential validity of property rights, it is suggested nevertheless that the same rules should generally apply to issues of form and capacity.
C. Flexibility in application of the lex situs rule.

The basic lex situs rule is quite simple. It accordingly requires some flexibility, to fulfill the various needs of its applications. This flexibility may be provided in a number of ways, for example by links between real rights and personal rights, by renvoi and by the use of subsidiary and exceptional choice of law rules.

1. Linked rights.

A connection of dependence sometimes exists between real and personal rights. Thus, in Scots law, it may be argued that if a contract of sale of goods is void, ownership of the property sold does not pass to the buyer: the real conveyance is linked to the personal contract'. On the other hand the German law of sale contains no such link between contract and conveyance. They are wholly separate juristic acts, and so even if a contract of sale of goods is completely void ownership may pass to the buyer if the parties "agreed" that it would pass and delivery has taken place2. This link ought then to be reflected in choice of law rules governing real property rights3.

This may be achieved by examining the detailed operation of the lex situs, to which reference is made by the basic choice of law rule. If that system does not require the consideration of personal rights in order to vest or divest real rights, as in expropriation or the German law of sale, the forum should not consider personal rights at this stage. If, on the other hand, the lex situs does require the consideration of personal rights in order to vest or divest real rights, the forum should consider personal rights at this stage. This, of course, is what is usually termed an "incidental question".

The forum must characterise the type and nature of the required linked personal right, in order that a legal system may be selected by which to decide the effect of an alleged personal right upon the vesting or divesting of the real right by the lex situs. This characterisation must be carried out by that lex situs, because any other method of characterisation could cause needless distortion of the operation of the real right in that system, or the needless nonsense of a link between incommensurable real and personal rights. Once characterised, a choice of law rule must be applied to the incidental question, giving rise to the classic dilemma of the incidental question: should the choice of law rule of the lex causae or the lex fori be applied? It seems clear that there is no simple answer to this dilemma of the incidental question, but that in some circumstances the lex fori would be more appropriate, and in others the lex causae4.

There can be little doubt that it is far more appropriate to apply the lex causae to an incidental question when the purpose of that question is the assessment of whether or not a real right has been vested or divested by the lex causae. It is absolutely clear that the incidental question is a subsidiary issue in this context, and not merely the fortuitous result of the way in which the issues have arisen. The issue of the personal right in question may arise again separately at a later stage in the case, and may be dealt with then, completely independently of its role as an incidental question5.
Thus if a contract of sale exists concerning goods situated in Scotland, court X should look to the Scots lex situs to see if ownership has passed. Scots property law arguably requires a link with a valid personal contractual right in order to transfer ownership to the buyer. Court X should therefore look to Scots international private law to assess which system Scots law considers to govern that personal right. In principle, Scots international private law considers the essential validity of a contract to be governed by its proper law. Court X should then attempt to assess which system Scots law would consider to be this proper law, and apply it to the essential validity of the contract, in order to decide whether or not the Scots lex situs has transferred ownership to the buyer. Court X may then wish to reconsider the contract, in order to decide whether or not there has been breach of contract, or to resolve some other contractual issue or perhaps some issue of unjustified enrichment. It should then apply its own choice of law rule, which may perhaps refer to the lex loci contractus for the essential validity of the contract, giving a different system from that selected for the incidental question. This different system should then be applied to the contractual issues, in the light of the real rights position which has already been established.

There is a risk that some of the systems involved will not fit together well. If, for example the Scots lex situs requires a valid contractual ius ad rem to transfer ownership on sale, a reference by the Scots lex situs to German law as the proper law of the contract would seem to give an ill-fitting link. This is because the right of the buyer under the German contract is not a ius ad rem in the sense of Scots property law, because, as mentioned above, in German sales law the contract and conveyance are completely separate: the German contractual right does not think it is linked to a conveyance. Equally, a French contractual right may consider itself also to be a conveyance. These problems are a commonplace of international private law, and are no different in the context of an incidental question or a main issue. It is thus for the lex situs to determine whether or not the linked incidental right is capable to vest or divest real rights. Thus the lex situs might require the parties to intend the transfer of ownership by their contract, and that this intention be reflected in the contract. It would then be rather difficult, but not impossible, to argue that a silent contract contained a contractual intention to transfer ownership, if that contract is incapable, in itself, of transferring ownership, according to its own legal system.

If there are items of property situated in several states, and all are included in a single property transaction, several different links may exist, for different purposes and with different systems. Thus a single sale contract may comprise property situated in Scotland, France and Germany. Each lex situs should be applied to the relevant items of property. In Scots internal law the conveyance of the property is linked to the existence of a contract which is not void, in French internal law the contract and conveyance are largely merged, and in German internal law the conveyance is not connected in any direct way with the contract.

Court X should look to the law which the Scots lex situs considers governs the essential validity of the contract, which may consider the contract valid; it should then look to the law which the French lex situs considers governs the contract, which may consider the contract voidable; and it should
then look to the German *lex situs* to assess the criteria thought relevant by that law to determine the validity of the conveyance. This German *lex situs* may consider the contract to be of some evidential importance to the intention to pass ownership. Ownership of the Scots property may have passed, ownership of the French property may have passed defeasibly and ownership of the German property may not have passed, perhaps because it has not been delivered.

The forum should then apply its own choice of law rule regarding the essential validity of the contract, perhaps to assess whether or not there has been any breach of contract, and if so what the effect of that breach might be, in the light of the ownership of the property which it has already determined in accordance with its *lex situs* choice of law rule. This choice may be of yet another system of law, and may leave the contract completely void. If this is the case, the forum must then apply its choice of law rules which govern unjustified enrichment, again to be applied in the light of the ownership position which the *lex situs* choice of law rule has established. These matters are discussed further in section D below.

There are some potential difficulties inherent in dépeçage of this incidental link. It could, for example, lead to irresolvable circles of reasoning, as, for example, could have arisen in the last example if the German consignment had been delivered and the contract, valid under each incidental reference, had provided a single date for the transfer of all of the property. Each *lex situs* might have had to assess whether or not ownership had passed under all of the other *leges situs*, before it could decide whether or not ownership had passed under its own system. This situation is probably best resolved by interpreting the contract in its international context, or if this does not resolve the problem, by assuming the validity of the transfers under all other *leges situs*, when analysing each *lex situs* in turn, in order to give a preliminary view of the general validity of the multiple transfer. That preliminary view could then be applied to assess the actual validity of the transfers by each *lex situs*. Such a solution has been suggested in the context of the formation of contract: the so-called "putative proper law".

2) Renvoi.

Renvoi can play an important part in the flexible operation of the *lex situs* choice of law rule, as it allows the main issue in a case to be referred to a system other than that initially referred to by a rigid choice of law rule. There is some degree of consensus that renvoi is appropriate in the field of property rights. This would seem to be because the relative harmonisation of result which may be obtained via renvoi is a positive virtue in the field of property rights, from which the wishes and expectations of the parties to transactions, perceived uncertainty and the seeming negation of the specific choice of *lex situs* by the international private law of the forum, do not significantly detract.

The wishes of the parties to transactions are limited by the structural emphasis of property law on law rather than volition, and the justification of their expectations is therefore similarly limited. The volitional content of property law is thus rather less emphasised than the volitional content of the likes of contract. Accordingly in contract it can be argued that the parties to a contract chose the substantive internal law which they wished to
govern their contract, and so the international private law of that system ought to be excluded, rejecting renvoi. It can be argued that such a proposition cannot be applied to a number of contractual situations, as perhaps where there is no express choice of law, or where the choice in such an express choice is of one of the parties only. This does not, however, derogate from the general volitional emphasis in contract: the theoretical ability of parties to define their rights and duties. The emphasis of property law, on the other hand, is upon the legal structure into which parties must fit their rights and duties. There is volitional content in property law, but it is exercised within far stricter limits than that in contract. There is accordingly less sympathy for the disappointment of expectations in property law than in contract, as the legitimacy of these expectations is more closely controlled by the law. It would therefore seem intelligible that renvoi be admitted in property rights: the law closely controls the rights of the parties, therefore the law can decide that another system of law is more appropriate to determine these rights.

It may be wondered what effect renvoi has on the certainty rationale of the *lex situs* choice of law rule. It is suggested that the certainty required in property law is the ability to find out one's legal position. Renvoi does not eliminate this in the same way as would a different choice of law rule. This is because the cautious third party can consult his lawyer, who can attempt to predict the result of renvoi. If the choice of law rule were different the third party would often lack the information necessary for his lawyer to make a prediction. Certainty is obviously reduced by renvoi, but would perhaps be further reduced by the greater disharmony of result to which the lack of renvoi could give rise, via increased forum-shopping options becoming available to litigants.

Lastly, it is clear that the *lex situs* choice of law rule does not reflect a fixed idea of which specific internal system is the "correct" one to apply to a problem. It rather reflects the idea that it is fairer to all concerned, and particularly to ignorant third parties, that they may rely upon the law applied at the situation of the property. The law applied at the situation of the property must surely include its choice of law rules.

It is suggested that two types of renvoi may be applied with regard to property rights, quite apart from the distinction of remission to the *lex fori* and transmission to a third system. The first might be termed "conventional renvoi", where the *lex causae* would refer the given issue to a different system from its own, were it the forum, and the second "permissive renvoi", where the initial *lex causae* might consider its own or another system applicable were it the forum, but does not object to the reference of the given issue by the actual forum to a certain other legal system. Conventional renvoi, as just explained, is probably applicable in this context.

There is little authority for the existence of permissive renvoi. It would allow the operation of choice of law rules at two levels: the first being a general level, referring to a system which is appropriate for general reasons like coherence and certainty, and the second being a reference to the system which the forum considers more appropriate to the narrower circumstances of the case than the general rule. As discussed in Chapter 6, A, such a structure of renvoi could make "universal" transfers of funds operate.
successfully and allow for the integration of other narrower subsidiary choice of law rules, where the general choice of law rule is particularly inappropriate.

Accordingly, the forum might wish the bankruptcy of an individual to be governed by the law of his commercial domicile, or the winding up of a company to be governed by the law of the place of its incorporation or of its operational centre. It might wish to refer all of the main issues to this law, including those relating to the transfer of real rights in specific items of property. Permissive renvoi may give hope that the desired result might almost be achieved, by means other than an unenforceable and distorting unilateral choice of law rule, coupled with questionable extra-territorial enforcement procedures. Thus the forum could refer the issue of the existence of real rights in property to the lex situs, but only to decide whether or not that lex situs prevents the vesting and divesting of rights by a different law which the forum would otherwise select. Thus a universal transfer may be constructed via the sum of the enlightened leges situs, and constructed more effectively than through unilateral choice of law rules.

Permissive renvoi is different from conventional renvoi, because the reference to a system other than that selected by the initial general choice of law rule does not occur because the system referred to considers that the issue ought to be governed by that third system, but because it has no objection to the reference of that issue to that third system by the forum. It is also different from a "declinature" theory of renvoi, since the system to which initial reference is made need not think its own system inapplicable, were it the lex fori, and also since that system initially referred to must have no objection to the application of the third system. It thus leaves residual control very much in the hands of the system to which initial reference is made. This residual control enables the integration of the general lex situs choice of law rule with other connected narrower choice of law rules which are more appropriate in situations of "universal" transfer, and in other situations where the application of a law other than the lex situs might be desirable.

There are traces of this type of analysis in several fields of international private law: in exceptional choice of law rules, in the analysis of the exclusion of foreign law on the grounds of public policy and in renvoi analysis itself.

Dicey (pp. 518-28.) had two alternative rules for the inter vivos transfer of individual items of moveable property: the lex situs or the owner's domiciliary law. A transfer under either was considered valid. His domicile rule was, however, subject to the exception that it did not apply where the lex situs prescribed a special form of transfer. Dicey's analysis seems to derive largely from Story's, whose approach was slightly different. Story's general rule was to apply the domiciliary law to all transfers of moveable property, whether individual or universal, inter vivos or mortis causa. This rule operated "unless there [was] some positive or customary law of the country where they situate, providing for special cases". He also discussed this point in the context of bankruptcy, which he considered to fall under his general domiciliary rule. He said: "It is admitted that the general rule is, that personal property...has no locality, but follows, as to its disposition and transfer, the law of the domicil of the
owner. But every country may by positive law regulate as it pleases the disposition of personal property found within it; and may prefer its own attaching creditors to any foreign assignee; and no other country has any right to question the determination"17. This looks rather like a reference to the *lex situs* to see if it objects to the application of the domiciliary rule.

Paulsen and Sovern19 argue in a similar way that the exclusion of foreign law on the grounds of public policy is manipulated in order to apply a more appropriate law than that indicated by a general choice of law rule. Thus they argue19 that the domiciliary law indicated as applicable to "general assignments" is often excluded, on the grounds of public policy, from application to specific items of property which have been arrested by creditors. They argue that this is done because the *lex situs*, which by chance is usually also the *lex fori*, is considered more appropriate. This bears some structural resemblance to Story's reference to the *lex situs*: the *lex situs* (*lex fori?*) is considered before the domiciliary law is applied. This structural similarity is also evident in Paulsen and Sovern's following application of renvoi. They argue20 that the admissibility of renvoi to the domiciliary law where the initial reference is to the *lex situs* indicates that the forum considers the domiciliary law more appropriate, but cannot ignore the *lex situs*. Both of these arguments are slightly out of alignment, since the exclusion of foreign law on the grounds of public policy seems to replace that law with the *lex fori* and not the *lex situs*21, and the application of a conventional renvoi applies the system considered more appropriate by the system to which initial reference is made, rather than to that considered more appropriate by the forum. Such are the structural limitations of the manipulation of results.

Similar structural limitations are evident in much of the more general discussion of renvoi. Griswold outlines a similar argument to that of Paulsen and Sovern22. He argues that all succession problems are initially referred to the *lex situs*, which may then refer the issue to the domiciliary law. This does, however, make the rather trite assumption that the *lex situs*, if it makes such a reference, will refer the issue to the domiciliary law, rather than to the national law of the deceased or to some other legal system, and, of course, it would apply the law considered more appropriate by the *lex situs* rather than that considered more appropriate by the forum.

The adherents to the declinature theory of renvoi perhaps provide the closest approach to a permissive renvoi. The declinature or désistement theory is now largely discredited as a general theory of renvoi 23; it does, however, provide important insight into the possible operation of subsidiary choice of law rules. Niboyet24 argued that if a legal system initially referred to by a choice of law rule did not consider its own law applicable it was declining interest in the case. The forum could then apply its own law, if some connection existed between the case and the forum state. This approach is obviously insular, since there is no reason to assume that the system to which reference is initially made has no interest in the system to be applied to that case. It is equally insular for the subsequent reference to be solely to the *lex fori*.
Lerebours-Pigeonnière adopted a more subtle approach. He argued that the forum could apply a subsidiary choice of law rule when the system to which initial reference is made does not consider itself applicable to the case in question. This "règlement subsidiaire" could then refer to a system other than the lex fori. This theory is not subject to quite the same criticism of insularity as is applied to that of Niboyet. It would, however, seem to be flawed by the same trite assumption that the system to which initial reference is made has no interest in the system which is applied to the case. It is also subject to criticism for introducing a plethora of uncertain subsidiary choice of law rules. It does, however, contain a potentially useful proposition: if the system indicated as appropriate by a main choice of law rule is, on closer examination, not appropriate, a subsidiary choice of law rule is capable of applying a more appropriate system.

Permissive renvoi reverses the order of this proposition. Thus a rule appropriate to a narrow category of situations will be applied, unless there is a good reason for applying a more general rule. This is not subject to criticism for ignoring the system initially referred to by the general rule, since reference is made to that system solely to assess whether or not the particular narrow rule is applicable. Neither may it be criticised for giving rise to an uncertain plethora of subsidiary rules, since the existence of the narrow rule and its relationship with the more general rule may be assessed in a relatively certain and straightforward manner. Thus a general choice of law rule may exist, referring the existence of real rights to the lex situs, and a narrower rule may exist, referring the transfer of ownership on bankruptcy to the domiciliary law of the bankrupt. The domiciliary law may then be applied on bankruptcy, provided the lex situs does not object. This may have been what Story meant when he referred to the "positive law" of the situs. He did not, however, consider this positive law to be a general rule from which substantial derogation might be made, but as a narrow exceptional and independent choice of law rule.

Permissive renvoi could operate in both an active and a passive way. Active permissive renvoi would require the system to which initial reference is made to contain a rule of law according specific approval to the possible application of the law indicated by the forum’s subsidiary choice of law rule. One of its most useful applications might be in universal transfers, such as sometimes occur on insolvency. True universal transfers might then be achieved in a controlled manner. Passive permissive renvoi would merely require the system to which initial reference is made not to contain a rule of law which denies the application of the law indicated as applicable by the forum’s subsidiary choice of law rule. Such passive permission might enable subsidiary choice of law rules to operate in exceptional situations where the lex situs is manifestly inappropriate. Thus passive permissive renvoi could resolve some of the awkward difficulties of property in transit discussed in section II, 1) below.

3) Subsidiary and exceptional rules.

It was argued in section 2) above that a structure of permissive renvoi could give rise to subsidiary choice of law rules which would provide some flexibility to the rigid general lex situs rule, while maintaining a coherent choice of law structure. It was suggested, for example, that a subsidiary choice of law rule favouring universal transfers on insolvency could provide
Effective and coherent universal transfers if an active permissive renvoi were sought from each relevant lex situs. It was further suggested that subsidiary choice of law rules may be applied regarding property in transit on the basis of a passive permissive renvoi from any potentially applicable leges situs.

Similar more general subsidiary rules have been suggested regarding ownership and security rights arising on import and export transactions. These are discussed in Chapters 4, A, 2) and 5, B, 3), c). Further such subsidiary rules may operate in relation to property subject to documents of title. Commercial convenience does suggest application of the lex situs cartae as regards property subject to documents of title. Cases discussed in Chapters 4 and 5, such as Cammell v Sewell (1860) 5 H & N 728, suggest that the lex situs of the property in question may nevertheless prevail in many situations. Further subsidiary rules are also suggested in section B, 3) above regarding ranking issues.

Exceptional choice of law rules may also prevent inappropriate applications of a rigid general lex situs rule. However, as subsidiary rules may normally be integrated more coherently with general principal rules than can exceptions to such general rules, it is suggested that the adoption of subsidiary rules is normally preferable to the adoption of exceptional rules. This is particularly true if it seems appropriate to apply a rule other than the general rule to a specific category of transactions, such as import and export transactions.

Exceptional rules probably work more effectively as regards specific categories of property than as regards specific categories of transaction. Thus 'mobile goods' are dealt with in Article 9 of the Uniform Commercial Code of the USA as a separate category of property from other goods as regards security interests. A fixed reference to the lex situs seems inappropriate as regards such goods, given the constant conflit mobile arising in respect of such goods if a fixed reference is made to the lex situs. As discussed in the next section, similar problems of conflit mobile arising in relation to ships may have given rise to separate choice of law rules regarding ships.

4) Ships.

Given the length of the history of problems of conflit mobile regarding ships, exceptional or subsidiary choice of law rules may be more readily accepted as regards ships than other categories of property. The development of such rules has not been straightforward, not least because of the pervasive influence of the idea that the law maritime constitutes a universal ius gentium.

Paradoxically, this concept of the law maritime appears to have led to the exclusion, as local customs contrary to that universal ius gentium, of some foreign rights differing from those available under the lex fori. English Admiralty courts were thus said by Willes J, in Lloyd v Guibert (1865) LR 1 QB 115 (at 123) to apply "the general maritime law, as administered in the English courts". Scots maritime law was found in Currie v McKnight (1896) 24 R (HL) 1 to be the same as English maritime law, constituting the maritime law of Great Britain.
Some foreign 'local customs' continued to be ignored as contrary to the general law maritime. Thus in Clark v Bowring & Co. 1908 SC 1168 a New York repairs and necessaries lien was not considered by Lord McLaren (at 1176) to be 'recognised by the general maritime law of the world', if perhaps it might be effective in New York. In Clark v Bowring arguments that New York law was applicable as the lex loci contractus were rejected, and despite some references to the Scots registration of the ship and its situation at the time of the action, it is probable that Scots law was applied to the validity of the lien as the lex fori.

The majority of the Privy Council in The Halcyon Isle [1981] AC 221 applied the lex fori to the validity of a New York repairs lien more overtly than the First Division did in Clark v Bowring. The minority in The Halcyon Isle largely rejected a specialised approach to choice of law in maritime law and applied New York law to the validity of the lien, as, it would seem, the law governing the contract from which the lien derived.

The analysis by the minority in The Halcyon Isle of the repairs lien by more conventional methods of choice of law accords with the application of the law of the place of registration to the transfer of ownership of a ship in Schultz v Robinson & Wiven (1861) 21 D 120 and the application to the validity in the first instance of a ship mortgage in Hooper v Gumm (1867) LR 2 Ch App 282 of that law.

Reference to the law of the place of registration of a ship seems an eminently sensible exceptional choice of law rule regarding rights in ships. Such a general exceptional rule has not, however, been authoritatively established, particularly as regards maritime liens. It is suggested that fragmentation of exceptional rules regarding ships between the law of the place of registration and the lex fori can only be productive of confusion and injustice, and that it may therefore be preferable if all choice of law rules relating specifically to ships were to be regarded as subsidiary to the general lex situs choice of law rule rather than exceptions to it.

Maritime liens may, perhaps, be distinguished from other rights relating to ships as rights arising only on enforcement by admiralty action in rem against the ship in question. There is certainly English authority to this effect. It is suggested that such characterisation is inappropriate for the purposes of choice of law, particularly if such a lien is 'perfected' with retrospective effect under a given version of the law maritime. The minority in The Halcyon Isle did not so analyse the New York lien in that case. It was similarly accepted in Clydesdale Bank Ltd. v Walker & Bain 1925 SC 72 that a maritime lien would have attached at the date any relevant services were rendered. It is accordingly suggested that such rights be considered real for the purposes of choice of law at the time of the occurrence of the relevant events and prior to the raising of an admiralty action in rem.

If a maritime lien is considered to arise on enforcement it is relatively easy to characterise it as procedural, and thus mechanically apply the lex fori thereto, as did the majority in The Halcyon Isle. Such an argument reinforces the application of the lex fori to such liens as the general law maritime. It is thereafter relatively easy to ignore distinctions between the existence and ranking of rights or to consider such distinctions.
unimportant, as ranking issues may, as by both majority and minority in The Halcyon Isle\textsuperscript{37}, also be characterised mechanically as procedural, and thus referable to the lex fori.

It is unfortunate that so many doubts exist regarding the analysis of rights in and to ships in international private law, not least because it is difficult to draw general conclusions regarding other types of property from cases relating to ships. This is particularly true of ranking issues, as the ranking of claims relating to ships can be particularly complex and could shed light upon more simple ranking issues relating to other types of property. Thus, for example, in \textit{The Colorado}\textsuperscript{38} the validity of a French hypothèque was referred to French law and that hypothèque was then translated as its nearest equivalent under English law for the purpose of determining its ranking under the English lex fori. However, other cases relating to ships raise many doubts concerning the general propositions which may be drawn from \textit{The Colorado}, both as regards the law governing ranking issues and the translation of rights for the purposes of ranking. This is unfortunate as \textit{The Colorado} contains much interesting analysis.

Accordingly ships should probably be regarded, on the whole, as a separate category of property for the purposes of choice of law to which, on the whole, exceptional choice of law rules apply.
D. Personal rights and the real rights rule.

The proposed choice of law rule is based upon the distinction between real rights in property and personal rights to property. The main real rights rule has been outlined above. It is accordingly appropriate to show how personal property rights fit into this scheme. Several issues arise here concerning, for example, the choice of law rules applicable to property rights which are characterised as personal rather than real and the interaction of personal rights with rights characterised as real.

Rights which have been characterised as personal rather than real have their own choice of law rules, like the proper law of a contract, or the lex loci delicti of a delict, or the proper law(?) of unjustified enrichment. Such rights can usually be clearly distinguished from real rights in property. However, some rights which are almost real, but cannot quite be characterised as real, must be governed by some legal system. If, perhaps, the right to proprietary estoppel under English law were not characterised as a real right, which system would govern the estopper's right? It was, however, difficult enough to decide which law to apply to proprietary estoppel without characterising it as personal rather than real. Characterising it as personal neither adds to nor detracts from this difficulty.

There is, however, a possible residual problem: the choice of law rules to apply to rights which might be characterised by the internal lex fori as real, but which ought to be characterised as personal for the purposes of international private law. Traditional internal lex fori characterisation as real might give a straightforward choice of law rule, where an "international" characterisation as personal might leave a gap. It is, however, difficult to think of an example of a right which might be characterised as real according to the internal law of a system, but which has the practical effect of a personal right, which might give it a personal characterisation for the purposes of international private law. This may be because legal systems tend to attempt to minimise real rights, because of their great power, and so attempt covertly to analyse some real rights as personal. There is no similar urge to minimise personal rights or so to hide them in real form. This does not mean that this residual problem does not exist.

In section C,1) above it was explained how a real right may be linked to a personal right, how this possible incidental question ought to be resolved according to the system indicated as applicable by the relevant lex situ and how an issue of personal rights may arise later in the case. It was argued that these later personal issues ought to be decided in accordance with the choice of law rules of the lex fori, on the basis of the real rights position which had already been established. It was also explained why incidental personal rights ought to be open to dépeçage, both according to the indications of each lex situ and between the incidental issues and the main issues of personal rights. It remains to explain why the main issue of personal rights should be postponed to those concerning real rights: why they should be decided in accordance with the real rights position which has already been established rather than the real rights issues arising as incidental questions in the determination of issues concerning personal rights.
The simple answer is that when real and personal rights interact, personal rights tend to be subsidiary to real rights. Indeed the whole purpose of many such personal rights is the alteration or maintenance of real rights: a contract of sale is about the transfer of ownership on sale and not vice-versa. A more subtle answer concerns the ease of severability of issues. It is relatively easy to apply dépeçage to personal rights, to use personal rights to decide the real rights issues, and then to decide the personal issues as main issues. In this way both the real issues and the personal issues are treated as main issues. It is not so easy to decide personal issues by means of incidental real issues and then to return to the main real issues. Thus it is easy to decide that a contract of sale is void, and so that ownership has not passed, and then to decide that the contract is really valid, leaving the seller in breach for not transferring ownership. It is not so easy to decide that the contract is valid and whether or not anybody is in breach, and then to consider the ownership position. If the ownership position is regarded as incidental to the contractual issue it can scarcely arise as a separate main issue on its own: you can scarcely decide that there has been no breach of contract, because ownership has passed, and then decide that ownership has not passed. It would make a mockery of the relationship between the law of obligations and property law so to decide.

However, in many circumstances the interaction of personal rights with apparent real rights will not arise in this way. Thus if there is a dispute among the parties to a transaction, and no third party is involved, it has been suggested that no issue of real rights, in an international sense, arises. The property issues among the parties to the transaction may be decided in accordance with a law other than the lex situs, perhaps the proper law of a contract\(^2\). The obligations of the parties may then be determined in accordance with the proper law of the contract or the law governing unjustified enrichment, in the light of the property relationship which has been established. If, however, a third party is involved, the lex situs becomes applicable. Thus if there is a contract for the sale of an item of plant situated in Germany, and the proper law of the contract is English, if the issue of breach of contract arises between the parties to the contract, perhaps by the late transfer of ownership, there may be a difference in the result of the case, depending upon the presence or absence of a third party. Thus if the issue arises between the buyer and seller ownership may be considered to have passed at the time of contracting, in terms of the proper law of the contract\(^3\). There may then be no breach of contract. On the other hand, if a third party, such as a sub-purchaser or trustee in bankruptcy, is involved, ownership of the plant may not have passed because no delivery has taken place to the satisfaction of the German lex situs\(^4\). The seller may then be in breach of contract. This is not arbitrary or self-contradictory; the lex situs is not applied in the first example because there is no third party relying upon the situation of the plant.

Real and personal rights also interact in the ranking of rights. This is discussed in section B.3 above. A ranking process relative to an item of property can involve both rights which are real, in an international sense, and rights which are personal. It is suggested that the lex situs at the time of ranking should be applied in the first instance to both, as regards normal rules of ranking, and the lex fori should thereafter be applied to both, as regards special rules of ranking, with rights being translated for the purposes of ranking in terms of the appropriate legal system\(^5\), and with
subsidiary rules operating after the main rules relative to, for example, rights deriving from the same legal system.
E. The inappropriate or undesirable lex situs.

It is unfortunate that choice of law rules do not always give satisfactory results; it is also inevitable. Fixed rules provide consistent and predictable answers to general questions, but cannot respond to infinite varieties of situation. There are several techniques by which to alleviate the inappropriate or undesirable effects of a given choice of law rule. One is to reformulate that choice of law rule in a more appropriate or flexible manner; another is to provide some additional detailed exceptional or subsidiary choice of law rules to cater for specific situations; and a third is to exclude the application of an indicated foreign law in the concrete context of a specific case. It is also possible to frame substantive internal law with a view to its international operation and to adopt internationally uniform or harmonised laws to address specific international problems.

It was explained in section A above why a fixed general lex situs choice of law rule is appropriate in this field, and in section C above how its basic inflexibility might be lessened by incidental questions, renvoi and subsidiary and exceptional choice of law rules. It is not easy to formulate a general rule which is more flexible or appropriate, while retaining the advantages of certainty in property transactions. The main exceptional choice of law rule suggested is that which decides property issues which arise between the parties to a transaction by a system other than the lex situs. An excess of exceptional ad hoc rules is not, however, something to be desired, as it can lead to unnecessary uncertainty and incoherence. Exceptional exclusion of foreign law and an international approach to internal law are better suited to avoiding the undesirable effects of a fixed choice of law rule, while maintaining structural coherence and certainty. Harmonisation and unification of internal laws are obviously the best options, if impractical over broad fields.

Foreign law is excluded for several reasons, as for example in the case of foreign revenue or penal laws, where foreign law is not applied, probably because of perceived breaches of sovereignty. However, in Scots international private law the usual reason for the exclusion of foreign law is that its application in the circumstances of the case would be contrary to the public policy of the forum. The forum applies its choice of law rule and assesses how the selected law would apply to the case before it. If the application of that law to that case would lead to a result which is fundamentally opposed to the policy of the forum state in international matters, the forum will refuse to apply that foreign law to the case. Instead, the lex fori will usually be applied, although much can be said in favour of applying some other law, if that law is more appropriate in the circumstances. The application of a law other than the lex fori to replace a foreign rule of law excluded on grounds of public policy is slightly different from the drafting of exceptional choice of law rules, since the replacement of the system indicated by the principal choice of law rule occurs after the law indicated has been examined, and excluded as contrary to public policy, rather than at a prior stage of characterisation. It would also seem to operate at a more concrete level than exceptional choice of law rules. Lagarde suggests this variant of the public policy theory has not been widely adopted.
There is an important distinction between the extinction of a right and its non-recognition on public policy grounds. A right is extinguished by the lex causae, when the choice of law rule of the forum is applied. A right is not recognised when the application of the lex causae to the case is highly objectionable in terms of the public policy of the lex fori in international matters. Thus a decision as to the recognition of a right takes place at the stage of choice of law. In this context the rights which exist under each lex situs are accordingly granted recognition. The prima facie validity of such rights may then exceptionally be disapplied. This is the non-recognition of a right.

This seems fairly straightforward: in extreme circumstances the forum refuses to apply the selected foreign law. It is, however, quite easy for the forum to invoke the public policy exclusion in circumstances where it is not really appropriate, since an affront to public policy is a rather vague matter, and one of degree. This tendency should be resisted, as the refusal to apply a foreign law which a choice of law rule indicates to be the appropriate law tends to undermine international private law itself. If it is remembered that the policy in question is not that of the internal lex fori, but that of the international private law of the forum, such insular excesses may be minimised.

Thus a court may be perfectly entitled to refuse to apply a foreign expropriatory law on the grounds of public policy, if, perhaps, it discriminated against the nationals of the forum state and gave no compensation. The choice of law rule indicates the lex situs is applicable, and in the exceptional circumstances of the case, the international public policy of the forum refuses to apply it.

There are several typical situations of public policy exclusion of foreign law, though all are connected to the central idea of a fundamental external policy objection to the specific application of the foreign law in issue. Thus laws which are outrageously immoral by the standards of the forum, or which are contrary to vital state interests of the forum state are excluded. More importantly, for present purposes, laws which cause extreme prejudice to persons residing or acting in the forum state, and laws which cause extreme conceptual difficulties in their integration with the lex fori or other relevant systems, may be excluded from application on the grounds of public policy.

These latter two types of public policy exclusion of foreign law are particularly prone to excessive application. It should not be sufficient, for example, to exclude a foreign security right that it has been registered in the state of its creation, but cannot be registered in the state to which the subjects subsequently move; the prejudice to persons residing and acting in the second state has more to do with the inadequacy of the law of the second state than with anything fundamentally objectionable in the concrete application of the relevant foreign law. Similarly, it is insufficient for a Civilian system completely to exclude the Anglo-American concept of trust on the grounds of public policy; the conceptual difficulties involved in its integration with such systems are great, but surely not great enough to give rise to fundamental objections. Indeed much international private law involves the integration of differing conceptual structures, many of which cannot be wholly reconciled. Such conceptual difficulties are thus a matter
of degree, and they must surely need to be extreme to become fundamentally objectionable to the external public policy of the forum.

"Fraud à la loi" is another, slightly different, type of public policy exclusion of foreign law. It is designed to overcome a specific difficulty of international private law: the evasion or manipulation of choice of law rules. It would also seem to result in the possible application of a law other than the lex fori when the law selected by the choice of law rule has been excluded. Thus an item of property may be moved to a certain state purely in order to create a right which is unavailable under the law of an otherwise relevant legal system. That right may then be refused recognition on the narrow grounds of fraud à la loi, and the law of the other state applied to determine the validity of the alleged right. It has been suggested that this doctrine does not exist in English international private law. If very narrowly applied, there seems little reason why it should not be a very useful part of Scots, and English, international private law.

In addition to excluding foreign laws which lead to undesirable results it is possible for the substantive internal law of a state to be designed with a view to its international application. Thus potentially inappropriate or undesirable results of a choice of law rule may be avoided by designing substantive internal law in such a way that the normal operation of the relevant choice of law rule is to give an acceptable result, and so remove the need to ameliorate the undesirable effects of its operation by the exclusion of law. The registration of securities gives good examples. It is possible that a state may require the registration of foreign securities within a period of the entry of the subject to its territory, on pain of their divestiture. This operates within the choice of law rule: the security may be valid by the original lex situs, only to be divested by the second lex situs when the holder of that security has failed to alleviate the risks to persons residing or acting in the second state, by registering his security. The Institute of International Law advocated such a solution at its Madrid conference in 1911 as follows: "[e]n cas de déplacement d'un meuble d'un territoire à un autre, les droits réels valablement acquis sur la chose doivent être respectés, lors même que la chose se trouverait ensuite sur un territoire différent. La loi de la nouvelle situation peut toutefois exiger, pour des motifs de tutelle sociale et d'ordre public, que l'on remplisse les conditions prescrites pour que le droit réel puisse produire effet vis-à-vis des tiers".

This could be expressed as a specific exclusion of foreign law, but is better expressed as a normal substantive internal law, because of the greater international effectiveness and the closer approach to the actual problem of such an expression. The exclusion of foreign law is the exceptional non-recognition of a right, which is particular to the forum, and the rule of internal law is the extinction of a right in accordance with the normal choice of law rule. Extinction of rights is likely to have greater multinational effect than their non-recognition. Thus the issue of the validity of a security which does not require registration by the first lex situs, but which has not been registered as required by the second lex situs, may arise in a third forum. If the registration requirement of the second lex situs is merely a matter of the exclusion of foreign law (i.e. non-recognition), this non-recognition should be irrelevant to the third forum, as it should apply only its own exceptional exclusions of foreign law. The policy of the second
situs, to protect persons residing or acting therein, would thus be thwarted by a fortuitous forum. On the other hand, were failure to register in accordance with the second lex situs to have the substantive effect of extinguishing the creditor's right, the third forum should normally apply the second lex situs to this effect, in accordance with the normal choice of law rule. This would clearly afford better protection to the residents of and persons acting in the second situs than would a policy exclusion of foreign law, without providing the excessive protection of which a policy exclusion is capable, as when the forum might refuse to recognise a security to which the lex situs has no objection.

There is however one inescapable fact in this field: some rules of the substantive internal law of some legal systems are too powerful in an international context, and others are too weak. Thus it is becoming increasingly obvious that the German law of reservation of title on sale favours sellers and prejudices third parties to such a degree that it gives rise to inordinate international difficulties. The same may be said of some of the excesses of English Equity. While these problems may reflect the inadequacy of other legal systems, which perhaps ought to provide the institutions which are obviously desired, it must also be countered, as the desire for such institutions cannot be justified solely in terms of a market in legal institutions. Excessively powerful foreign legal institutions may be neutralised by the invocation of public policy to exclude the excesses of these institutions, perhaps via fraud à la loi when there has been blatant "institution-shopping". However, as explained above, exclusions of foreign law should be minimised. It seems, therefore, that the erection of divestitive barriers of substantive law is the most appropriate solution to such problems, pending international pressure on the legal systems in question to adopt a more balanced approach.

Harmonisation and unification of substantive law is sometimes the only effective solution to problems of international private law deriving from differences in substantive law. Various attempts at such harmonisation and unification of property laws are discussed in Part B below.
F. Translation of rights.

There is a constant temptation in international private law to interpret a foreign institution or concept as if it were an analogous institution or concept of the interpreter's own system. Such a process may be termed "translation". This translation is not surprising, as familiarity with a concept makes reasoning with it a lot easier than when preliminary familiarisation has to be carried out. In a similar way it is possible that the detailed application of a foreign concept will be very difficult within a legal structure which is not designed to take account of such a concept.

However, this temptation to translate must be strenuously resisted, since the translation of an institution or concept will often lead to needless or absurd distortion of that translated institution or concept. This important point is well stressed in the 1984 Hague Convention on the Law Applicable to Trusts and on their Recognition. Trusts do not exist as such in Civilian legal systems, although some Civilian institutions, such as the German Treuhand, are quite closely analogous to trust. Article 11 of the 1984 Convention is, however, quite adamant that a trust is to be enforced as a trust, to the extent that this is possible, and not as a Treuhand or fondation or as any other analogous institution. It also acknowledges that this may not be completely possible, and so in Article 15 exhorts Civilian courts to attempt to give the practical effect of a trust when they cannot enforce the trust as such.

The translation of rights may, however, occasionally be necessary, or even desirable, for specific reasons. The translation of real rights in property may occur in three basic situations: to justify the exceptional non-recognition of a right, as a part of the process of extinction and creation of rights and as a means by which to rank extant rights. The first is very hard to justify, the second may occasionally be justified on the grounds of conscious policy and plays an important part in the characterisation of the lex causae, and the third is an integral part of the proposed choice of law rule governing real rights in property.

1) Translation and non-recognition.

The forum may attempt to find a right in its own system which corresponds to the right created by the law indicated as appropriate by its choice of law rule. If the forum cannot find a corresponding right it may then refuse to recognise this foreign right, to which its choice of law rule has accorded prima facie validity. This is an untenable extension of the exceptional exclusion of foreign law. Quite apart from the obvious difficulties of degree in assessing the existence or non-existence of a corresponding right, it is inappropriate to make a policy decision to exclude a foreign law from application solely on the ground that no corresponding right exists in the lex fori. It may be that such an unknown right causes no prejudice to the parties to the case, nor indeed to anybody else, and that few difficulties arise in its conceptual integration with the lex fori and other relevant legal systems.
2) Extinction and creation of rights by translation.

The operation of translation in the non-recognition of rights may often be confused with translation in the extinction and creation of rights. This is because the distinction between the extinction of a right (by operation of the choice of law rule) and the non-recognition of a right (by exceptional refusal to apply the foreign law selected) is not always clearly drawn. If the forum examines a right to see if it corresponds to a right in the lex fori it is making a decision about non-recognition; if the forum examines a right to see if it corresponds to a right in the lex causae it is making a decision about the extinction and creation of rights.

However, the lex fori and the lex causae are often the same legal system, as litigation about corporeal property in particular often takes place in the courts of the state in which the property in question is situated. Thus a court may apply a foreign lex situs to the creation of a real right in an item of property, and then be required to apply its own system as a subsequent lex situs, in terms of its choice of law rule. The issues of non-recognition and extinction of rights may then appear merged, or more accurately they may then be confused, because the lex causae and the lex fori are the same legal system. The separate stages of the application of the choice of law rule and the subsequent consideration of the possibility of excluding foreign law may not be properly followed through, and the criteria of each may be applied to both. This may give rise to excesses both of non-recognition and of extinction, both by a failure to approach only the relevant issues.

There may be very good reasons for a lex situs to translate a foreign right, by means of the extinction of one right and the creation of a corresponding right. Thus it would be quite intelligible for a legal system containing the security right of pledge but not hypothec to translate a foreign hypothec as a pledge, if perhaps that foreign hypothec were not registered in the pledge state within a certain period of its entry into that territory. This would protect persons residing and acting in the pledge state, without causing undue prejudice to the holder of the original hypothec. This example should make one point clear: such translation of a foreign right ought to be conscious and reasoned. Haphazard, wholesale translation by extinction and creation of rights is insular, and contrary to the tolerant spirit of integration which is necessary for choice of law rules in property rights to be workable.

It is, however, interesting to consider what is translated in the translation of rights. There are two approaches: the translation of a "bag" of rights, such as hypothec to pledge, and the translation of the contents of such a bag, as when property may become alienable or inalienable by the alteration of the contents of "ownership". In a sense both operate in the same way, in that in both the contents of the bag change. However, by the first approach the bag is changed, in turn changing its contents, and in the second the contents are changed, which may or may not entail relabelling the bag.

Consciousness of the alterations to the contents of the various bags is critical. When hypothec is translated as pledge the translator ought to be conscious that he is changing the contents of the bag; when one system's "ownership" is translated as another system's "ownership" unconscious
translation is quite easy. Therefore the forum ought to be particularly careful of what is meant by terminology like "ownership", as much unconscious, and indeed undesirable, translation may be taking place. It may be desirable, as a matter of reasoned policy, for the lex situs to translate foreign concepts like ownership to those of its own system, but it ought to be conscious of this policy, and of the fact that greater change may occur between one type of "ownership" and another than that which occurs on the translation of a bag called hypothec as a bag called pledge.

The wholesale translation of the contents of a bag of rights is a further difficulty. There may be a good reason consciously to translate some of the contents of a foreign bag of rights, as in conferring a power of alienation where there was formerly a disability. Does this entail the translation of the other contents? This exposes the fallacy of the concept of translation in its application to the creation and extinction of rights: bags of rights can be translated, but their contents can only be extinguished or created. It makes little sense to speak of the translation of a disability to alienate as a power to alienate. This does not mean that bags of rights may not be translated, and with that translation their contents extinguished and created. It does, however, mean that when the translation of a bag of rights is being considered, the extintive and creative effect of that translation upon its contents is the real issue. Thus when hypothec is translated as pledge the issue really concerns the justification of changes to the rights comprising the contents of these bags of rights. It may then be justifiable to change the contents wholesale and translate the bag, if only on the ground that partial translation would merely create a weird and anomalous bag of rights which would create more problems than it solved. The translation of rights, as a mode of the extinction and creation of rights, ought therefore to be carried out carefully and sparingly.

There is one situation in which it is unexceptionable to translate rights for the purposes of the extinction of rights. This situation is the characterisation of the scope of application of an applicable lex situs. Thus in section B.2 above the possible effect was discussed of Article 2279 of the French Code Civil, that "possession vaut titre", upon English trust rights. It is clearly not possible to determine any possible effect of Art. 2279 upon the rights of trustee and beneficiary without both interpreting Art. 2279 in its international context and translating the English rights, roughly, into French law in order to aid this interpretation. This is a different type of translation from examining French law to see if such equivalent rights exist and extinguishing the rights in question if there are no equivalent rights and then creating new rights if there happen to be some broadly equivalent rights. The first is a reasoned and necessary application of Article 2279 of Code Civil; Article 2279 is irrelevant to the second, which is an insular rejection of foreign concepts.

3) Translation for ranking.

A ranking process is the main situation in which the translation of rights is completely justified. This is because the ranking of extant property rights is an integral part of the choice of law structure governing rights in property. It was explained in section B above that this proposed choice of law structure comprises two parts: the assessment of the existence of rights in property and the ranking of these rights. It was also explained that
ranking process involves the comparison and relative evaluation of several rights. These rights may have arisen under different legal systems, making their comparison and relative evaluation difficult, if not impossible. In order to provide a common basis for this comparison and relative evaluation, the rights in question must be expressed in terms of a common legal system, that is to say some must be translated. It was explained in section B above why this common legal system ought to be the lex situs at the time of the ranking, when the rights in question do not already share a common basis of ranking. Translation for ranking is accordingly merely a necessary evil in the choice of law process.

The major difficulty in translation for ranking is the situation where there is no close analogue in the ranking system to the right to be translated. In this situation resort must be made to the general residual ranking structure of the ranking system. Thus a ranking system may generally rank real rights by date, or all rights by date or rateably. Such a general residual ranking structure ought then to be able to take account of any foreign right.

It should be possible for a right to be re-characterised for the purposes of ranking, just as an item of property may initially be characterised as immovable for the purposes of international private law and then re-characterised as personal for the purposes of the final lex causae. Thus a right may be considered real for the purposes of choice of law up until the final ranking stage, whereupon the final lex situs might characterise it as personal in its internal law, and give it a "personal" ranking. This is, of course, merely one aspect of the translation of a right for ranking purposes; the situation where the translation crosses the major characterisation distinction of real and personal rights.

Traditionally, international private law concerns differences in law in space, and the just resolution of the difficulties to which these differences give rise. However, it also contains an important element of time, derived from differences in law according to time. Most time difficulties in law are not, however, directly linked to international private law. Thus Roubier maintains that "droit transitoire" and international private law are wholly distinct, to the point that even analogous reasoning between the two is not permissible. This position is perhaps rather extreme, since some similarities of droit transitoire and international private law could lead to potentially useful analogy.

Time and law interact in three basic ways: first within a single system the law may change, secondly the laws of several states may be applicable consecutively in terms of a choice of law rule and thirdly the unchanged law of a single state may contain provisions relating to time. The first is the true droit transitoire, the second is the conflit mobile and the third might be termed a "static time provision". The first two have been extensively discussed, and the last does not seem to have received comprehensive treatment in an international context. The conflit mobile may also involve issues of droit transitoire or static time provisions.

1) Droit Transitoire.

Droit transitoire arises in several circumstances in international private law. Firstly, the choice of law rule of the forum may change, and secondly the lex causae may change. The alteration of the choice of law rules of the lex fori does not cause great difficulties in this context. The general view of the writers cited above is that such alterations are governed by the normal droit transitoire of the forum. Alterations to the lex causae are more controversial, particularly if they purport to have retrospective effect, according to that lex causae. Again, there seems to be some degree of consensus among the writers, at least as to the general applicability of the droit transitoire of the lex causae, even when retrospective effect is accorded to new legislation by the lex causae. This is clear in the comment of Lord Reid in Starkowski v the Attorney-General [1954] AC 155 (at 172) that "it there is no compelling reason why the reference [under the choice of law rule] should not be to that law as it is [retrospectively] when the problem arises for decision".

Difficulties arise in the limitation of the application of the droit transitoire of the lex causae. All would seem to concede that such droit transitoire might be excluded on the grounds of public policy. There is, however, much disagreement as to the justification of exclusion of the droit transitoire of the lex causae for any other reason. There are two basic arguments. The first argues that different choice of law rules ought to take different approaches to the droit transitoire of the lex causae, rather as different approaches may be taken to renvoi according to the type of choice of law rule. The second argues that some criterion other than straightforward public policy might be used to exclude foreign droit transitoire.
Most of these arguments seem to concern the difficulty in applying retrospective changes in law to situations of conflit mobile. There are apparent tensions between the conflit mobile and droit transitoire which operates retrospectively. This is because the conflit mobile seems to operate in real time: first one legal system is applicable and then a second is applicable. If the law of the first legal system is changed retrospectively, after the second legal system becomes applicable in real time, the first legal system appears to control the operation of the second. In fact the first legal system controls the second in the same way as it does when there is no retrospective change to the laws of the first legal system: the forum's choice of law rule indicates that it operates prior to the operation of the second. This apparent tension between droit transitoire and the conflit mobile seems to derive from the untenable theory of vested rights7.

The retrospective droit transitoire of the lex causae sometimes seems to have been applied in situations of conflit mobile8. There has, for example, been considerable discussion of the effect of retrospective droit transitoire in the context of succession and matrimonial property régimes9. However, succession tends to give rise to a static choice of law rule and the matrimonial property cases are mixed and difficult to analyse, probably due to the complications of doctrines of the "mutability" and "immutability" of such régimes10. The Lamet case11 may indicate a willingness to permit the operation of the retrospective droit transitoire of the lex causae in situations of conflit mobile. On the other hand, there are several German decisions12 in which the courts have refused to apply retrospective changes to the lex causae, "petrifying" an old immutable matrimonial property régime after the connecting factor has indicated a different legal system to be relevant. Similarly the Cour Fort-de-France13 has "petrified" an old mutable property régime.

It has been argued that the retrospective alteration of a matrimonial property régime ought not to be upheld if there is no longer any substantial link of the parties with the system altered14. If this argument holds with regard to an immutable matrimonial property system, it ought surely to hold in the case of a mutable system, which would present a classic conflit mobile15. The reason for reticence in the admission of retrospective changes to matrimonial property régimes is clearly the importance attached to the certainty of the spouses and to their reasonable expectations: refugees must have some basis upon which to organise their affairs. If the law of their former matrimonial domicile continues to regulate them then that is predictable, as is the regulation of their régime by their new matrimonial domicile. They cannot adequately regulate their affairs if a retrospective alteration of their régime may be effected by a state which they have abandoned, particularly if their régime is mutable and they may therefore, if advised, consider it governed in its entirety by the law of their new matrimonial domicile.

This argument is the more compelling in the general context of real rights in property16, upon which there is little clear authority, and scant discussion of the difficulties involved. The basis of the application of the lex situs to the creation, extinction and ranking of real rights in property is the certainty which such a rule provides for third parties. This may be rephrased in terms of vested rights: the application of the lex situs in
order to assess the vesting and divesting of real rights performs the useful function of promoting certainty among third parties. That certainty is destroyed if a former lex situs is altered retrospectively, if this alteration is given effect once a second lex situs has become applicable. The Potasas Ibericas case seems to be the only case in which this issue has been directly discussed. In this case minerals extracted by a Spanish company from a Spanish mine were seized in France. A Spanish law transferred ownership of the minerals to someone else, retrospectively, from a time when the minerals were still in Spain. The French court refused to apply the Spanish law, on the basis that French law was applicable once the property entered France, leaving a later Spanish enactment irrelevant, notwithstanding its retrospective nature.

This decision has been criticised for failing to take account of the droit transitoire of the first lex situs and for ignoring the "correct" method by which to achieve the desired result: the exclusion of foreign law on the grounds of public policy. There are, however, great difficulties involved in the application of the public policy exclusion of foreign law in many such circumstances. It is possible that an expropriation will not be contrary to public policy, if perhaps compensation is paid to the persons expropriated or there is no punitive or selective application of the expropriation.

Similarly a statute may make retrospective alterations to the forms of transfer, or the capacity to transfer to enable greater ease of transfer. If the public policy exclusion is not generally applicable, third parties under the second lex situs are in a position of great uncertainty: their debtor, whose asset they have seized, might no longer own that asset, because an earlier invalid transfer, under an earlier lex situs has been accorded retrospective validity. This contingency greatly limits their ability to assess their legal position.

This leads to the conclusion that the droit transitoire of the lex causae ought normally to be applied, even if it has retrospective effect; but that in situations of conflit mobile some dépeçage is desirable. This dépeçage ought, in some circumstances of conflit mobile, to give rise to the exclusion of the retrospective droit transitoire of the lex causae, leaving the former "petrified" law applicable. The choice of law rule governing the creation, extinction and ranking of real rights in property gives rise to a conflit mobile for which the exclusion of the retrospective droit transitoire of the lex causae is appropriate, because the fiction of vested rights provides the certainty which the choice of law rule requires.

2) Static time provisions: conditions.

Property laws, perhaps more than other laws, have a tendency to contain provisions having specific reference to time, like prescription, retrospective vesting and divesting and conditional rights. Above, these interactions of time and law were termed "static time provisions", to distinguish them from droit transitoire, which regulates changes in the laws of a single system, and the conflit mobile, which occurs when several different legal systems are consecutively applicable to a given problem, according to a lex fori choice of law rule.

A static time provision exists within a single legal system and does not involve any formal alteration in law. It is of greatest importance in
international private law in situations of conflit mobile, where there has been a change in the system applicable in terms of a choice of law rule, during the period of time indicated as relevant by the static time provision in question. Outside the field of prescription, there has been little discussion of static time provisions in the conflit mobile\textsuperscript{29}. There are two situations, other than prescription, in which static time provisions lead to particular difficulty in this context. These are the existence of conditions and the retrospective operation of rights. As with the operation of droit transitoire in the context of a conflit mobile in real rights in property, there can be no automatic assumption that the static time provisions of the first applicable law will apply, or will apply in their entirety, after the second legal system has become applicable in real time. This is particularly true of the retrospective operation of rights under a static time provision, which is discussed in the next section.

Conditions annexed to rights and conditional rights of the first lex situs cause great difficulties in a situation of conflit mobile. This is because the choice of law rule states that a second legal system is applicable, but the simple application of that second system could distort the nature of the rights created under the first system. As discussed above, the main choice of law rule attempts to maintain the rights of the first lex situs intact, to the extent that this is possible. However, a surfeit of conditions can give the first lex situs practical control over the functioning of a subsequent lex situs, in the same way that retrospective changes to the first lex situs can control the functioning of the second lex situs, if accorded full validity. Thus a right which has been vested conditionally by the first lex situs may be divested by that first lex situs after the property has moved to a second state, by the purification of a condition which is an intrinsic part of the right. Similar possibilities may arise in the vesting of rights.

A condition is a proviso to the existence or operation of a right, which is related to time. Conditions are of two basic types: suspensive and resolutive. Suspensive conditions either bring a right into existence or operation, prospectively, from the time of their satisfaction. Resolutive conditions prospectively extinguish rights, or remove them from operation, from the time of their satisfaction. Retrospective conditions are discussed in the next section.

Although there is little authority on the subject, resolutive and suspensive conditions might operate in an international context as follows. A security created over property in state S1 must be registered there within 30 days of its creation, on pain of nullity. The security subjects may be removed to state S2 within the 30 day period, before registration has taken place. The issue of the validity of the security may then arise in court X. S1's "30 day rule" may be characterised as a resolutive condition, which divests the real right which has been created by the granting of the security document, if registration does not occur within the 30 day period. Court X would distort law S1's security right if it did not permit the resolutive condition to divest the creditor, were the creditor to be sufficiently stupid as not to register his security; court X would otherwise create a much more extensive and powerful right than would perhaps be possible under any of the legal systems involved. Court X should therefore give effect to the resolutive divesting condition, if law S1 should be so characterised. Similarly court X should not give effect to this condition were the creditor to register the
security within the 30 days, despite the fact that this action takes effect under a law different from the current *lex situs*, S2.

This 30 day period may, however, be characterised as a suspensive condition, and the real right may not come into existence until the security has been registered. If there has been no registration by the time the security subjects have been moved to S2, it is suggested that court X ought not to permit subsequent registration in S1, within the 30 days, to create this right. This would not distort law S1's security right in the way that the non-application of a resolutive divesting condition would so distort it. This is because no real right existed under law S1 at the time of movement of the property to S2, and so there is nothing to distort except the choice of law rule, which indicates that law S2 is then the appropriate system.

It may, however, be argued that a real security right existed from the time of the granting of the security document, and that the 30 day rule merely suspended its operation until registration within that period, without suspending the existence of the right. It may equally be argued that the suspension of the operation of such a right is effectively the same thing as the suspension of its existence, particularly in an international context, where the characterisation of a real right may occur at the relatively concrete level of its practical operation21. As a right which does not operate in a real manner cannot be considered real for the purposes of international private law, rights of which the operation has been suspended should be considered equivalent to rights of which the existence has been suspended.

Relative title shows these issues not to be quite so simple as they may appear. There used to be a rule of English law as follows22. A's property is stolen and sold in "market overt" to B, and the thief is later convicted. Both A and B have relative titles to the property in question. Until the thief is convicted B's title is preferable to that of A, but thereafter A's title is preferable to that of B. Thus English law resolves by an alteration in ranking, problems which a civilian system would resolve by the vesting and divesting of substantive rights23.

One analysis of this rule might be via suspensive conditions: the (preferential) operation of A's title is suspended between the time of sale in market overt and the time of the conviction of the thief24. That right still exists during this suspension; it merely has no value. It is, however, of great potential value. Is effect then to be given to this potential value when the thief is convicted, after the property has been moved to another state? It clearly distorts the suspension of A's right not to give effect to its renewed operation. However, the choice of law rule attempts to balance the interests of third parties under each consecutive *lex situs*. The interests of third parties under the second *lex situs* deserve protection from the unexpected right. They could not readily predict the appearance of this right after the change of situs, and it does not appear to be real prior to that change. English law is not unduly prejudiced, since it is up to each state to consider the possible international consequences of its rules of internal law.

Having said that, it may be that the practical operation of A's right has not in fact been suspended to the extent suggested here. If A can maintain an
action for conversion, after the thief's conviction, against persons who had
dealt with the property prior to the thief's conviction, his right may be
considered real, for the purposes of international private law, while it is
apparently suspended. This involves issues of the retrospective operation of
rights which is discussed in the next section. It would seem, to anticipate
that discussion, that the retrospective effects of static time provisions of
internal laws are or should be largely ignored in international private law.
Such retrospective "real" behaviour should accordingly not lead to the
characterisation of the suspended right as real.

There are three other important structural difficulties raised by conditions:
first, the characterisation distinction of conditions and divesting criteria;
secondly, the possible interdependence of several conditions; and thirdly,
the characterisation distinction between conditions and ranking rules.

Is the divesting of a right on the occurrence or non-occurrence of given facts
the operation of a resolutive condition annexed to that right, or is it the
effect of separate provisions of law? Is the divestiture of the right in
security by the "30 day rule" described above the operation of a condition
annexed to the right at the time of its vesting, or a very short
prescription? This example seems more credibly characterised as a condition,
but other examples might be more difficult to characterise. The importance
of the difference is that the first lex situs may apply to conditions, and
the second to rules of vesting and divesting. The distinction seems to lie
in whether the vesting or divesting criteria are an intrinsic part of the
right, constituting a condition thereof, or are extrinsic to it. This
distinction is, in turn, rather difficult to apply.

The second structural difficulty concerns the interaction of several
conditions. Suppose the transfer of the ownership of an item of plant takes
place on delivery under the law of S1, but the new owner's right is subject
to a resolutive condition which divests his ownership if he does not register
the transfer within 3 months of delivery. Law S1 may also revest ownership
in the previous owner on the expiry of the 3 month period, in the absence of
registration, by means of suspending the previous owner's right upon this
contingency. If the plant is moved to S2 within the three month period, and
no registration takes place, the new owner's right may be considered
divested, because of the resolutive condition. On the other hand, the
previous owner's right may not re-appear, if its suspension is equivalent to
its extinction.

These conditions would, however, seem to be interdependent. The new owner
might be considered divested without the old owner's right reviving, or this
divestiture might not be considered possible unless the previous owner's
right revives. Some distortion of the operation of law S1 or law S2 seems
inevitable; it probably causes the least distortion to laws S1, S2 and the
choice of law rule to consider the scope of the dependence of the resolutive
condition on the suspensive condition by law S1, and to consider divestiture
to occur in accordance with the resolutive condition only if law S1 does not
consider the two conditions to be necessarily linked. Therefore if the
conditions are truly interdependent, neither condition may operate. This
distorts the operation of the resolutive condition, but does this in order to
maintain the interdependence of the two conditions and because of the
difficulties inherent in permitting the suspensive condition to take international effect.

The third structural difficulty is the characterisation distinction of conditions relating to the extinction of rights and ranking rules. If a right is conditional, the purification of the condition can extinguish the right. The extinction of a right removes it from consideration in a ranking process. A condition may therefore undermine a ranking process.

Suppose that law S1 has two types of security over plant, one requiring registration to be valid and the other not, perhaps because it is based upon possession. Also suppose that there is a rule of law S1 which requires a registrable security to be registered within 7 days of its execution, in order to be considered valid from the date of execution. If A grants a registrable security over his plant to B, then grants an unregistrable security over that same plant to C and moves the plant to S2 within the 7 days, after which period B registers his security in S1, how is court X to rank the rights of B and C? The "7 day rule" of law S1 could be characterised as a rule of ranking, which prefers C to B if B does not register his security promptly. If it is a rule of ranking court X may not apply it, but apply law S2 instead. Law S2 may rank all security rights by the date of their creation, preferring B to C. On the other hand, the "7 day rule" could be characterised as giving rise to a resolutive condition, divesting B's right if he does not register his security within the 7 days, and revesting it in him on any later registration. Court X could then consider the resolutive condition to have divested B of his right. B's later registration of his security may not then revest his right, because court X could consider such an issue to be governed by law S2, and so B may have no right against which to rank the right of C, automatically preferring C.

The characterisation of a given rule as a ranking rule or as a rule giving rise to a condition ought to be carried out in the same manner as the distinction between a condition and an independent rule of divestiture: by the lex fori, with the necessary international perspective. In this context there is no trite rule of thumb, like that of intrinsic and extrinsic criteria which aids the distinction between conditions and independent divesting rules. This is because the distinction between conditions and ranking rules is a complex example of the more general distinction between the existence and the ranking of rights, where that between conditions and divesting rules is characterised as giving rise to two categories of rules which concern the existence of rights. The same caution ought therefore to be applied before a rule of ranking is characterised as a condition (and vice-versa) as when a rule of ranking is characterised as any other type of rule which relates to the existence of rights. Therefore court X ought to be very hesitant to characterise the "7 day rule" discussed above in a manner different from the characterisation of law S1, since it is by no means clear that there is little practical distinction between the two characterisations in law S1, which would entitle court X to choose the characterisation it thought more appropriate.

3) Static time provisions: the retrospective operation of rights.

One of the most awkward difficulties in this entire field is the retrospective operation of rights. This difficulty arises from the
expression of the basic choice of law rule in a prospective timescale; a right is considered to exist or not to exist in real time. The basic rule is not designed to take account of rights existing or not existing in real time, which are subsequently considered not to exist or to exist. This problem is discussed in section 1) above, in the context of retrospective alterations to the lex causae, according to the droit transitoire of that lex causae. There it was stated that most of the criticisms of the application of the retrospective droit transitoire of the lex causae derived directly or indirectly from the untenable doctrine of vested rights, but that it might be intelligible to apply dépêçage to the application of the droit transitoire of the lex causae, because such dépêçage might lead to just results. It was argued that the choice of law rule governing the creation, extinction and ranking of real rights in property ought to exclude the retrospective droit transitoire of the lex causae, because the choice of law rule was based upon the certainty of third parties, which is, in turn, promoted by applying a doctrine of vested rights, those rights being considered vested and divested by the current lex situs.

Retrospective changes in the law are not uncommon comparatively, although they are clearly considered anomalous in some situations.29 Similarly retrospective static time provisions which vest and divest rights are not uncommon, particularly in insolvency, although they too appear exceptional and anomalous. Retrospective changes in the law do, however, appear to be more frequent and less anomalous than static retrospective laws. Thus changes to laws of procedure almost always have some retrospective effect, while static retrospective laws are comparatively rare. Similarly, retrospective changes to law often reflect important political changes, and are accompanied by considerable publicity. Static laws, on the other hand, lack the deliberate policy changes implicit in retrospective changes to law, and have the capacity to lead to great confusion and uncertainty, even in an internal context. It is exceptional and anomalous to alter any rights retrospectively by changing the law with retrospective effect, presumably because of the unsettling effects on certainty of such changes. It is therefore all the more anomalous and exceptional to alter real rights in property retrospectively, given the great importance of certainty in property rights. The risks of uncertainty are multiplied by the enforcement of retrospective static time provisions regarding real rights in property when such laws are placed in an international context. Accordingly such retrospective static time provisions ought not to be given effect by other legal systems.

If, for example, an item of property were to have been situated in England at the time of an "act of bankruptcy" by its owner under the former English bankruptcy régime, and subsequently moved to a different state before the owner was adjudged bankrupt, should the trustee in bankruptcy's title to that item of property "relate back" to the date of the act of bankruptcy?30 This issue is of course complicated by the supposed "universal" effect of an English bankruptcy according to English law31. If it is assumed that the actual situs allows the adjudication in bankruptcy under English law to take effect within its territory, ought this adjudication to be considered retrospective, and so possibly affect rights, or the ranking of rights, which may have been vested by the new lex situs between the time of the act of bankruptcy and the adjudication? It is suggested that the English bankruptcy ought not to relate back with regard to property which is not situated in
England throughout, unless each *lex situs* also permits this retrospective
effect of the bankruptcy within its territory. This is because of the
detriment to certainty which would arise were the retrospective vesting and
divesting of rights to have international effect as a general rule.
Retrospective vesting and divesting is considered exceptional and anomalous
in internal legal systems; it creates even greater anomaly in an
international context.\(^2\)

It is possible that the "30 day rule" in the registration of securities
discussed in the previous section may operate as a retrospective suspensive
condition. This may be termed "ex tunc" vesting. Thus the security subjects
may be situated in S1 at the time of the granting of the security document,
be moved to S2 within the 30 days and the security registered in S1
thereafter, still within the 30 days. Law S1 may consider the vesting of a
real right to be suspended until registration, but once that registration has
taken place deem the real right to have been vested at the time of the
granting of the security document. Court X is then faced with some
difficulty when the grantor of the security grants another security, or sells
the security subjects under law S2. There are two main difficulties here: is
the creditor's right in fact real prior to registration, because of its
retrospective real effect in that period after it has been registered? If
that right is characterised as real because of this effect, ought it to be
considered real in court X from the time of the granting of the security
document or its registration?

It is suggested that such a right cannot be considered real prior to the
registration of the security, and that if the property changes situation
before registration has taken place there is no real right vested by law S1,
which court X is required to consider extant by its choice of law rule.
Similarly the "relation back" of a bankruptcy ought not to be considered to
give rise to a real right prior to the adjudication of bankruptcy; and the
person from whom property has been stolen and sold in "market overt" should
not be considered to have a real right in that property until the thief has
been convicted. All of these solutions involve a distortion of the legal
institutions which they are attempting to integrate. All of these
distortions are also justified, by the harm caused to the certainty of the
current *lex situs* by the recognition of the retrospective operation of
rights.

There is one situation in which the retrospective vesting and divesting of
real rights may be acceptable. This situation is where a permissive renvoi
operates. Thus any *lex situs* may allow another legal system to have
retrospective effect upon any right in question. Accordingly the current *lex
situs* may allow a bankruptcy to "relate back" to the time of an "act of
bankruptcy". There are several complex issues here. Suppose there are four
items of property, two in S1, one in S2 and one in S3. The owner of these
items of property commits an act of bankruptcy under law S1. One of the
items of property in S1 subsequently moves to S2 and then to S3. Another
moves directly to S3, and the item of property in S2 moves to S3. The owner of
these items of property is then adjudged bankrupt in S1, and the effect of
the bankruptcy upon each of these items of property arises in court X.

As discussed in Chapter 6, the issue of the effect of the adjudication of
bankruptcy on each item of property may arguably be referred in the ultimate
analysis to the *lex situs* of each at the time of the adjudication. Accordingly, court X may consider the S1 bankruptcy to transfer ownership of these items to the trustee in bankruptcy, even at the time of the adjudication of bankruptcy, only if law S3, the *lex situs* at that time, allows such a permissive renvoi. If law S3 is relatively enlightened it will probably allow the S1 bankruptcy to have effect within its own territory, if the bankrupt has a sufficient link with S1. Accordingly court X may refer to law S3 in order to see if it objects to the application of law S1 to the transfer of ownership to the trustee in bankruptcy, and law S3 may allow such a reference to law S1.

Court X must then decide when this transfer to the trustee is considered to have taken place. It may then refer to each *lex situs* between the time of the act of bankruptcy and the adjudication of bankruptcy, to see if each *lex situs* allows law S1 to take this effect. This is quite simple with regard to the property moving directly from S1 to S3, and the property situated in S3 throughout. Court X will see if law S3 objects to the retrospective operation of the adjudication of bankruptcy. Court X must then examine law S2 to see whether or not the transfer to the trustee has completely retrospective effect regarding the property which has been situated in S2. If law S2 does not allow retrospective effect to a foreign bankruptcy decree this may mean that the bankruptcy decree may "relate back" only to the date of the entry of the property to S3, with regard to the property which had been situated in S2. This would also seem to apply to the property which had been situated in S1 at the time of the act of bankruptcy, and had later passed through S2, since any other decision would defeat any certainty upon which third parties in S2 may rely.

4) Conclusion.

As discussed in Chapter 6,C,4), different "retrospective" insolvency devices operate in different ways, some of which are not strictly retrospective. Similar legal objectives in other fields may also be achieved in alternative retrospective and non-retrospective ways, as perhaps in the registration of securities.

Differences in result concerning static time provisions and rules performing similar functions may thus occur, depending upon the characterisation of a given rule as a suspensive or resolutive condition, or because a right or condition operates with prospective or retrospective effect, or in a completely different manner. Conventional choice of law structures are rather unsuited to resolving all of such problems and some may be better resolved by harmonising substantive laws or through subsidiary choice of law structures.
II. Conflit Mobile: problems of space.

The conflit mobile to which the *lex situs* choice of law rule gives rise creates many difficulties of space as well as those of time. Some of these difficulties are discussed in Part B below. Two, however, are of particular theoretical importance, and are therefore discussed here. These difficulties concern the law applicable to property in transit, and the suggested requirement for "new acts" to take place after property has moved to a different situs in order that the new *lex situs* may operate.

1) Property in transit.

There are two main difficulties with property in transit. One is the possibility that the property in question is not situated within any state, as where the cargo of a ship is on the high seas. The other is the possibility that where there is an actual situs, that situs may be inappropriate or completely unknown to many interested parties, as may sometimes be the case when the property is in a port for trans-shipment, or travelling by rail across a continent. Both of these difficulties are minimised by the use of bills of lading, or other documents of title, and their analysis as if the document were the specific item of property. They are also minimised by referring the property relationship of the parties to a transaction to a system other than the *lex situs*.

It does not seem permissible automatically to apply the law governing a bill of lading, perhaps the *lex situs cartae* of the bill, to rights in the property to which the bill refers when that property has an actual situs. This would rather detract from the certainty and security of persons acting at the actual situs. Therefore if the law governing the bill of lading is of relevance to the resolution of disputes relating to real rights in the property to which the bill refers, this relevance must be subsidiary to that of the actual *lex situs*. On the other hand, when the property in question does not have an actual situs, it does little harm to certainty to permit the vesting and divesting of rights in this property by the law governing the bill itself, and indeed it is the purpose of bills of lading to facilitate such transactions while the property is in transit. However, the knowledge that an item of property referred to in a bill has an actual situs, and if so what that situs is at any given time, will not always be readily available to persons wishing to enter transactions regarding that property. Accordingly they will be in a position of uncertainty regarding the effect on the property itself of their transactions with the bill.

In order to counteract this needless inconvenience a permissive renvoi and subsidiary choice of law rule might readily operate in this context, whereby a reference is made to any actual *lex situs*, to see if it objects to the transaction being governed by the law of the bill. If the situs objects, as perhaps when a creditor of the original owner has seized the cargo of a ship by diligence, this objection should be upheld, although it may then be permissible to apply the law of the bill thereafter, if the actual situs does not object to the validity of the specific document as a document of title.

Thus a consignment of cars may be shipped from Japan, and the consignee may receive the bill of lading while the ship is at sea. The cars may be transshipped in Singapore, and the consignee may assign the bill while this is
taking place, completely oblivious to the cars' actual situs. The cars may then be shipped to France for distribution in Europe. They may then be seized by a creditor of the consignee's assignee, who assigns the bill again while completely oblivious as to the actual situs and the seizure.

There seems little harm in the law of the bill governing the transfer of ownership from consignor to consignee, while the cars are at sea. There seems to be equally little harm in the law of the bill governing the effect on the cars of the first assignment of the bill, as no third parties seem to be prejudiced, as no third parties would seem to rely upon the law of Singapore. A permissive renvoi by the law of Singapore is however important, just in case such a third party exists. This permissive renvoi might, however, be of the less rigourous type of those described in section C,2): the passive type, which assumes no objection to the operation of the bill on the cars if no specific provision of Singapore law prevents it. Thus if Singapore law were to deny the validity of a bill of lading as a document of title, this transfer could not occur while the property was situated in Singapore. The next reference must be to the law of France, since a third party has placed reliance upon the actual situation of the cars, thus (probably) initially refusing permission to the permissive renvoi. Permission may then be considered given for the reference to the law of the bill, so that the reliance of the second assignee might not be completely nullified. A court might then rank the rights of the first assignee's creditor and the second assignee in accordance with French law, the final lex situ. There is little direct authority for this suggested analysis.

Bills of lading and other documents of title are not always used, and so the difficulties of property in transit must be considered without them, as if, perhaps, a bill were null. This situation quite aptly shows the difficulties both of a lack of situs and of the presence of an inappropriate situs. If the property has no actual situs it is hard to decide which law ought to apply. One option is to preserve the status quo, and not to permit any changes in real rights while the property has no actual situs. Such a rule seems to give undue favour to sellers and consignors, and could lead to needless delays in commodities markets.

The other options are normally thought to be the law of the place of departure, or of destination, or possibly even the law of the "flag" of the ship or aircraft involved*. Application of the law of the place of departure is rather regressive. The rights of the parties may have been affected while the property was actually situated in that place. There is no reason to suppose that there is any link whatsoever with that system once the property leaves its borders. It may indeed be the choice of despair, rather as a domicile might continue or revive while a person has no close connection with any legal system, but has clearly permanently abandoned those considered to apply! The law of the flag is a similar despairing plea. Whatever residual merits the law of the flag may have with regard to the ship or aircraft itself, or with regard to the likes of delict, or as a residual indication of the proper law of a contract of affreightment*, it must have little merit when applied to the cargo being carried under that flag, particularly since the flag flown by the vessel used is likely to be fortuitous and probably completely unknown to most of the people involved, and most particularly third parties.

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The law of the place of destination might be considered the most appropriate option. It is clearly more appropriate than the law of the place of departure, since there is at least a planned future link with that legal system. It does not, however, accord with commercial reality, since the destination of a cargo is often not decided upon until a ship is at sea, and may frequently be changed during the voyage. The optimum "solution" is probably the application of the "proper law" at the time of an alleged change in real rights, with a presumption in favour of the proposed destination at that time. This gives rise to unfortunate, but inevitable, vagueness. An actual lex situs would, however, presumably prevail.

The other main difficulty with property in transit is that there are often several inappropriate leges situs, as where trans-shipment occurs or where a rail delivery passes through several states en route for its final destination. It does not seem appropriate to refer an issue of real rights to such a fortuitous system. Events may, however, occur in such a state which prevent the application of that lex situs being inappropriate, as when creditors relying on that lex situs seize the property concerned, or the carrier sells it for some reason. It would, however, be odd were the rights of the seller's and buyer's other creditors, or those of a sub-purchaser, to be determined by lottery; by a system of which they may be completely unaware. The solution must be similar to that suggested regarding situations involving documents of title: the lex situs must be referred to, subject to a permissive renvoi to a system which is more appropriate in terms of a subsidiary choice of law rule. Where there are documents of title it is easier to decide which system is more appropriate than the lex situs; where there are none the same difficulties arise as in the situation where there is no actual situs. It would accordingly seem to be sensible to refer to the "proper law" at the relevant time, with a presumption in favour of the law of the intended destination at that time.

2) New acts.

It is sometimes argued that the mere change of situation cannot of itself alter real rights, but that something more is needed to do this, perhaps some "new act" in the new situs, or a specific statute on the issue. A case decided by the O.L.G. Zweibrücken on 13 July 1898 has been much discussed in this regard. This case concerned a sale of property which was initially situated in Germany, but which was moved to France prior to delivery in terms of German law. Was some new act necessary after the property had entered France, before the French lex situs could be considered to transfer ownership from seller to buyer? The court decided that there was no need for any such new act, and as delivery was unnecessary under French law, the buyer was considered to own the property. There seems to be little justification for a fixed requirement for such a new act, and if the Zweibrücken case can be criticised it must be criticised for its interpretation of the new French lex situs. The choice of law rule indicated that French law governed the issue of the creation and extinction of real rights, and so the requirement for some new act after the property had entered France was surely a matter for French law.

It is of course odd that a change in situs can have this great effect of itself, but such an effect surely occurs on many occasions, for example when property which cannot be alienated in one state becomes freely alienable in
another, merely by the translation of ownership concepts on a change in situs. It is however rather hasty to assume that French law will not require some new act to transfer ownership, and the Zweibrücken case may be criticised on this ground. It should not tritely be assumed that because German internal law completely severs contract and conveyance, and because French internal law combines the two, that French law will ignore the fact that the contract, under its German governing law, is incapable in itself of transferring ownership. Surely the division of contract and conveyance in French international private law is capable of more subtle analysis? If the French conveyance is inextricably linked to the contract, that contract might then be able to determine when ownership will pass. That contract may be governed by German law, and cannot in itself transfer ownership, according to that law. Whether French law will then decide that ownership does not pass until delivery, or delivery in terms of German law, or on some "new" indication of intention to transfer, or immediately, depends upon the nature of the relationship between contract and conveyance in French law. It may be that French law should consider the inability in itself of a German contract to transfer ownership indicates the parties' intention to transfer ownership only after some form of delivery has taken place. This should be a matter for the French lex situs to determine. It ought not to be determined by some independent requirement of the lex fori that there be "new acts" when property moves to a new situs.
I. Applications of the *lex situs* rule.

The application of the choice of law structure discussed in this chapter in aspects of the Scots international private law of sale, securities and insolvency is discussed in Part B. As mentioned in Chapter 1, it is suggested that this choice of law structure has been applied, to a greater or lesser extent, in each of these fields of Scots international private law and that it is potentially applicable outwith such fields and as a more general model structure for both Scots and other systems of international private law.

Introduction.

This chapter concerns the sale of corporeal movables. It is straightforward to distinguish the issues discussed in this chapter from those discussed in Chapter 3. This is because there are few clear and useful analytical distinctions on regard's choice of law between sales and securities, and between each of these in their straightforward forms and the various rights arising in various forms of sale and security transactions. One of the principal features of sale is the transfer of ownership from the seller to the buyer; any stipulated function may be coupled with additional security functions, whether security or covertly. Sale of goods under reservation of title, for example, covenants both sale and security functions. Simultaneously, rights such as an express security lien, which arises as a matter of course in sale often perfect security positions.

Accordingly, while this chapter relates largely to simple sales and rights arising in the course of such sales, the relevance to issues relating to securities should be borne in mind, but as a matter of the issues discussed in Chapter 3 are of relevance in the context of sale. It is indeed significant that in *Frasby v Thyssen Stahlbetrieb* *et al.* 1980 SLT 545 Lord Hayfield, at First Division, considered at 552-57 the material choice of law rules regulating sale security to be the same, explaining at 567 to relate to the creation of real estate in corporeal movables.

In another section concerning the transfer of ownership in sale are discussed in the context of this section, after which a number of specific issues and theoretical problems are considered. It is concluded, the position regarding a number of international conventions and draft conventions is reviewed, on they have light upon a number of issues.

1. Alternative theories.

There are several different legal systems to which the issue of the transfer of ownership on sale might be referred. In accordance with Dr. Khairallah's position in the field of voluntary securities, it might be referred to the law selected by the parties in the parties by the sale. This might be a reference to different law from that governing the contract of sale as Khairallah maintains the content of securities, or it might be a reference to the same law as that governing the contract of sale. However, Mr. Tindale has vigorously attacked this perspective as a vital tendency of the Quebec course of property and characterises property issues as contracting in this manner, has some force, particularly in the light of the tendency of the French parties in the parties to a sale to avoid the knowledge of other parties.
PART B
PARTICULAR APPLICATIONS OF THE GENERAL LEX SITUS RULE

CHAPTER 4
SALE

A. Introduction and general issues.

1) Introduction.

This chapter concerns the sale of corporeal moveables. It is not straightforward to distinguish the issues discussed in this chapter from those to be discussed in Chapter 5. This is because there are few clear and useful analytical distinctions as regards choice of law between sales and securities, and between each of these in their straightforward forms and the various rights arising in various forms of sale and security transactions. One of the principal functions of sale is the transfer of ownership from the seller to the buyer. This simple function may be coupled with additional security functions, whether covertly or overtly. Sale of goods under reservation of title, for example, performs both sale and security functions. Similarly rights, such as an unpaid seller's lien, which arise as a matter of course in sale often perform security functions.

Accordingly, while this chapter relates largely to simple sales and rights arising in the course of such sales its relevance to issues relating to securities should be borne in mind, just as a number of the issues discussed in Chapter 5 are of relevance in the context of sale. It is indeed significant that in Armour v Thyssen Edelstahlwerke A.G. 1986 SLT 452 Lord Mayfield, at first instance, considered (at 456D-G) the material choice of law rule regarding sale and security to be the same, expressing it to relate to 'the creation of real rights in corporeal moveables'.

General issues concerning the transfer of ownership on sale are discussed in the remainder of this section, after which a number of specific issues and theoretical problems are considered. In conclusion, the position regarding a number of international conventions and draft conventions is reviewed, as they shed light upon a number of issues.

2) Alternative theories.

There are several different legal systems to which the issue of the transfer of ownership on sale might be referred. In accordance with Dr. Khairallah's arguments in the field of voluntary securities, it might be referred to the law indicated by the choice of the parties to the sale. This might be a reference to a different law from that governing the contract of sale, as Khairallah suggests in the context of securities, or it might be a reference to the same law as that governing the contract of sale. However Dr. Talpis has vigorously attacked what he perceives as a wilful tendency of the Quebec courts to ignore property law and characterise property issues as contractual in this manner. His argument has some force, particularly in the light of the tendency of the free choice of the parties to a sale to evade the knowledge of third parties. As
discussed in Chapter 3A, their best hope of certainty in their actions relative to an item of property seems to lie in the application of a lex situs rule.

Recognising this difficulty, Professor Stoll has advanced a more cautious alternative argument. He notes that the existence of at least two leges situs is inevitable in international sales transactions, making a conflit mobile inevitable according to traditional analysis. According to Professor Stoll such transactions should therefore be separated from other property law situations, and a restricted autonomy granted to the parties to the sale contract.

In terms of his theory buyer and seller could then select either the first or second lex situs, or perhaps the personal law of either, and this law would then be applicable to the transfer of ownership under the sale. However, in order to eliminate difficulties which arise at the actual situation of property, Professor Stoll permits the actual lex situs a veto over the effects of a different law, for the duration of the presence of the relevant item of property in that state. This qualification would seem to leave residual control in the hands of the current lex situs, in a similar manner to the more general theory of permissive renvoi proposed in chapter 3C,2.

Professor Stoll's choice of law rule is theoretically attractive, since it largely preserves the certainty of third parties and permits the integration of choice of law rules for international sales with other choice of law rules, while acknowledging the consensual nature of sale and avoiding an otherwise inevitable conflit mobile. It does, however, have little support in case law.

3) General Scots rule.

In Scots international private law the conventional rule appears to prevail. Thus the essential validity of the transfer of ownership on sale would seem to be governed by the lex situs at the time of an alleged transfer of ownership. Despite a relative lack of authority, this proposition appears to be supported by the authorities discussed in section B below, and in particular by Todd v Armour (1882)9 R 901 and Armour v Thyssen. This view is also supported by the general arguments of the majority of the Whole Court in Inglis v Robertson & Baxter (1897)24 R 759, (1898)25 R(HL) 70, as supported by the House of Lords, even though, as discussed in Chapter 5, Inglis strictly concerned a security. Similarly the forceful decision in Winkworth v Christie (1960) Ch 496 must be regarded as highly persuasive authority in Scotland, given its relative clarity and its congruence with the Scottish decisions.

It is probable that the domiciliary system of the owner of an item of property was at one time considered applicable in Scotland. Erskine (11.2.40) appeared to take this view, for example. A continuing attempt to apply the domiciliary system through the maxim mobilia sequuntur personam is evident in Lord Young's dissenting judgements in Todd and Inglis. Lord Young's views are discussed in Chapter 5C below, along with Wallace v Davies (1853)15 D 688, a case relating to incorporeal property which apparently also favours application of the domiciliary system to the transfer of moveables. There can be no doubt that the domiciliary approach has been abandoned.
4) Rights inter partes and incidental questions.

There is little clear Scots authority for the proposition that the property relations of buyer and seller are to be decided in accordance with a different choice of law rule from that determining the property relations of buyer and seller with third parties. However authority to the contrary is even more obscure. This situation may be explained by the fact that it is seldom necessary to distinguish between the contract of sale and the transfer of ownership unless a third party is involved. It is therefore relatively easy to plead a case in contract when only the parties to a sale are involved, or to characterise a proprietary issue as contractual in that situation. There are dicta in the securities cases Inglis v Robertson & Baxter and North-Western Bank v Poynter (1894)22 R (HL) 1 which support a distinction of property relations between the parties to a transaction and property relations regarding third parties. These dicta are discussed further in Chapter 5,D,4).

It is similarly difficult to find authority for or against the proposition that an incidental question as to contractual rights arising under the lex situs should be determined in accordance with the choice of law rule of that lex situs. Armour v Thyssen may be analysed in this way, although, as discussed below, the issue was not completely clear in that case.

5) Exceptional and subsidiary rules.

It was suggested in Chapter 3 that, for example, ships and property in transit or subject to a document of title may be subject to exceptional or subsidiary choice of law rules from those applying to other types of corporeal property. It is significant that the property most likely to give rise to choice of law problems on sale often falls within these categories. There is little direct support for such exceptional or subsidiary rules in Scots international private law except, perhaps, as regards ships. It must also be of some significance that the actual lex situs was applied in Cammell v Sewell (1860)5 H&N 728 and Inglis v Robertson & Baxter, as arguments based upon documents of title could have been attempted in those cases. It may therefore be suggested that any such other choice of law rules are subsidiary rather than exceptional to the main choice of law rule.

It was also argued in Winkworth v Christie (1980)1 Ch 496 (at 510E-511A.) that the lex situ rule applied only when there had been a 'lawful' transfer by an owner, at least in the situation where the lex fori was in a position to enforce its (apparent) policy in favour of the protection of title. As discussed below, Winkworth concerned property stolen in England, sold to a bona fide purchaser in Italy and returned to England for auction.

The plaintiff did not however make a very clear distinction between the argument that an exceptional choice of law rule arose because of these factors in the case and an argument that the normal lex situs choice of law rule ought to be excluded in favour of the lex fori on the grounds of public policy. Slade J. rejected such an exceptional rule on the practically indistinguishable authority of Cammell v Sewell, the persuasive authority of Todd v Armour and the rather more dubious authority of the bill of exchange case Embiricos v Anglo-Austrian Bank (1905)1 KB 677.
Quite apart from authority, and the difficulty of deciding under which law such a transfer would have to be considered lawful, this argument is open to further criticism. Although he did not espouse the entire theory, the plaintiff’s argument in *Winkworth* was based largely upon the arguments by Beale and others in the U.S.A. in the 1930’s that a second *lex situs* could only be applied to the detriment of a conditional seller or chattel mortgagee if that person had consented to the removal of the property from the state of the original security transaction. This argument and its flaws are discussed further in Chapter 5,B,3),c).

6) Public policy.

It was also argued in *Winkworth* (at 510F-511A.) that Italian law ought to be excluded from the case on the ground that its application was contrary to English public policy. Similar arguments that German reservation of title clauses were contrary to Scots public policy were upheld in *Armour v Thyssen* and *Hammer v Schne v H.W.T Realisations Ltd*. 1985 SLT(Sh Ct) 21.

Clearly the application of the public policy exclusion of German law in the *Armour v Thyssen* and *Hammer* cases was inconsistent with the application in those cases of Scots law as the *lex situs* in terms of the normal choice of law rule referred to above. As indicated in Chapter 5,D,1), it was equally inappropriate to apply an internal policy of Scots law as if it were a matter of Scots policy in international matters. The reversal of the internal policy of Scots law by the House of Lords in *Armour v Thyssen* itself emphasises its inappropriateness as a basis for the exclusion of foreign law. Doubtless a foreign property law leading to extreme injustice would not be applied by the Scots courts, as they have indicated their willingness to exclude fairly innocuous German security laws.

The public policy argument in *Winkworth* was not adequately distinguished from the argument that an exceptional choice of law rule ought to be applied to the case. The plaintiff made no attempt to argue that the application of Italian law was contrary to justice or morality (see 510E.). Instead, his argument turned on the narrow basis of the fact that the property in question was stolen in England and had later returned to England, coupled with the (apparent) favour granted by English law to security of title over security of transaction.

Slade J. could find no authority for such a broad application of the public policy doctrine or for such a new category of public policy exclusion of foreign law, and furthermore noted the commercial inconvenience and uncertainty which would arise from the application of such a public policy doctrine. As discussed in Chapter 3,E, this position is surely correct, and preferable to that suggested in the *Armour v Thyssen* and *Hammer* cases. The further comment of Slade J. (at 512G.) that ‘security of title is as important to an innocent purchaser as it is to an innocent owner whose goods have been stolen from him’ is telling.

The position may be different were laws such as the Italian one in *Winkworth* to be used in order to ‘launder’ stolen property. If it were possible to set up such a scheme its operation must surely be contrary to public policy, as, arguably, a manipulation of choice of law rules: *fraud à la loi*. As discussed in Chapter 3,E, it has been maintained that the doctrine of *fraud à la loi* does not exist in English international private law. The decision in *Winkworth* may be taken to reinforce this argument. However, had the facts in *Winkworth* been...
slightly different, it is suggested that the doctrine of *fraud à la loi* could have been pled and upheld and that it should be so available in Scots international private law.

Delivery is often important in sales, although its significance differs under different systems of law. Delivery involves a change in the control of property, and this change in control may have various legal consequences. One of these consequences may be the transfer of ownership, since a third party commonly understands property to be under the control or in the possession of its owner. Another possible consequence is the indication of the party upon whom the risk of the destruction or a change in the property lies, because of the obvious practicality of a connection between control and risk. Of course neither of these consequences is inevitable, and neither in their connection.

A third party's reliance on the possession or control of property being the owner may not be justified, since it is comparatively common for a co-owner to possess or control property. Similarly, other factors are significant to the transfer of ownership, such as the commercial convenience which a seller delivers requirement understands.

Accordingly the significance of delivery to the transfer of ownership on the sale of property varies comparatively, or does the dependence of the validity of the delivery upon some related factor, such as a contract. Similarly, the criteria which establish delivery vary from system to system.

In some legal systems, delivery of some sort is a necessary prerequisite to the transfer of ownership on sale of goods. Delivery might perhaps suffice in itself, as a brute fact, but it more usually requires the presence of some other factor, or factors, in order to be effective. Thus in German law delivery (abgabe) is insufficient unless the parties are in agreement (geltung) that ownership shall pass at the relevant time. Delivery is distinct from the substantive contract of sale, although it may be reflected in the contract, and ownership may pass even if the sale contract is completely void. Such a requirement may be termed "abstract" name.

Alternatively, delivery might be a prerequisite for the transfer of ownership, but also requires to be connected with other "contractual" causes, such as a contract of sale which is not valid. In other legal systems delivery is completely irrelevant to the transfer of ownership on sale and ownership may, for example, pass by the consent of the buyer alone. The consent may, for example, require to be stated in a valid contract of sale, constituting what might be termed a personal conveyance with personal cause, entailing delivery of the conveyance upon novelty of the contract. As a further alternative, the consent might only require to be contained in a personal conveyance with abstract cause, including without delivery as it were, purporting a valid personal conveyance upon a void contract of sale.

Although there is little clear authority, the Scots choice of law structure appears to be as follows. If the issue of ownership arises between the parties to the sale, the proper law of the sale contract might be applied to this proprietary issue. If a third party, such as a creditor or owner of buyer or seller, is involved, the law which at the time of the alleged transfer of ownership should be applicable. This lexmitis will then determine whether or
B. Specific property issues on sale.

1) Delivery and linked personal rights.

Delivery is often important in sale, although its significance differs under different systems of law. Delivery is seen as a change in control of property, and this change in control may have various legal consequences. One of these consequences may be the transfer of ownership, since a third party commonly understands property to be under the control or in the possession of its owner. Another possible consequence is the indication of the party upon whom the risk of the destruction of or damage to the property lies, because of the obvious practicality of a connection between control and risk. Of course neither of these consequences is inevitable, and neither is their connection.

A third party's reliance on the possessor or controller of property being its owner may not be justified, since it is comparatively common for a non-owner to possess or control property. Equally, other factors are significant to the transfer of ownership, such as the commercial convenience which a strict delivery requirement undermines.

Accordingly the significance of delivery to the transfer of ownership on the sale of property varies comparatively, as does the dependence of the validity of the delivery upon some related factor, such as a contract. Similarly, the criteria which establish delivery vary from system to system.

In some legal systems delivery of some sort is a necessary prerequisite to the transfer of ownership on sale of goods. Delivery might perhaps suffice in itself, as a brute fact, but it more usually requires the presence of some other factor, or 'causa' in order to be effective. Thus in German law delivery (Übergabe) is insufficient unless the parties are in agreement (Einingung) that ownership shall pass at the relevant time. Einingung is distinct from the relevant contract of sale, although it may be reflected in the contract, and ownership may pass even if the sale contract is completely void. Such a requirement may be termed 'abstract' causa.

Alternatively delivery might be a prerequisite for the transfer of ownership, but also require to be connected with some 'concrete' causa, such as a contract of sale which is not void. In other legal systems delivery is completely irrelevant to the transfer of ownership on sale and ownership may, for example, pass by the consent of the buyer and seller alone. This consent may, for example, require to be contained in a valid contract of sale, constituting what might be termed a consensual conveyance with concrete causa, entailing nullity of the conveyance upon nullity of the contract. As a further alternative, the consent might only require to be contained in a consensual conveyance with abstract causa, Einingung without Übergabe as it were, permitting a valid consensual conveyance upon a void contract of sale.

Although there is little clear authority, the Scots choice of law structure appears to be as follows. If the issue of ownership arises between the parties to the sale, the proper law of the sale contract ought to be applied to this proprietary issue. If a third party, such as a creditor or successor of buyer or seller, is involved the lex situs at the time of the alleged transfer of ownership should be applicable. This lex situs will then determine whether or
not delivery or causa is necessary, and if so the nature of the required delivery or causa.

Thus the majority of the First Division in Robertson & Co.'s Tr. v Bairds (1852)14 D 1010 indicated that ownership of iron situated in Glasgow could not pass to an English buyer, and thus his sub-purchasers, without delivery. The Scots lex situs was considered applicable to at least this basic issue departure. However, this example should perhaps be made to the sale contract, such as the validity of a sale contract. The scope of this incidental question may arise, such as the validity or partially valid nature of the contract of sale, should then be determined in accordance with the lex situs, and the law considered appropriate by the lex situs should thereafter be applied to the specific incidental issue defined by the lex situs. Other matters arising under the sale contract, such as breach thereof, may then be determined in accordance with the proper law which the lex fori considers governs that contract, in the light of the ownership position established under the lex situs.

Such an analysis of incidental contractual rights is suggested by Lord Davidson's comment in Zahnrad Fabrik Passau GmbH v Terex Ltd. 1986 SLT 84 (at 88) that 'if, as s.17 of the Sale of Goods Act 1979 provides, the parties to a contract are entitled to agree when property is to pass, then I think it is wrong to regard the lex situs as being an inflexible corpus of law. Agreeing with counsel for the pursuers on this point, in a contract regulating the rights and obligations hinc inde of two contracting parties, prima facie I see no reason why they should not incorporate into the contract one or more provisions of a foreign legal system'. A similar analysis is also suggested by the approach to Scots and German law taken by the Lord Ordinary, Lord Mayfield, at first instance in Armour v Thyssen Edelstahlwerke A.G. 1986 SLT 452. Both of these cases concerned German sale contracts containing broad retention of title clauses and they are thus discussed more fully in Chapter 5.

Further difficulties may arise if a sale relates to property situated in the territory of several legal systems and these systems have differing rules concerning delivery and causa. It is possible, for example, that a sale contract may indicate that ownership of all of the property subject to it will pass to the buyer on a certain date, but that none of that property shall have been delivered by that date. If part of that property is situated in the territory of a legal system under which ownership passes without delivery and another part is situated in the territory of a system under which ownership may only pass after delivery, it is not immediately obvious that ownership of the first part of the property has passed to the buyer.

This example may be resoluble by subtle interpretation of the sale contract. However, more complex examples may be suggested under which the terms of the sale contract are of limited relevance under one lex situs and further leges situs make reference to the sale contract, but reach different views as to its validity or effects. There would appear to be no authority upon such difficulties. It is suggested that their existence should not detract from the general rules described above and that an attempt should be made to resolve such difficulties in accordance with such rules. It is suggested in Chapter 3(C,1) that some putative validity preference could operate in such circumstances.
2) Conflit mobile.

International sale problems often arise in export and import transactions, which by their nature give rise to a conflit mobile, as the situs of the property in question changes in the course of the transaction.

Issues of delivery and causa illustrate well the problems of the conflit mobile on sale. If law S1 requires delivery and abstract causa, law S2 merely requires a consensual conveyance but with concrete causa, and the subject of sale moves from S1 to S2 prior to delivery in terms of law S1, it is not immediately obvious who owns the property in question before delivery takes place. If law S1 applies the seller still owns the property, and if law S2 applies the buyer probably owns the property.

This was more or less the situation in the case decided by the O.L.G. Zweibrücken on 13 July 18983. Law S2 was applied in that case, which apparently entailed ownership passing at the border! As mentioned in Chapter 3,H,2), this case has been the subject of much discussion, presumably because of the apparent senselessness of the conflit mobile itself effecting the change in ownership. One result of this discussion was the argument that some 'new act' take place once the property has moved to S2 before law S2 can become applicable.

As was argued in chapter 3,H,2, a requirement for such a new act at the level of choice of law is a needlessly rigid imposition upon the choice of law structure. The consensual conveyance of law S2 requires causa, and this causa is unlikely to ignore the international aspect of the transaction. Law S2 may consider the causa to be contained in a contract governed by law S1, law S2 or some further law. While all of these laws should then be interpreted in accordance with the international context of the transaction, it would be particularly odd, though not impossible, for a contract governed by law S1 not to be interpreted to require delivery or some other formal act to take place prior to the time ownership was intended to pass. It would thus seem to be in the application of law S2 and not in its choice of law structure, that the court in the Zweibrücken case went wrong.

The converse of the Zweibrücken situation is instructive. Nobody has argued that it would be outrageous to allow the consensual conveyance of law X full effect after the property has moved to Y, but before delivery has taken place to the satisfaction of law Y. What might be missed here is the possibility that law X may not, on a close examination of the causa of its consensual conveyance, transfer ownership without some form of delivery. Both the Zweibrücken situation and its converse give rise to problems for third parties under each consecutive legal system. However a straightforward reference to each consecutive lex situs should provide these third parties with their greatest hope of certainty. It seems unreasonable to assume that any lex situs would be as unsuitable as to ignore the international context of the transaction.

There is little Scots authority upon this issue. Zahnrad Fabrik v Terex and Armour v Thyssen, discussed above, concerned export sales from Germany to Scotland, as did the further reservation of title case Hammer & Sohne v H.W.T. Realisations Ltd. 1985 SLT (Sh. Ct.) 21. All are discussed more fully in Chapter 5 below. In all of these cases ownership of the property in question was held to have passed to the buyer under the second, Scots, lex situs. Delivery was
probably considered to have taken place in Scotland, although the cases are not clear.

The distinction between the first, German, *lex situs* and the second, Scots, *lex situs* was largely passed over in the Terex case. In both of the other cases the 'actual' *lex situs* was considered applicable. The second *lex situs* may thus have been applied in conscious preference to the first *lex situs*, rather than the first and second *leges situs* being applied consecutively. It may even be suggested that this was done specifically because of the problems of the *conflict mobile*, in the manner proposed by Professor Stoll.

However, as in the Zweibrücken case, in the Thyssen and Hammer cases the first *lex situs* did not purport to create or extinguish any rights while the property was situated there. Such function was therefore exercised only by the second, Scots, *lex situs*, to transfer ownership and thereby extinguish for a specific reason what was seen, until the Thyssen case reached the House of Lords, as a functional security prohibited under Scots law. The favour shown for the 'actual' *lex situs* in the Thyssen and Hammer cases was accordingly obiter. As noted in Chapter 5.D.2) below, the reasoning and authority underlying these obiter views were also painfully inadequate.

Perhaps most importantly, the authority in this context of Todd v Armour (1882)9 R 901 was not recognised in the Thyssen and Hammer cases. In Todd a sub-purchaser in Scotland of a horse bought in market overt in Ireland from a non-owner was preferred to the 'former owner' thereof by the Second Division. As explained in section 3) below, the majority in the Second Division appear to have supported the application in turn by the Sheriff-substitute of the Irish *lex situs* and the Scots *lex situs*, entailing the recognition of the title acquired by the purchaser in Ireland under Irish law.

The leading English case Commell v Sewell (1860)5 H & N 728 was approved in Todd. It is of interest that neither Commell v Sewell nor Winkworth v Christie (1980) Ch 496, which followed it in England, were referred to in the Thyssen and Hammer cases. In these English cases, which are discussed in sections 3) and 4) below, property was sold in, respectively, Norway and Italy by a non-owner, prior to the property in question being brought to England. The titles acquired by the purchasers under Norwegian and Italian law, as previous *leges situs*, were then upheld after the property in question had been brought to England. English law, as the last or 'actual' *lex situs*, did not disturb those titles.

In Winkworth certain works of art had been stolen in England, sold to a *bona fide* purchaser in Italy and returned to England for auction. It was argued (at 509A) that English law should be regarded as the *lex situs* of the property in question as regards the purchase in Italy. Slade J. rejected (at 509C-G) arguments to the effect that: (i) the actual situation of the property at the time of the action should be regarded as the relevant *lex situs*; (ii) the previous situation of the property in Italy should be ignored because the property had returned quickly to England or because it had been removed from England without the consent of its owner; and (iii) the connection of the property with Italy was 'spurious' given its other connections with England; being of the view that '[i]ntolerable uncertainty .. would result if the court were to permit the introduction of a wholly fictional English *situs* .. merely because the case happened to have a number of other English connecting factors'.

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Todd v Armour would appear to have established a general approach to this conflict mobile in Scots international private law, entailing reference in turn to consecutive leges situs to determine which real rights have been created or extinguished in respect of the subjects of sale. It is suggested that the Thyssen and Hammer cases have not established a different rule with regard to export sales and that the dicta therein are not followed in future Scots export cases, given the inadequacy of their underlying reasoning and authority. Until a subsidiary choice of law rule has been introduced for export transactions on a basis similar to that proposed by Professor Stoll, it is further suggested that the approach of the Todd and Vinkworth cases be adopted by the Scots courts as regards such transactions. Such an approach is entirely consistent with the main lines of reasoning in the Thyssen and Hammer cases.

It might be argued in some export sales that the property being sold is in transit when certain issues arise relative thereto. As discussed in Chapter 3,H,1 above, property in transit may be subject to exceptional or subsidiary choice of law rules. Property is of course more clearly in transit in the sense of such possible rules when it is being transported across a state otherwise unconnected with the transaction in question or across the High Seas. Sales under which the subjects of sale move between two adjacent states do not give rise to great problems in this context. If a problem were to arise during transit, the laws potentially applicable, the laws of departure or destination or the various likely proper laws, are the same systems as the first and second leges situs. The same may be said when the territories of the legal systems of departure and destination are separated only by the High Seas. It is therefore suggested that property is not considered to be in transit in such situations.

It is of course common for documents of title, such as bills of lading, to be used in the course of export sales and exceptional or subsidiary choice of law rules may therefore be applicable to property subject to such documents, whether or not such property may otherwise be considered to be in transit. The property in Cammell v Sewell was, however, held on a document of title. This speciality does not appear to have affected the court's reasoning.
3) Security of transactions.

There is a constant conflict in the law of property between the security of title and the security of transactions. As Lord Denning said in Bishopsgate Motor Finance Corp. v Transport Brakes Ltd. [1949] KB 322 (at 336-7): 'In the development of our law two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.' Such a conflict between the protection of title and transaction seems inevitable, and even the Scandinavians, with their apparent abandonment of traditional property concepts, accept this difficulty. It also extends far beyond the law of sale, for example to the situation of the grant of securities to bona fide creditors. Sale by a non-owner is however its classic example.

Different legal systems adopt different solutions to this problem, some favouring title over transaction more than others, and many striving to reach similar results by different theoretical routes. The problem for all legal systems is however basically the same: striking a balance between Lord Denning's two principles.

Scots law, for example, is quite extreme in the degree of protection it affords to title over transaction, with the rule 'nemo dat quod non habet' being subject only to quite limited exceptions, such as ss. 24 and 25 of the 1979 Sale of Goods Act, which favour bona fide purchasers from a non-owning seller or buyer in possession. Italian law, on the other hand, offers quite extreme favour to the bona fide purchaser, seeming to require only that any purchaser be in good faith in order to acquire ownership, regardless of the manner in which the seller acquired the property.

Various more complicated variants exist, such as those distinguishing commercial sales, or auction sales from other sales; or those completely protecting the bona fide purchaser only when the property had not been 'lost' or 'stolen'. Other variants require the 'former owner' to reimburse the price paid by the bona fide purchaser before allowing him to reclaim 'his' property, or require the former owner to pay for any improvements made by the bona fide purchaser, or impose a time limit in which the 'former owner' might claim the property back. There are also varying limits as to the types of property to which such laws apply, and sometimes registration requirements or differing rules as to good faith and onerosity.

There seems to be little doubt as to the relevant Scots choice of law rule. In Todd v Armour (1882) 9 R 901, the lex situs at the time the bona fide purchaser alleged he had acquired ownership was clearly applied. In Todd a horse was stolen in Ireland, sold in market overt in Ireland, brought to Scotland, and sold again. The person from whom the horse had been stolen tried to recover the horse. Quite clearly that person was considered to own the horse by Irish law, the first lex situs, and his ownership to have been extinguished by Irish law, that first lex situs. There was then no reason for Scots law, either as the second lex situs or as the lex fori, to divest the bona fide purchaser and undermine the certainty underlying his reliance upon the Irish market overt rule. The sub-purchaser in Scotland clearly acquired, by the Scots lex situs, the ownership which his author had obtained in Ireland.
The opinion of Sheriff-substitute Gillespie (at 903) is very clear upon these points, supporting the proposition in the English case *Cammell v Sewell* (1860)3 H & N 617 at 638, that 'a transfer binding by the law of the place where it is made is in general binding everywhere', and rejecting the pursuer's argument from Savigny that the title of the purchaser in market overt, even if it were to be good in Ireland, became bad when the horse was moved to Scotland. In particular, the Sheriff-substitute approved the comments in *Cammell v Sewell* that a court of a legal system not containing a market overt rule ought to apply the market overt rule of a former *lex situs* when the property subsequently moved to that state. The facts in *Todd* were exactly in point with this hypothetical example in *Cammell v Sewell*.

The judgements of the Second Division in *Todd* are less satisfactory, partly due to their tendency to dwell upon the defective nature of the parties' pleadings, but mostly due to the pursuer effectively conceding the defender's argument as to choice of law. The basic proposition upheld by the Sheriff-substitute does however seem to underlie the judgements of all of their Lordships bar Lord Young. Lord Young did not make it clear upon what basis he considered Irish law to apply to the sale in market overt. This is evident from his obiter comments (at 907–8), suggesting that a sale in some sort of 'market overt' in Scotland might 'purge' an Irish 'vitium reale'. While the choice of law argument which underlies his Lordship's comments appears obscure, it is probable that Lord Young considered the domicile of the owner to provide the appropriate law, given his Lordship's more detailed dissent in *Inglis v Robertson & Baxter*¹. Lord Justice-Clerk Moncreiff and Lord Craighill disagreed with these remarks of Lord Young.

**Winkworth v Christie** [1980] Ch 496 is clear, and recent, English authority to the same effect¹². Slade J.'s reasoning was remarkably clear, precise and consistent with *Todd*, and *Winkworth* must therefore be regarded as highly persuasive authority in Scotland. Briefly stated, in *Winkworth* works of art were stolen in England, taken to Italy, sold there to a *bona fide* purchaser and returned to England to be auctioned. *Todd* was approved, and the choice of law structure adopted seems very similar. It is clear that the person from whom the art works were stolen was considered to own them under English law, the first *lex situs*, and to own them under Italian law, the second *lex situs* (at 500B), until divested by a sale to a *bona fide* purchaser according to article 1155 of the Civil Code of that second *lex situs*. English law, the third *lex situs*, was not considered to re vest ownership in the former owner.

Choice of law issues are not, however, so simple if more complex regulation of title and transaction is involved. It is not, for example, clear how time limitations of claims or changes in circumstances should be analysed. Nor is it clear what approach should be taken to requirements upon a 'former owner', in connection with recovery of the property in question, to reimburse the price paid by a *bona fide* purchaser for the property or to recompense him for improvements made to it. These issues are discussed next.

**a) Time limits.** There are several possible analyses of a time limit in this context. It might be considered to relate to the extinction of an owner's rights and the creation of the rights of a *bona fide* purchaser, as if it were a short rule of prescription. Alternatively, it might be considered to relate to a subtle rule of ranking, altering rankings after a period of time has elapsed. Thirdly, it might constitute a condition, whether relating to the extinction and creation

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¹ *Inglis v Robertson & Baxter* 1980 Ch 496

¹² *Winkworth v Christie* [1980] Ch 496
of rights or to their ranking. There is little authority of much assistance regarding these matters.

Sauveplanne describes a provision of Swedish law under which a strict rule of nemo dat quod non habet protects an 'owner' absolutely for a period of time, and thereafter a bona fide purchaser is absolutely protected. As discussed in Chapters 2,H and 3,E,3), this may be regarded as a ranking rule in internal Swedish law. It is, however, suggested that this provision might be analysed as a short prescription in an international context, without causing undue distortion of Swedish law, and that other time limits in this context should be analysed in a similar prescriptive manner. Certainly Sauveplanne was of the view that even short time limits of this type are best characterised in this straightforward way.\(^4\)

b) Changes in circumstances. A change of the circumstances surrounding a conflict between title and transaction occasionally affects the resolution originally adopted to that conflict. However, most changes in circumstances will constitute a new transaction relative to the property in question. English law nevertheless formerly provided an example of an apparently retrospective change in the resolution of the conflict of title and transaction. Under ss.22(1) and 24(1) of the 1893 Sale of Goods Act the claim of a bona fide purchaser in market overt of stolen goods was preferred to that of the person from whom they were stolen, unless the thief had been convicted, whereupon the goods were considered to remain vested in the former owner.

Although repealed in 1968, the apparently retrospective operation of ss.22(1) and 24(1) of the 1893 Act were discussed briefly in Vinkworth. Slade J. (at 501) felt this rule was an example of a statute which was binding upon the court, containing in itself a choice of law rule overriding the normal choice of law rule governing the issue and applying the lex fori. Such a rule is one category of those termed "spatially conditioned" by Nussbaum, and what is termed in France a loi d'application immédiate. This is surely rather an extreme and insular approach to the rather more general problem of such retrospective changes to title. Slade J.'s brief remark seems as ill-considered as it was obiter.

The Irish equivalent of ss.22(1) and 24(1) almost came into operation in Todd v Armour. In Todd a stolen horse was sold in market overt in Ireland, removed to Scotland and sold again. The 'thief' was prosecuted in Ireland, after the horse had been removed to Scotland, but acquitted. Unfortunately the Second Division did not discuss the hypothetical case of the conviction of the thief.

It is possible to characterise this English rule as the extinction of the bona fide purchaser's right and the re-creation of the former owner's right, with retrospective effect. Such an analysis certainly appears to accord with a Civilian choice of law structure, but may distort the English rule on a change of situation of the property, as the retrospective changes in rights are unlikely to be given effect under the second lex situs\(^5\) and the bona fide purchaser is therefore likely to be accorded greater protection than that provided by the English lex situs at the time of the transaction.

Wolff, on the other hand, considered (p.529) ownership to vest in the buyer, subject to a resolutive condition of divestiture upon the conviction of the thief. Accordingly on a change of situation of the property after the sale but prior to the conviction, Wolff argued that the resolutive condition still took effect,
divesting the *bona fide* purchaser. However, the title of the former owner would then require either to have remained unaltered by the sale in market overt or to have been suspended thereby pending conviction of the thief. Given the uncertainty deriving on a *conflict mobile* from a profusion of separate titles, it seems unrealistic for other legal systems to consider the former owner's title unaltered by the sale in market overt. Given the difficulties deriving from suspensive conditions upon a *conflict mobile* discussed in Chapter 3G, it seems similarly unrealistic for other legal systems to give effect to an open ended suspended title. Divestiture of the *bona fide* purchaser by the operation of a resolutive condition upon his title may then distort the English rule, given the connection between the revival of the former owner's title and the divestiture of the *bona fide* purchaser.

Wolff's analysis may nevertheless be preferable if the sale in market overt did give rise to such a 'defeasible' title in the *bona fide* purchaser, as the former owner may be able to recover the property on the basis of a lesser personal title than that previously divested. However, it seems improbable that the market overt rule operated in this conditional manner, rather than as an alteration of the relative ranking of former owner and *bona fide* purchaser in a fairly unusual situation. Characterisation of the rule in terms of ranking would, however, distort its operation to a greater degree than either of the alternatives discussed above, as it would not in theory apply if the sale took place in England prior to a change in situation of the goods in question. It is therefore suggested that either the prescriptive analysis or that of Wolff discussed above should be adopted. If difficulties relating to the former owner's title can be resolved, Wolff's analysis seems to provide the more subtle solution.

c) Reimbursement of Price. There are several possible characterisations of a requirement of a 'former owner' to reimburse the price paid by a *bona fide* purchaser for property which the former owner seeks to recover. The characterisation adopted may, of course, differ as regards different rules which contain differing further criteria of preference.

The *bona fide* purchaser may be considered to have a personal right against the former owner, as a matter of unjustified enrichment. However nobody appears to have been enriched other than the seller to the *bona fide* purchaser. An analogous allocation of unjustified loss may, of course, give rise to similar choice of law criteria. Alternatively the *bona fide* purchaser, rather than having become owner of the property in question, may be considered to have been vested with some other real right in it subject to a resolutive condition of reimbursement, most credibly some sort of lien or other security right. If the former owner must also claim within a specific period, a 'lien' held by the *bona fide* purchaser for reimbursement may also be considered to fly off on the acquisition of ownership by the *bona fide* purchaser at the end of the period in question. A further alternative may be some sort of public law restraint upon the owner exercised, presumably, by the *lex fori*. It may even be possible in some situations to argue that the former owner loses title but retains a preferable right of pre-emption at the price paid by the *bona fide* purchaser.

There appears to be no Scots authority upon these issues. They were, however, discussed in the Ontario case *McKenna v Hope* [192512 DLR 460]'. In *McKenna* a car was stolen in Rhode Island, taken to Quebec and acquired by a car dealer. This car dealer subsequently resold the car to an Ontario car dealer, with
delivery to take place in Ontario. The Ontario car dealer resold to a private purchaser in Ontario. The latter two purchasers were sued in replevin by the 'former owner'.

The laws of Rhode Island and Ontario contained a basic nemo dat quod non habet rule, as did article 1487 of the Civil Code of Lower Canada. Article 1489 of the Civil Code contained a reimbursement rule. This latter rule did not provide that ownership of the property in question would pass to a bona fide purchaser, since it merely stated that the 'owner cannot reclaim [the property], without reimbursing...the price'.

Lennox J., at first instance, upheld the claim to reimbursement, but was reversed by the unanimous decision of the Appellate Division of the Ontario Supreme Court. The reasoning of the Supreme Court was far from unanimous, even on the most basic issues of characterisation.

Smith J.A. (at 465-467) was the only member of the bench to draw an overt distinction between contractual and proprietary rights in general, and to apply the lex situs to proprietary rights, such as title to the car. Nevertheless, Smith J.A. considered the Quebec reimbursement rule to be a restriction upon owners independent of property law, and therefore inapplicable. This public law analysis received obiter approval in Phoenix Assurance Co. v Laniel [1926]3 DLR 301 (at 305).

The other judges did not distinguish contractual and proprietary issues so clearly, most analysing the case in contractual terms or in terms of the transaction of sale. General analysis of sale in contractual or transactional terms seems neither appropriate nor generally accepted10. However, as discussed in section 5) below, characterisation of rights such as liens in largely contractual terms appears to have some support. In McKenna, even Smith J.A. expressed some doubts as to the application of the lex situs to liens, if the Quebec rule could have been so interpreted. It is suggested, as also discussed in section 5) below, that the lex situs should govern the essential validity of liens when a third party is involved. In McKenna the former owner was clearly a third party relative to all of the sale contracts entered into after the theft of the car.

Mulock C.J.O. (at 461-463) characterised the Quebec reimbursement rule as a lien, but considered this lien, under the law governing the sale by the Quebec car dealer, extinguished by loss of possession. It was also felt that this lien could not be transferred to the sub-purchaser in Ontario under the laws of either Quebec or Ontario.

The Quebec reimbursement right was not related to possession in Quebec law. Its extinction by loss of possession may have derived from a conscious translation as a broadly equivalent right under Ontario law. It seems more likely that the connection with possession derived from insular characterisation as, for example, Smith J.A. concluded that the Quebec reimbursement rule did not purport to constitute a lien precisely because it was not related to possession.

It is suggested that the Scots courts should be willing to characterise foreign reimbursement rights in terms analogous to liens, if they purport to have such effect under the lex situs at the time of the transaction in question, and apply that lex situs in situations involving third parties, such as a 'former owner'.

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Upon movement of the property in question to a different state, it is further suggested that, as with foreign securities\(^1\), that second *lex situs* should not extinguish the foreign lien or convert it into a broadly similar domestic lien unless there is specific reason to do so\(^2\). If a reimbursement rule cannot be so characterised as a lien or security, it is suggested that it be characterised in terms of unjustified enrichment, as the general function of such rules is the allocation of loss. Such a characterisation seems manifestly more appropriate than the public law approach advocated by Smith J.A. in *McKenna*.

\(\text{(d) Improvements.}\) If the 'former owner' is required to reimburse a *bona fide* purchaser for the cost or value of repairs or improvements made to the property in question, before he is entitled to recover it or its value, such a requirement ought probably to be characterised as a matter of unjustified enrichment, since the former owner gains at the expense of the *bona fide* purchaser. A similar argument applies to the situation where the *bona fide* purchaser has to pay the former owner any diminution in the value of the property. It is possible that such claims may be effective against third parties. Their analysis in terms of liens or securities may then be appropriate, as for price reimbursement claims. The depreciation of the car in the *McKenna* case was discussed, but no conclusions were reached because of a lack of clear evidence. The issue of choice of law was not broached.
4) Further issues in security of transactions.

In the preceding section general rules regulating conflicts of title and transaction were discussed. There are many other rules determining a balance between title and transaction, and it is often difficult to draw lines between the general rules discussed above and analogous rules regulating other conflicts of title and transaction. Moreover, where distinctions can be drawn it may not be helpful to do so for the purposes of choice of law.

The situation may arise, for example, that an agent has possession of property belonging to his principal, which he proceeds to sell to a third party, completely outwith the scope of the actual authority given to him by his principal. Internal French law might characterise the property relations of principal and third party in terms of its general rule that possession vaut titre, examining whether or not the agent obtained possession with the permission of the principal and whether or not the third party was in good faith, all in terms of Articles 2279 and 2280 of the Code Civil. Internal Scots law, on the other hand, might characterise the issue at a more concrete level, in terms of the law of agency. Thus the actual authority of the agent might be examined initially, followed if necessary by the narrow application of the agency language of s.2 of the Factors Act 1889.

The problem, and indeed the solution, would seem to be the same in both instances, the differences lying in the generality of their expression. There appears to be no Scots authority in point, but the authority to this effect of the English case Janesich v George Attenborough & Son (1910)26 TLR 278 seems very persuasive. Indeed the main Scots rules favouring transaction over title, ss.24 and 25 of the Sale of Goods Act 1979, are expressed largely in the terminology of agency.

In the Attenborough case a necklace was given in France to an agent for sale. This agent traded both in Paris and London and pledged the necklace in London, outwith his authority, to the defendants. While it was established that the pledge would have been valid under Article 2279 of the French Code Civil, it was held that English law was applicable. It was further held that the pledge was valid in the circumstances under s.2 of the Factors Act.

So too in the Irish High Court decision in Re Interview [1954] IR 382, Kenny J considered (at 392-395) the Irish lex situs applicable to the sub-sale in Ireland of televisions imported from Germany under reservation of title. It was held that the criteria of good faith and lack of notice in ss.2 and 9 of the Factors Act and s.25 of the Sale of Goods Act 1893 had not, however, been satisfied.

Cammell v Sewell (1858)3 H & N 617, (1860)5 H & N 728, the leading English case in the general field of choice of law in corporeal moveables, also supports such a general approach, and was indeed argued substantially in terms of agency. It may also suggest that the same choice of law criteria apply in relation to sales with judicial authority and as regards property in transit subject to documents of title and that maritime law creates no specialities regarding choice of law in this field.

In Cammell v Sewell a Prussian ship carrying a consignment of wood from Russia to England was damaged and stranded on the Norwegian coast. The English consignees gave notice of abandonment of the wood to their insurers, who
subsequently accepted the notice, settled the claim and had the relevant bills of lading indorsed to them. In the interim the master of the ship had arranged for an official survey of the ship and cargo to take place, the report of which recommended a sale by public auction. Agents for the insurers objected to the carrying out of the subsequent official auction at that auction but could not at that stage prove their title to object. The insurers' agents thereafter challenged the auction in the Norwegian courts in what appears to have been an appeal against the decision made by the official auctioneer to proceed with it. The Norwegian court rejected the challenge to the competency of the auction. The purchaser at the auction re-sold the wood and it was shipped to England, where it was claimed by the insurers.

The English Court of Exchequer rejected the insurers' claim because the decision of the Norwegian court was considered to be a judgement in rem. On appeal the Exchequer Chamber was of the view that the decision of the Norwegian court could not be given effect as a judgement in rem. However, at least Byles J.\(^2\) was of the view that a judgement in rem by a court of the situation of an item of property would be considered to alter rights in that property.

The majority in the Exchequer Chamber clearly applied the Norwegian lex situs to the acquisition of ownership of the wood by the purchaser in Norway and the extinction of the previous title and considered English law to have no effect on this position once it became the lex situs. The majority judgement of Crompton J. is expressed in very general terms, using analogies of sales under distress for rent and in market overt, suggesting that the official nature of the auction, the use of bills of lading and the specialities of maritime law were immaterial to the decision.

The generality of the majority view in Cammell v Sewell suggests that acquisitions of property under the law of prize may fall within general choice of law rules on sale. Indeed the law of prize was referred to in Cammell v Sewell, both in argument and from the bench. The law of prize is rather specialised\(^3\). It largely concerns ships, which might, as discussed in Chapter 3, C, 4, be considered a special type of property for the purposes of choice of law. It also involves a certain lack of volition on the part of the dispossessed, which might be thought to involve expropriation! It may also be considered part of maritime law, perhaps still a distinct field of law from general municipal law according to many legal systems; and it also appears to be influenced more directly by rules of public international law than many fields of ordinary municipal law. It might further be argued that the law of prize, as a matter of international private law, relates more to the recognition of judgements than to the choice of law\(^4\). Additionally, the very presence of the expediencies of war might be thought to distort the general relevance of prize cases.

However Scots prize cases seem to deny much of this specialisation when the issue of ownership of the prize arises. In this respect the Scots courts appear to show a remarkably passionnate and straightforward approach even to hostile seizures, in what is obviously regarded as a conflict of the title of the dispossessed and the transaction by which a purchaser acquired his title. The Scots prize cases would therefore seem to have a degree of general relevance.

Anton\(^5\) considers Benton v Brink 1761 Mor 11949 to be an early Scots authority for the general application of the lex situs to property issues. In this case a Scots ship was captured by a French privateer and taken to neutral Denmark. It
was then condemned by the French High Admiral and sold to a Dane. The legality of the seizure was challenged in the Danish courts, on the ground that it had taken place in Danish waters, but the validity of the seizure and subsequent sale was upheld. The ship was then brought to Aberdeen, where the former owner attempted to recover it. He argued that the seizure and condemnation were invalid in public international law and that the intervention of the Danish court was unjustified. He also argued that Danish law did not displace title to the ship. The purchaser's arguments seemed principally to relate to the need to recognise the decrees of the French High Admiral and the Danish court, particularly since these decrees had been executed.

The purchaser was preferred, but the ratio is not clear. It would seem that the seizure and (probably) the condemnation were considered valid in public international law, and that the intervention of the Danish court was unexceptionable. It is not however clear whether the validity of the seizure and condemnation in public international law was crucial to the preference of the purchaser. If it were crucial it is not clear that invalidity in public international law would have led to the preference of the former owner as a matter of choice of law or the exclusion of foreign law on policy grounds.

Neither is it clear that the decrees of the French High Admiral and the Danish court were crucial to the preference of the purchaser. The condemnation by the High Admiral may have been necessary as a matter of public international law, and it might also have been necessary as a matter of Danish law, as an incidental question relating to the validity of the sale to the Danish purchaser. It is not clear that the condemnation required to be recognised directly as a judgement vesting ownership in the privateers. It is also also unclear whether the Danish judgement was recognised as a judgement or, in terms of a choice of law rule, as a transfer. Furthermore, it is not indeed clear whether the Danish judgement was considered necessary to the preference of the Danish purchaser, or whether the sale itself was sufficient as a matter of choice of law.

These difficulties apart, Danish law seems to have been applied in Benton v Brink to the validity of the purchaser's right in the ship and probably also to the displacement of the former owner's right in it. Danish law was probably applied as the lex situs. Similar applications of the lex situs appear to have been made in other prize cases, such as Wake v Hillary 1801 Mor App 'Prize' No.1 and A Dutchman v Lindsay 1558 Mor 11957. These prize cases would thus appear to support the generality of the application of Todd v Armour (1882)9 R 901.
5) Rights arising on sale: liens.

It is difficult to classify and analyse many of the rights which arise during the course of sale transactions. This is true both in internal law and more especially in international private law. It is, for example, difficult to decide whether the effects of fraud upon a sale should be analysed in terms of delict, contract or property law. In internal Scots law fraud may be of relevance in all three fields. It is similarly difficult to decide what effect in property law the rescission of a sale contract for breach should have, and when any effect should take place or be deemed to take place. For example, under some legal systems ownership may re-vest retrospectively in the seller on rescission. These examples may easily be multiplied by examining various liens and rights of retention, stoppage in transit, revendication, resolution and so on and the varying criteria surrounding their exercise. Furthermore, persons other than the parties to a sale contract, such as carriers, repairers and warehousemen, may acquire rights during the course of a sale transaction relative to property sold.

Several general suggestions may be made concerning the analysis of such rights in an international context. It is suggested, firstly, that such rights should generally be analysed in a similar manner and, further, that unnecessary distinctions should not be drawn between sale and security transactions in this context as such transactions are often difficult to distinguish and similar rights may arise during the course of each type of transaction.

Secondly, it is suggested that no simple distinction should be drawn between rights arising by operation of law and rights arising in accordance with the will of the parties to a transaction. Legal systems vary, for example, as to the extent to which they permit liens to be varied according to the will of the parties to the transaction concerned. Differing comparative approaches to similar problems require more subtle integration than an automatic distinction of the effects of law and volition.

Thirdly, some care is required in deciding the time at which a given right operates. Thus in some legal systems a maritime lien is sometimes said to come into existence when it is invoked in court, where in other legal systems maritime hypothecs exist prior to their enforcement, rather like ship mortgages'. Similarly a sale may be 'rescinded' for non-payment of the price, leaving the seller owner of the property sold, either because ownership was initially retained, conditionally upon payment of the price, or because non-payment is a breach of contract which entitles rescission, which in turn re-vests ownership in the seller, perhaps retrospectively.

Care is necessary in the integration of such comparative differences in law not least because of the possibility that differing technical approaches to similar functional problems might lead to the same problem being dealt with twice or not at all. Careful characterisation, subtle operation of choice of law rules and an international outlook from internal laws may minimise difficulties in this context.

In the following sections a specific category of such rights is considered. This category may be broadly termed 'liens'. The approach taken to such liens may be of some relevance to further categories of rights arising in the course of sale and security transactions.
a) Chesterman’s theory of special claims. The most comprehensive analysis of this field is contained in an article published in 1973 by M.R. Chesterman, in which a quite radical approach to choice of law is suggested. Chesterman’s analysis proceeds upon a definition of a ‘special claim’ as ‘any limited right against goods which arises in the course of a sale of the goods by virtue of a debt being unpaid by a person entitled [to the claim]’. This classification of special claims is narrower than that suggested above, as, for example, rights arising by operation of law in the course of a security transaction are excluded. However most major devices, such as liens for non-payment of price or charges, are likely to fall within Chesterman’s classification.

Briefly stated, Chesterman argues that a distinction should be drawn, at the level of choice of law, between issues arising between the parties to a contract from which a special claim derives and issues involving third parties. He considers that the law governing the contract in question, be it a contract of sale, carriage or other contract, should determine issues relating to a special claim deriving from that contract, if they arise between the parties to that contract.

On the other hand, Chesterman is of the view that the lex situs should play a major role in relation to issues concerning special claims when a third party is involved, such as an attaching creditor. After reviewing several choice of law structures, Chesterman concludes that reference should be made initially to the law governing the contract from which a special claim derives in order to ascertain its existence as between the parties to that contract. He suggests that if, and only if, the special claim exists between the parties under the law governing the relevant contract, reference should then be made to the lex situs at the first time at which the special claim and the competing claim of the third party co-exist in order to ascertain whether or not the special claim prevails over that of the third party. The resolution of this latter issue is reached by translating the special claim under the law governing the contract as its nearest equivalent under the relevant lex situs.

b) Issues between parties. It was argued in Chapter 3,B,1) that a general distinction should be drawn between property issues arising between the parties to a contract and those involving third parties. The favour for such a distinction in international sale conventions is also noted in section D below. There is, as discussed, little clear authority for such a distinction. It is nevertheless suggested that such a distinction should be drawn in relation to the rights discussed in this section.

c) Issues involving third parties – problems with Chesterman’s approach. While it is not intended to analyse Chesterman’s approach here in great detail, it is suggested that a different approach from his should be taken to situations involving third parties. Chesterman objects to initial application of the lex situs as regards third parties and the application to incidental questions under the lex situs of the law the choice of law rules of the lex situs considers to govern the relevant contract. His objection to such a choice of law structure is based largely upon arguments that such a structure will detract from the ability of contracting parties to exercise their volition in relation to claims such as liens and from their ability to assess their position, and yet will fail to provide the uniformity apparently underlying general lex situs choice of law rules.
The first argument is fallacious because, as mentioned above, party autonomy is restricted in relation to special claims and because parties to a contract can ascertain the situation of the property subject to the special claim in question if, as argued below, the lex situs at the time of the contract under which the special claim arises is the applicable law. The second argument is fallacious because third party certainty and not uniformity of result is the basis of general lex situs choice of law rules.

d) Issues involving third parties - general choice of law rule. Contracting parties would indeed find it difficult to assess their position if, as suggested by Chesterman, the relevant lex situs were that existing at the time a special claim and a competing third party right first co-exist. It is suggested that the selection of the lex situs at that time derives from a failure to distinguish the existence and ranking of rights and that Chesterman accordingly translates special claims at too early a stage in the choice of law process. It is suggested that such translation should take place only for the purposes of the extinction and creation of rights by consecutive leges situs and, more importantly in this context, for the purposes of ranking rights in property by the lex situs at the time of ranking. Translation at the final ranking stage has the advantage of allowing the ranking of multiple claims. Chesterman deals with this issue in relation only to multiple special claims and thus does not integrate other property rights.

It is accordingly suggested that the general choice of law structure proposed in Chapter 3 could be applied to Chesterman's special claims and to other analogous rights, including those arising by operation of law. The lex situs at the time it is alleged that such a right became a real right could be referred to, with incidental reference being made to the proper law of any relevant contract if required by, and in terms of the choice of law rules of, that lex situs. Subsequent leges situs could then be relevant to the extinction of such a real right, if any such lex situs were positively to extinguish analogous rights. A surviving real special claim could then be translated for the purposes of its ranking with other rights in and to the property in question in accordance with the lex situs at that time. Subsidiary choice of law rules relating to property in transit, property subject to documents of title, export transactions and ranking could, of course, replace the lex situs as appropriate at each of these stages.

The application of this general choice of law structure has the great advantage of eliminating difficult distinctions between special claims deriving principally from contracts from similar rights deriving from, or more restricted by, fixed rules of law. It also provides for the coherent integration of special claims and analogous rights with other property rights and for the elimination of more general characterisation distinctions, such as might be drawn between conditional sales and unpaid seller's liens.

e) Issues involving third parties - exceptional choice of law rule. It may, however, be arguable that difficulties in characterising special claims as property rights, risks that various consecutive leges situs may extinguish special claims needlessly and practical commercial reliance, even if unjustified, by parties to a contract on that contract could justify the application of an exceptional choice of law rule in this context.
It is suggested that such an exceptional rule could be based principally upon the *lex situs* at the time of ranking. The application in principle of that *lex situs* accords, as described in section D below, with the general approach taken in the 1958 Hague Convention on the Law Applicable to the Transfer of Ownership in the International Sale of Goods and in particular with the narrow approach taken to the claims of unpaid sellers in article 4 of that convention. It also accords with some North American analyses of repossessory rights under conditional sales and chattel mortgages and reduces characterisation problems regarding some liens which, as mentioned above, apparently come into existence only upon enforcement.

Such an exceptional rule should probably be applied to both special claims deriving principally from contracts and similar rights arising by operation of law, given difficulties in distinguishing such rights. Although other property rights could probably be integrated adequately with rights arising under such a rule, some characterisation difficulties would, however, remain as rights such as ownership on reservation of title could, as mentioned above, conceivably be considered a right of an unpaid seller analogous to lien. It would not then be obvious which *lex situs* was principally applicable.

Contracts from which special claims derive could then be included in the choice of law structure either in terms of incidental questions arising under the *lex situs* on ranking or in the direct manner suggested by Chesterman. If a distinct choice of law rule is to be established in this context, Chesterman's approach to the contractual element has its attractions, as it may promote, marginally, the certainty of contracting parties since incidental questions need not arise under the *lex situs*.

On this basis, reference would therefore be made to the law governing a contract from which a special claim is alleged to derive in order to assess its existence between the parties to that contract and an existing special claim would then be translated for the purposes of ranking with third party rights as its nearest equivalent under the *lex situs* on ranking. Analogous rights not deriving from contracts could be assessed by direct application of that *lex situs*, under which the various rights could then be ranked.

This approach does, like that of Chesterman, risk cumulative application of the *lex situs* and the proper law of the relevant contract and the consequent "paralysis" of special claims. Similar paralysis could, of course, occur even if such contracts were incorporated by means of incidental references from the *lex situs* on ranking, and indeed under the general choice of law structure, unless incidental references to the proper law were carried out in a subtle manner by the *lex situs*.

**D) Issues involving third parties - paralysis by the *lex situs***. It may be said that special claims under the proper law of a contract must be paralysed to a certain degree by the *lex situs* in order to provide third parties with certainty as regards their actions in relation to a given item of property. Chesterman reflects this concern by translating special claims in terms of their nearest functional equivalents in the *lex situs* at the time of creation of a third party right. A seller's right under the proper law of a sale contract to repossess goods for non-payment up to four days after receipt by the buyer may therefore be paralysed by its translation in terms of such a right under the *lex situs* exercisable only until such receipt.
It is suggested that the general choice of law rule described above provides both third party certainty and could, if subtly applied, minimise paralysis of special claims by the lex situs. Third parties are in a better position to assess consecutive leges situs of an item of property than they are to assess the law governing contracts giving rise to a potential multitude of special claims. They may therefore assess the special claims and analogous rights which are likely to exist in relation to that item of property, including those a given lex situs may permit parties to a contract to create or vary. If leges situs subsequent to that under which a given claim has been created are subtly analysed they need not extinguish claims created under previous leges situs and thereby paralyse special claims upon which contracting parties may justifiably have relied. Translation for the purposes of ranking under the lex situs at the time of ranking may then take place at a relatively abstract level, allowing, in the above example, repossession by a seller within four days of receipt by the buyer to prefer the seller to a creditor of the buyer attaching the goods in that period because the attaching creditor should have been able to ascertain that such a foreign right existed which was slightly more extensive than its equivalent under the lex situs at the time of attachment.17

It is, of course, probable that an attaching creditor would be unaware, in practice, of the existence or extent of a foreign right of this type, as he may, as discussed in Chapter 5,B,3), be similarly unaware of the existence of a foreign security. This may be a reason, analogously to the argument in foreign securities, for the lex situs consciously to translate foreign liens and similar rights at a relatively concrete level, or extinguish them. As liens and analogous rights are more numerous and varied than more formal securities and are often unregistered, the argument for wholesale concrete translation or extinction may be stronger than in securities, particularly if such translation or extinction is carried out, as suggested by Chesterman, by the lex situs at the time a third party acquires a competing right. It is, however, suggested that such wholesale translation and extinction of rights should not normally be considered to take place, but that it could be considered to take place for the limited purpose of ranking the rights of a claimant and a third party relative to each other in terms of a subsidiary choice of law rule relating to ranking and operating after initial rankings have been assessed under the lex situs at the time of ranking.

g) The Scots position. There are a great many Scots cases concerning liens, stoppage in transit and similar rights arising in import and export transactions. It is therefore quite surprising that choice of law issues in this field appear never to have been adequately discussed by the Scots courts. Perhaps most of the likely connecting factors have tended to coincide in favour of the application of Scots law, or doubts about choice of law have led to compromise or unwillingness to plead foreign law.

The side note to Cushney v Christie 1696 Mor 6237 states 'Hypothec on goods for the price found not to take place by the law of Scotland'. In this case two Scots merchants acquired a consignment of goods in Danzig on credit as part of a joint adventure. One of the merchants was found liable for the full price by a court in Danzig on arrest of the goods by the seller, it being alleged that he therefore 'had preference to the returns before [his partner] or any of his representatives or creditors', or otherwise a 'hypothec' or 'privilege' for the price. Thereafter the goods were shipped to Scotland under the separate marks of the Scots merchants and the other merchant died. An executor-creditor to the
deceased merchant who arrested in Scotland the part of the goods shipped under the mark of the deceased was preferred as to those goods to the other Scots merchant because 'there was emptio et venditio by the division of the goods bought' and because 'by our law there [is] no tacit hypothecation'.

It is not clear whether Scots law or the law of Danzig was considered applicable to the transfer of ownership of the property by its division and separate marking, or the basis upon which one law or the other might have been considered applicable. Possibly the two laws did not differ in this regard.

It is clearer that any hypothec which was acquired under the law of Danzig over the property by the merchant paying the full price was not allowed effect in Scotland. The reason for this decision is less clear. Scots law may have been applied as the domiciliary system of the merchants' or, perhaps, as the second lex situs. As reference of proprietary issues to the domiciliary system has generally been replaced by reference to the lex situs, it may be preferable in the modern context to interpret Cushney v Christie in terms of the lex situs.

Gosford disagreed with the decision in this case, considering that 'foreign trade ... must be ruled by the laws of the place where the traffic is to be used, and the goods ... be disposed'. He appears to have felt that the law of Danzig should have been applied, and, given the terms of his reference thereto, probably so applied as the lex loci contractus. It seems probable that the law of Danzig was considered by the court to be of relatively little importance, either as the lex loci contractus or as the first lex situs, or that whatever its effect rights thereunder could take effect in Scotland only if allowed such effect under Scots law. If Cushney v Christie supports any of the theories discussed above, it would appear to support a reference to the lex situs at the time of ranking, either without reference to other laws or as restrictive of the law governing the relevant contract or of a previous lex situs.

Mitchell v Burnet and Mouat 1746 Mor 4468 may clarify Cushney v Christie slightly. Mitchell is often considered to concern the creation of securities, and it is therefore discussed in Chapter 5.C. Fine distinctions between 'impignoration' of goods to a warehouseman in Campvere and his right to 'detain' them were not, however, drawn at the level of choice of law. The custom of Holland was nevertheless applied to the warehouseman's rights in goods left with him by an apparent owner to whom the warehouseman advanced money. The domicile of all relevant parties was probably Scots and the lex loci contractus and the lex situs on both constitution and ranking of the warehouseman's rights all appear to have been Dutch. Save for excluding the domiciliary system and the lex fori, Mitchell appears to add little to Cushney v Christie.

Robertson & Co.'s Tr. v Bairds (1852)14 D 1010 contains suggestions that the lex fori, the lex situs, or the law governing the relevant contract is applicable to liens. In this case iron warehoused with Glasgow ironmasters was sold by their Bristol agents to a Bristol merchant, who re-sold the iron to a Glasgow merchant through a Liverpool broker. The Bristol merchant paid for the iron, but prior to the delivery order therefor being presented to the ironmasters by the Glasgow merchant the Bristol merchant incurred further debts to the ironmasters in respect of further consignments of iron. The case was argued largely on the entitlement of the ironmaster under his contract with the Bristol merchant to withhold delivery of the iron to the Glasgow merchant, pending payment by the Bristol merchant of the further debts. This right was characterised largely in
contractual terms, to which rights in the iron itself, such as ownership or lien, may have been relevant as a subsidiary matter.

The Lord Ordinary, Lord Wood, considered (at 1011) the contract between the ironmasters and the Bristol merchant to be governed by Scots law, and its performance accordingly so governed. His Lordship did, however, take the obiter view that even if English law governed that contract, the 'remedy' of retention would be governed by the law of scotland, 'the place where both the contract was to be performed and where the suit is brought'. The majority of the First Division agreed that Scots law was applicable to the obligation to deliver the iron under the relevant contract, but no comment was made on the Lord Ordinary's view of retention as a 'remedy'.

The Glasgow merchant had argued that English law governed the contract in question, and that under English law a lien existed in respect of the iron for its price alone. The majority of the First Division^22 clearly considered ownership of the iron itself to be governed by the Scots lex situs, and to remain with the ironmasters. The Glasgow merchant may have been attempting to distinguish liens from ownership for the purposes of choice of law, with the contractual system applying to liens. He may, on the other hand, have been characterising liens in purely contractual terms in order to avoid application of the lex situs thereto^23.

Lord Ivory made the obiter remark^24 that a lien 'depends on possession, and so must very much depend on the law of the country in which possession is held', and it may thus be inferred that his Lordship considered liens to be governed by the lex situs of the relevant property. Despite the uncertainty of his Lordship's position on general property issues, Lord Cunningham also made the obiter remark (at 1018), in his dissenting judgement, that 'when goods are deposited in another country, and disposed of by the owners there, the purchasers are certainly liable for all the collateral claims of third parties, such as wharfingers, warehousmen or the like', distinguishing the contractual rights of vendors and vendees. However, given his Lordship's later obiter approval of a passage from Story applying the lex loci contractus to liens, Lord Cunningham's remarks are difficult to interpret in terms of the lex situs.

Robertson & Co.'s Tr. v Bairds is rather obscure regarding possible liens upon the iron in that case. It is suggested that it is not reliable authority regarding the law applicable in general to liens upon corporeal property, and that it related rather to incorporeal property. Thus a contractual right to delivery of a certain quantity of unascertained iron was subject, under its proper law, to a right of retention for a general balance. As with Mitchell, the Bairds case would thus seem to add little to Cushey v Christie.

The main English authority, Inglis v Usherwood (1801)^1 East 515, is ambiguous. In this case a Russian seller, on hearing of the insolvency of the English buyer, instructed the master of a ship on which the relevant goods had been loaded in St. Petersburg to deliver them in London to their own agents rather than to the buyer. The master complied with this instruction and was sued in trover by the trustee in bankruptcy of the buyer, who had been appointed in the meantime.

Under English law, as the ship had been chartered by the buyer, transit had previously ceased and with it the seller's right of stoppage in transit. Under Russian law the equivalent right had not so ceased. Russian law was considered...
applicable and it was therefore held that the master had acted correctly. The reason for the application of Russian law is not clear. Lord Kenyon C.J. and Lawrence J. referred to the place the transaction took place, rather as Gosford suggested in relation to Cusheen v Christie. Lord Kenyon also considered the goods to have been sent to England 'with the condition attached to them'. Grose J. appeared to emphasise the place of delivery.

Inglis v Usherwood may probably be considered authority for the application of the lex situs at the time the right was alleged to come into existence, the law governing the relevant contract, or some combination of the two. Certainly the second, English, lex situs was not applied either as a matter of initial choice of law or to restrict the operation of Russian law. It is, however, possible that English law could have been considered to have some restrictive function, which did not come into operation because, unlike in Cusheen v Christie, there was a broad equivalence, noted by the bench, between the Russian and English rights.

Further guidance may be drawn from two rather more recent Canadian cases, Re Hudson Fashion Shoppe Ltd. [1925]3 DLR 927, [1926]1 DLR 199 and Re Satisfaction Stores [1929]2 DLR 435. In the Hudson Fashion Shoppe case goods in Quebec were sold by a Quebec seller to a buyer in Ontario. The goods were delivered f.o.b. Montreal to the buyer, who was subsequently bankrupted in Ontario after receipt of the goods there but prior to payment. The seller had no right to recover the goods under the law of Ontario. The seller nevertheless sought to recover the goods, as his right of dissolution for non-payment in terms of the law of Quebec could be exercised on insolvency up to 30 days after delivery.

Riddell J.A. was of the view (at 203) that 'the law loci contractus governs as to goods sold in one country and taken in another so far as the ownership of property and its results are concerned'. Accordingly, as the view of Fisher J. at first instance that the contract was governed by the law of Ontario was reversed in favour of the law of Quebec by the Appellate Division of the Ontario Supreme Court, the seller's claim was upheld. Riddell J.A. was (at 205) 'of course ... not discussing the result if there were an express statute in the country to which the goods were removed', being generally of the view, quoting Story, that 'a right in rem is not ... displaced by the mere change of local situation of the property'.

Reference would thus appear to have been made initially to the law governing the relevant contract to assess the existence of a special claim, with reference being made thereafter to a later lex situs which, although it contained no precisely equivalent right, allowed it effect as a right in rem, although it may have been relevant to restrict it.

It is, however, suggested that the general reference in the Hudson Fashion Shoppe case to the law governing the contract limits its persuasive authority in Scotland. In another Ontario case, McKenna v Hope [1925]2 DLR 460, discussed in section B,3) above in relation to the security of transactions, a similar contractual approach was taken to general proprietary issues. The Hudson Fashion Shoppe case and McKenna v Hope also contain general analysis of property issues in transactional terms. As the Scots courts would be more likely to analyse such issues in terms of the lex situs at the time of alleged creation of a right in rem, the reference to the law of Quebec in the Hudson Fashion Shoppe case as the law governing the contract, for the purposes of
choice of law in Scotland, may be best considered a reference to the law of Quebec as the first *lex situs*.

It is also interesting that the view was taken (at 202-203) that under the law of Quebec the buyer received only a qualified title to the goods rather than some form of 'privilege' being vested in the seller. It is possible, although the issue does not appear to have been further discussed, that the case may have been decided differently had the right under the law of Quebec been characterised as a seller's privilege. If Riddell J.A. had in mind a privilege in the sense of a special insolvency preference, this would perhaps have been governed by the law of Ontario as the law governing the insolvency process. It is otherwise fraught with complication to distinguish a right qualifying an absolute title from a separate right in rem to which an absolute title may be postponed.

The facts in the Satisfaction Stores case were similar to those in the Hudson Fashion Shoppe case, except that the buyer was in Nova Scotia rather than Ontario. It was also agreed that the sale contract was governed by the law of Quebec.

The case principally concerned the applicability of the registration requirements of the Nova Scotia Bills of Sale Act to the sale contract, which had not been complied with. The seller argued that title had passed to the buyer, subject to resiliation for non-payment under the law of Quebec and that the Nova Scotia Bills of Sale Act did not apply as a matter of interpretation. The Nova Scotia Bills of Sale Act expressly applied to foreign contracts relating to goods brought into Nova Scotia, but it does not seem that the Supreme Court of Nova Scotia regarded these provisions as a special unilateral choice of law rule. It would therefore seem to have been agreed that the law of Nova Scotia was relevant as a general matter of choice of law, as the second *lex situs*. It was similarly assumed that the law of Quebec was initially applicable, although its role as the first *lex situs*, the law governing the contract or both was not clearly distinguished.

The majority in the Supreme Court considered that absolute title had not passed to the buyer under the law of Quebec and that the Nova Scotia Bills of Sale Act accordingly applied to what was considered an agreed reservation of title. While the majority did not expressly accept the argument by the buyer's trustee in bankruptcy that the sale should be considered a conditional sale in the conventional sense, the Bills of Sale Act was applied as if it was such a conditional sale. Had the Bills of Sale Act not been considered applicable, it seems clear that the seller's right under the law of Quebec would have been allowed effect in Nova Scotia.

It would thus seem that the seller's right under the law of Quebec was translated as a broad equivalent under the subsequent *lex situs* and extinguished in accordance with a broad interpretation of the Bills of Sale Act of that *lex situs*, but that if it had not been so extinguished it would have ranked in accordance with general principles of the law of Nova Scotia, as that second *lex situs*.

An argument by the sellers that their right arose by operation of the law of Quebec rather than under the sale contract was rejected. Regrettably this issue does not seem to have been fully discussed. If such an issue were to have been considered referable in the first instance to the law of Quebec as, presumably,
the lex situs at that time, it seems clear that the law of Nova Scotia could nevertheless have performed a restrictive function as a subsequent lex situs.

It is suggested, from a consideration of these cases, that the Scots courts should apply the general choice of law rules relating to property rights outlined above as regards liens and analogous rights arising in the course of sale, and indeed security, transactions. It is further suggested that such general rules may perhaps be refined in this context by the application of a subsidiary rule at the ranking stage whereby liens and analogous rights may be re-ranked relative to given third party rights by the lex situs on co-existence of the rights in question.

As discussed above, if the general lex situs rule were applied, no distinctions would require to be drawn between rights arising from contracts and those arising by operation of law, nor between such rights and more general property rights, such as ownership retained on conditional sale. Difficulties of characterisation of rights as proprietary or contractual may also be largely avoided, particularly if a distinction is drawn between property issues arising between the parties to a relevant contract and those involving third parties. Characterisation of a given right as real or personal relative to third parties is probably more straightforward, even if difficulties remain regarding rights such as liens arising on their exercise. It was argued in Chapter 3,C,4) that maritime liens, the most obvious rights arguably of this character, should normally be considered real from the time of the events giving rise to them, rather than from the raising of an admiralty action in rem. Other liens operating retrospectively may be amenable to similar analysis.

Difficulties also remain regarding rights operating with retrospective effect, as when rescission of a sale contract may re-vest ownership in the seller. As discussed in Chapters 3,G,3) and 6,C,4), retrospective effect is not normally allowed in Scotland to foreign laws. It may, however, in some situations be credible to characterise the right to rescind a contract as a real right for the purposes of choice of law and give rescission effect analogously to the foreclosure of a security.

Cushney v Christie can be interpreted as authority against the application of this general choice of law structure in this context. Mitchell v Burnet and Mount and Robertson & Co.'s Tr. v Bairds are even more ambiguous. It is, however, suggested that Cushney v Christie be interpreted as the restriction by the second, Scots, lex situs of rights created under the law of Danzig and the other cases viewed accordingly. It might be hoped that a less insular general approach to such foreign rights would be adopted by the Scots courts nowadays, particularly as regards their translation for extinction and ranking.

As discussed in Chapter 3,C,4)29, cases relating to maritime liens favour the application of the lex fori thereto. The ship cases may also take a more restrictive approach than some of the cases discussed above to the translation of foreign rights30. However, as also mentioned above, care must be taken when applying cases relating to ships to other property. It is therefore suggested that the ship cases are of limited authority in this context.

The numbers and diversity of liens and analogous rights could, as mentioned above, lead to difficulties under consecutive leges situs. The Satisfaction Stores case shows how these difficulties may be partially resolved, by analogy
to rules in securities. Indeed a 'lien' over freight was considered a registrable charge under the Companies Act in Re Welsh Irish Ferries [1986] Ch 471. It is suggested that foreign liens may also be registrable as charges, providing a partial solution to the difficulties mentioned. If, as discussed in Chapter 5.D.6, charge registration statutes may be considered to relate to the ranking of rights rather than to their extinction, it may then be possible to minimise unnecessary paralysis of registrable foreign liens by applying only the last lex situ to such registration requirements.
C. Some conceptual difficulties.

As mentioned in Chapter 3, the general choice of law structure which is being proposed is basically Civilian in approach. This inevitably gives rise to difficulties regarding the integration of legal systems containing property theories differing significantly from Civilian theories. The property theories of Anglo-American and Scandinavian legal systems give rise to the greatest such difficulties, although there is little evidence of serious practical problems arising from such conceptual difficulties. There is certainly an absence of Scots authority regarding such conceptual difficulties which could arise in the context of sale.

The apparent abandonment of abstract property concepts by Scandinavian legal systems is discussed in Chapter 2,H. As discussed in section D below, disagreements between states adhering strictly to abstract Civilian property concepts and Scandinavian states favouring concrete solutions to property issues appear to have led to the failure of the 1958 Hague Convention on the Law Applicable to the Transfer of Ownership on the Sale of Corporeal Moveable Property.

It is suggested that the compromise proposed during the negotiation of the 1958 Convention, of distinguishing property issues between the parties to a sale and property issues involving third parties, is the best manner in which non-Scandinavian legal systems may integrate Scandinavian property theory with other property theories and thereby distort each theory as little as possible. Furthermore, sensitive characterisation of Scandinavian property rights as real or personal and Scandinavian property laws as relating to the constitution or ranking of rights may minimise both distortion of Scandinavian laws and inequitable results in cases. It may, for example, be preferable to characterise what may be regarded under a Scandinavian legal system as a rule preferring, on certain conditions, an unpaid seller to an attaching creditor of a buyer broadly in terms of what might be a real, but conditional, lien under another legal system.

Abstract concepts have apparently also been abandoned by the Uniform Commercial Code of the U.S.A. It is suggested that a similar approach is taken to its sale provisions as that suggested in relation to Scandinavian property laws, to the extent that such an approach is necessary. The security provisions of Article 9 of the U.C.C. are probably of greater interest as regards choice of law. Article 9 is discussed in Chapter 5,E,3).

The conceptual difficulties posed to a Civilian analysis by Anglo-American legal systems derive largely from English law concepts of relative and multiple titles and equitable rights. As equity appears to play a relatively minor role in the sale of goods in English law but plays a central role in English security law, equitable property rights are discussed in Chapter 5,E. It suffices here to note the conclusion that equitable property rights should generally be characterised as real rights for the purposes of choice of law and that they should not thereafter be given separate effect as personal rights.

The distinction of property issues concerning the parties to a transaction and concerning third parties suggested to integrate Scandinavian property theories with other property theories sometimes seems appropriate to integrate theories of relative title with other property theories. Thus, for example, the precise
meaning, in English law, of ss.16-20 of the 1979 Sale of Goods Act is, as discussed in Chapter 2,6,3), controversial. These sections are headed 'Transfer of property as between seller and buyer'. Some have contrasted these sections with ss.21-26 of that Act, which are headed 'Transfer of title'.

It is argued, roughly speaking, that ss.17-20 concern the property relations of the parties to the sale and that ss.21-26 concern the property relations between those parties and third parties. Thus 'ownership' might pass 'between buyer and seller' at the time when the contract was made, in terms of ss.17 and 18 Rule 1, but not pass as regards the property relations of the buyer and a third party to whom the seller in possession has fraudulently re-sold the goods in terms of s.24. Thus, in a limited sense, it can be argued that ownership passes by consent with regard to the parties to the sale, but only upon the transfer of possession, with regard to certain third parties.

The difficulty with such laws in international private law arises when the situation of the property changes at a time when 'ownership' has passed 'between the parties', but not with regard to third parties. May, for example, the seller in possession referred to above take the goods in question to Germany and resell them in such a way as to enable the German buyer to defeat the English buyer who 'owns' in terms of s.17 of the Sale of Goods Act? If it is assumed that the German law favouring bona fide purchasers is inapplicable on the facts of the case, it might be crucial to the German buyer that the seller in possession is owner or has some other sort of real right, for the purposes of the German law of sale.

The nature of the right of the English buyer must be characterised in the light of s.17 of the Sale of Goods Act. If that right is only valid between the parties to the sale contract, it is difficult to characterise it as real for the purposes of international private law in accordance with the theory described in Chapter 3, since the contract exists as a credible personal reason for their property relations. However it is here that the ambiguity of the English transfer 'between buyer and seller' appears, since it is clear that this transfer also operates between the creditors and successors of buyer and seller, if not perhaps with regard to what Scots law might term singular successors. The buyer's right may thus be neither personal nor real, but a class right, valid against creditors and successors. A right having such broad incidence ought surely to be characterised as real for the purposes of choice of law, and accordingly its existence ought to be determined initially by the English lex situs.

Next the right of the seller in possession must be characterised. He might be said to 'own' the property with regard to persons other than the buyer and the creditors and successors of himself and the buyer. The extent of this ownership does not however appear to be great, with its major content being a power under s.24 of the Sale of Goods Act to give to an acquirer in good faith a title preferable to that of the first buyer, if he gives that acquirer in good faith possession of the goods. Such a right is hard to characterise as real. However the seller might be considered to have some sort of real right after ownership has passed 'between the parties' by virtue of s.17, perhaps because of his right of stoppage in transit or because of his ability to recover the property from a person having no title to it. It would however seem that the seller's rights relating to goods which have passed to the buyer under s.17 are
so particular and precise as to exclude the unity of a general real right of indeterminate incidence.

German law should then be examined, to see if the English buyer's real rights (if any) have been extinguished and whether any new real rights have been created. It is at this point that the rights of the seller ought to be reconsidered. If his rights are real, and one of their aspects is a power to give preferable title to an acquierer in good faith while he retains possession, it would seem that the exercise of this power ought to be able to confer ownership upon the German buyer, under German law. This of course depends upon the German lex situs, but in the application of the German lex situs it would not be difficult to translate the power of the seller in possession by analogy to the power of sale of a security holder. German law might then extinguish the English buyer's right, and confer ownership upon the German buyer. The seller's right may then be extinguished by the fulfilment of its purpose under English law.

If, as argued above, the rights of the seller are not considered real, the first buyer's real right may still be extinguished by the German lex situs, in accordance with the international private law of agency. Section 24 is expressed in terms of deemed agency, with the seller in possession selling as agent of the buyer. This deemed agency is however scarcely credible, since the last thing the buyer empowers the seller to do is to defraud him. It would thus seem preferable to characterise s.24 as regulating the conflict of title and transaction, similarly to the general English rule of market overt in s.22 of the same Act. The consequence of this characterisation would seem to be that s.24 is relevant only to transactions relating to goods situated in England, as a matter of choice of law. Thus if ownership passed by means of a fully consensual conveyance under a foreign lex situs but the seller continued in possession, and bringing the property to England sold it to bona fide purchaser, it would seem that s.24 ought to operate to extinguish the ownership of the first buyer and to create for the second a title to such property in terms of English law.

There is little authority upon these issues, save as discussed in section B.4) above. It is, however, suggested that any distinctions between the parties to a transaction and third parties for the purposes of choice of law should be made very carefully as regards legal systems containing rules of relative title. Cheshire proposed a distinction between parties to a transaction and third parties for the purposes of choice of law in property rights and the particular distinction he proposed has beensearchingly criticised. One of the greatest difficulties with Cheshire's distinction must be his characterisation as 'parties' of persons deriving their rights from the actual parties to a transaction. The cause of this difficulty appears to be Cheshire's use of internal English concepts of relative and equitable title for the purposes of choice of law.

The concept of relative title also gives rise to a tendency in English law to prefer claimants to property by ranking existing titles rather than by extinguishing a title postponed. Thus it has been argued that, under English law, when persons deriving title from a bona fide sub-purchaser from a buyer in possession are preferred under s.25 of the Sale of Goods Act to a seller who has retained title to the goods in dispute under s.17 of that Act, the preference of such persons occurs because their titles are 'sheltered' by s.25 from the title of the original seller.
The obvious analysis of s.25 in Scots law® is the statutory extinction of the ownership of the original seller of the goods in question and the statutory creation of ownership rights in the bona fide sub-purchaser, or a statutory transfer of the original seller's ownership rights. On either analysis there is no ranking of rights between the original seller and persons deriving title from the sub-purchaser as the original seller has no right to be ranked.

On the other hand, there appears to be a ranking under English law of several existing rights. It may indeed be said that English law has more in common with Scandinavian legal systems than with Civilian legal systems as regards the ranking of rights in that both English law and Scandinavian legal systems appear to have a less rigid structure of creation, extinction and ranking of rights than do Civilian legal systems. Relative titles under English law thus appear, to an outsider, to carry with them constantly mutating relations to other titles to the same property. Thus while the holder of a Civilian real right can be fairly sure that his right will rank in a certain manner unless the right or ranking is altered in a small number of specific ways, the holder of an English relative title appears to float in a sea of changing titles, equities and priorities®.

It is suggested that the persons not 'sheltered' under English law by s.25 of the Sale of Goods Act are so few that the only intelligible analysis of s.25 for the purposes of international private law is that suggested above as its analysis under Scots law. Accordingly s.25 should apply to sales of goods situated in England by a buyer in possession and if those goods are moved to a different state the seller's title should be considered extinguished. Other relative rankings under English law should probably be analysed in a similar way, as rules concerning the extinction or ranking of rights, according to the generality of preferences accorded under English law. While there is little authority on these issues, the approach of other legal systems to equitable securities appears to support this approach°.

Further support may be drawn for this analysis from Vinkworth v Christie [1980] Ch 496. As discussed in section B,3) above, this case concerned the theft of some works of art in England, their purchase by a bona fide purchaser in Italy and the preference in an English court after their return to England for auction of the Italian bona fide purchaser to the person from whom they were stolen.

Slade J. clearly considered (at 499) the issue in the case to be the determination of the 'immediate right to possession', rather than absolute ownership. The basic issue was therefore one of relative title, as a matter of English law. No reason was given for this (agreed) application of English law. However Slade J. continued (at 500C) to consider the incidence of the right conferred upon the buyer under Italian law, commenting that 'if the effect of the sale in Italy was to confer ... a title to ownership ... which is valid even against the plaintiff, ... it would necessarily follow that ... the plaintiff has lost and the second defendant has acquired, the immediate right to possession'.

These comments are quite important, in that they seem to acknowledge the distinction between the relative title of English law and the absolute title of Italian law, and attempt their integration. Thus the potentially extinctive effect of Italian law upon an alien relative title was considered by examining the analytical operation of the purchaser's right in Italian law, and assessing whether or not a right such as the plaintiff's would have survived. This is a
very simple example of the translation of a right for the purposes of the characterisation of the lex causae'. The conclusion was that the plaintiff's relative title was extinguished by Italian law. Next, the absolute ownership of Italian law was translated into the relative terms of English law, as the immediate right to possession, for the purposes of ranking and remedies. It then prevailed as the only valid right pled.

This analysis might seem unnecessarily complicated, given the simple subject matter of Vinkworth. If however the bona fide purchaser in Italy had in fact been a bona fide grantee of a security, such complexity of analysis might have been more telling. In view of Slade J.'s comments, the relative title of the plaintiff would in that situation be translated as its nearest possible equivalent in Italian law, presumably absolute ownership, and the effect of the grant of a security to a bona fide grantee upon this right assessed. Italian law might then have conferred a lesser, but absolute, security right upon the grantee and not extinguished the translated relative title. Next, the Italian security right would require to be translated into English relative terms, for the purposes of ranking and remedies, perhaps as some sort of charge or (unregistrable?) bill of sale. This example shows that relative and absolute titles may be integrated cautiously, in the manner suggested by Slade J., without undue distortion of conceptually differing systems involved.

However it is not impossible to read Slade J.'s comments in such a way as to collapse a formal distinction between the existence and ranking of rights, in conformity with the internal English approach discussed above. Thus Slade J.'s comments can be read to suggest that Italian law was examined to determine the property relations of the parties to the action relative to each other and thereby to assess whether or not the preference of the plaintiff relative to the defendant, by virtue of his immediate right to possession under English law, had been altered in any way by Italian law. It is suggested that these comments should be analysed in the more subtle manner described above, not least because of the potential utility of such analysis. In any event Vinkworth shows that foreign courts would not distort English concepts excessively by adopting such an analysis.

There are, of course, many other conceptual problems which might arise in this context. It is suggested that most may be addressed satisfactorily by means of sensitive application of the general theory outlined in Chapter 3.
D. International conventions.

Several international conventions and draft conventions exist in the field of sale, or are of relevance to the international operation of sale transactions. These conventions fall into several categories: those setting out substantive uniform laws, such as the 1980 UNCITRAL Uniform Sales Law\(^1\), and those attempting to harmonise choice of law rules, such as the Hague Convention of 1958 on the Law Applicable to the Transfer of Ownership on the Sale of Corporeal Moveable Property\(^2\). There are also those conventions which deal largely with contractual issues on sale, such as the 1980 UNCITRAL Convention and the 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods\(^3\), and those which deal largely with proprietary issues on sale, such as the 1958 Hague Convention and the 1976 UNIDROIT Draft Uniform Law on the Acquisition in Good Faith of Corporeal Moveables\(^4\). Thirdly, there are those conventions having the narrow ambit of sale alone, such as the 1980 UNCITRAL Convention and the 1958 Hague Convention, those encompassing a broader area of operation, such as the 1976 UNIDROIT 'Good Faith' Draft and the E.C. Convention on the Law Applicable to Contractual Obligations of 1980\(^5\), and those concerning a narrow issue within sale, such as the Council of Europe Draft European Convention on a Uniform Law on the Simple Retention of Title of 1982\(^6\).

None of these conventions or draft conventions has yet had significant effect upon the proprietary aspects of the Scots international private law of sale\(^7\). It might indeed be doubted whether those conventions which may yet be fully implemented will make great changes to the Scots international private law of property. However, the terms of some of these conventions, and more importantly the difficulties encountered in their negotiation and implementation, shed some light upon the problems of choice of law regarding the proprietary aspects of sale, and suggest some solutions which, as discussed above, the Scots courts have adopted or may yet adopt.

Substantive uniform laws may be seen as the panacea to the ailments of international private law, as they appear to eliminate the issue of choice of law altogether. This appearance is, however, deceptive. It is naive to suppose that uniform laws operate in a completely uniform way, unless the various legal processes involved and the other substantive laws with which a given uniform law will interact are also unified. A brief look at the 'U.K.' tax system is sufficient to illustrate this. It is however clear that a uniform law minimises problems of international private law, if it is carefully drafted\(^8\).

It is also clear that some fields of law are more amenable than others to the international agreement required to introduce uniform laws and harmonise choice of law. The 1980 UNCITRAL sales convention is intended, in part, to replace two UNIDROIT conventions of 1964 relating to sales contracts\(^9\). The 1976 UNIDROIT draft uniform law on acquisition in good faith of moveables was conceived as an extension of the 1964 UNIDROIT uniform sales laws when the 1964 conventions were being negotiated\(^10\). In 1969 Professor Sauveplanne, who was closely involved with the project from its inception, commented that 'the differences which still exist...make it at first sight hardly conceivable that international unification of the law on [the bona fide acquisition of goods] can ever be achieved'\(^11\). The broadening in scope of the draft in 1975\(^12\) to include acquisitions outwith sale can hardly have increased the chances of agreement. It is therefore unsurprising that no state has been willing to convene the diplomatic conference necessary to adopt the final draft of 1976\(^13\).
The general field of obligations would appear to have been much more productive of successful international conventions than has the general field of property\(^1\). This is true of both conventions unifying laws and those harmonising choice of law rules. It is possible to speculate that difficulties have arisen in relation to property conventions largely because of large diversity in laws and the economic conservatism and insularity of states involved. It may be said that states are willing to agree upon matters such as contract because most legal systems allow parties to contracts a large degree of autonomy, but are less willing to agree upon property laws because in these fields of great economic importance there is less scope for an individual directly to determine his legal position.

Narrow conventions also appear more likely to succeed than broad conventions, and although various proposals concerning reservation of title on sale have not made significant progress, it is suggested that a convention will ultimately be concluded in this field. It is perhaps interesting that suggestions have been made that the 1976 UNIDROIT draft uniform law on the acquisition in good faith of moveables be narrowed, so that it relates only to 'cultural' property\(^2\).

The second distinction between conventions drawn above was between those relating primarily to contractual issues and those relating to proprietary issues. The contractual conventions have little direct influence upon property issues, although some articles of some contractual conventions do relate to property issues, particularly as they arise between the parties to a sale. In addition, the law of contract can of course have significant effect upon the operation of property law.

Property issues are expressly excluded from the main UNIDROIT sale contracts convention of 1964 by Article 8 thereof\(^3\), and Article 4(b) of the 1980 UNCITRAL convention performs the same function, unless there is express reference to property issues in other provisions in the convention. None of the other articles of the UNCITRAL convention seems to refer to property issues\(^4\). The 1980 E.C. Contracts Convention applies in terms of article 1 only to 'contractual obligations', the reporters Lagarde and Giuliano considering\(^5\) the express exclusions of property issues in former drafts superfluous.

The 1985 Hague Convention contains minor provisions relating to property issues. These provisions seem largely to derive from certain articles of its 1955 predecessor and the 1958 Hague property transfer convention. Article 5(d) of the 1985 Convention excludes the Convention from application to the effect of the sale in respect of any person other than the parties to it\(^6\), and Article 5(c) excludes the Convention from application to the transfer of ownership\(^7\), except as listed in Article 12. Article 12 lists a series of specific issues to which the transfer of ownership may be relevant. This list is very similar in substance to that in Article 2 of the 1958 Convention and Article 5(3) of the 1955 Convention, although several new provisions have been added.

As in the 1950's conventions, in the 1985 Hague Convention the law governing the contractual relations of the parties to the sale contract governs risk, entitlement to 'fruits' and the validity and effect of reservation of title clauses, all with regard only to the relations between the parties to the sale. It was argued above that Scots law adopts, or should adopt, this general approach.
All of the modern conventions which deal with risk on sale separate the issue of risk from property issues\textsuperscript{21}. It is probably only mentioned in such conventions to prevent unthinking characterisation thereof as proprietary by legal systems which connect risk with ownership in some way in their internal law\textsuperscript{22}. Entitlement to 'fruits' seems to have been treated analogously to risk in both the 1958 and the 1985 Conventions, but with little discussion\textsuperscript{23}. This seems unobjectionable if limited to the relations of the parties to the sale. Reservation of title is discussed further in Chapter 5. For the present, it suffices to note, that in common with the other potentially proprietary issues in the contractual conventions, a distinction is made between its operation between the parties to the sale, and with regard to third parties, with the contractual law being applied between the parties to the sale.

Articles 12(f) and (h) of the 1985 Convention do not derive directly from the 1955 and 1958 Conventions. Article 12(f) applies the law of the contract to the consequences of its non-performance. This would presumably mean that the rescission or resolution of a sale contract for breach by the buyer could have the effect of vesting ownership retrospectively in the seller, if the law governing the contract gave such effect to rescission or resolution\textsuperscript{24}. Article 12(h) applies the law of the contract to the consequences of the nullity or invalidity of that contract. This would presumably mean that the law of the contract would determine whether or not ownership would pass from buyer to seller on a void or voidable contract, or what sort of remedies might exist in unjustified enrichment in such circumstances. Both of these effects of Article 12 upon ownership would however appear only to operate between the parties to the sale, given the terms of Article 5(d) of the Convention. Again, it has been argued above that a general distinction between parties and third parties should be drawn in the Scots international private law of property.

There is one difficulty which all of the contractual conventions appear to ignore, probably as a result of rather trite assumptions that contractual and proprietary issues might easily be distinguished. This difficulty is the link which exists in many legal systems between the law of contract and the law of property\textsuperscript{25}.

This is probably not of great importance regarding the choice of law conventions, since the residual choice of law structure of the forum may provide appropriate solutions. Thus court X may refer to the Scots lex situs to assess whether or not a buyer has acquired a real right in property sold, perhaps because the seller is insolvent. An incidental question as to the validity of the sale contract may then arise, and perhaps the operation of the contractual right as a lus ad rem. Court X must decide whether to refer the validity and effect of this contract to the law indicated as appropriate by the Scots lex situs, or whether to refer this issue to the law indicated as appropriate by its own choice of law rules governing the essential validity of contracts.

It has been argued in Chapter 3.C,1) that court X ought to apply the choice of law rule of the lex causae, the Scots lex situs, to this incidental question. Court X may however find itself in the position of being bound to apply the terms of an international convention, say the 1980 E.C. Contracts Convention. In common with the other contractual conventions, the E.C. Contracts Convention is silent upon this issue. The problems are not, however, insuperable, and court X\textsuperscript{26} may decide that the E.C. Contracts Convention applies to such an issue, and accordingly assess the validity and operation of the contract under the law.
indicated as applicable by that convention. On the other hand it may be decided that such an issue falls outwith the scope of the convention, and residual choice of law rules could then be applied.

The E.C. Contracts Convention was brought into force in Scotland by the Contracts (Applicable Law) Act 1990. Its application to such incidental questions remains undecided. It is suggested that the convention should not be applicable if the forum is a convention state but that it should be so applicable if the property is situated in a convention state. The purpose of the convention seems satisfied by such an interpretation without undermining third party reliance upon the lex situs.

If such an incidental question arises in relation to a uniform law, such as that contained in the 1980 UNCITRAL convention, the above example raises more difficult problems. Court X has to decide whether or not the incidental question falls within the scope of the convention. If the convention is applicable, court X must then assess the effect of a contractual right as a ius ad rem in the context of an ad hoc artificial system. This might not be easy, since an ad hoc uniform law cannot cope so easily with the unforeseen as can a complete organic legal system. It may be that it is unlikely that court X will interpret the convention so as to include such an unexpected eventuality, but such an interpretation is not impossible. There is no obvious answer to these problems, other than care in the drafting of uniform laws, so that they become properly integrated with connected internal laws.

The property conventions are also of interest. The draft uniform laws of course largely side-step difficulties of international private law, without completely eliminating them. None of those mentioned above is, however, in effect. The 1958 Hague property transfer convention seems to have been equally lacking in success, and it was not resurrected along with its contractual sister of 1955 when that latter convention was effectively superseded by the 1985 Hague Sales convention27.

The 1958 Hague convention is however of interest for several reasons. Firstly, it contains some possible approaches and solutions to persistent difficulties in its field and secondly it illustrates the sort of conceptual compromises which appear necessary to achieve internationally acceptable and workable solutions. It is however hard to draw conclusions from what is, to all intents and purposes, a failed convention. Nevertheless solutions which have not gained international unanimity might still be a useful source of guidance to individual systems of international private law.

The negotiations leading to the 1958 convention revealed a fundamental division between the Scandinavian states and most of the other states. That division concerned the crucial concept of ownership. The Scandinavian legal systems, as explained in Chapter 2,H, have almost abandoned traditional property concepts, in favour of the resolution of specific 'dynamic conflicts'. In other words Scandinavian legal systems resolve property problems at a relatively concrete level by means of a fairly large number of largely autonomous ranking rules, rather than by means of general concepts and general rules of ranking. The Scandinavians were therefore rather unwilling to have the 'lump' concept of ownership imposed upon them28.
On the other hand, many legal systems, such as those of Germany or Austria, have relatively abstract property systems, and were accordingly unwilling to agree to a convention which did not contain a central concept of ownership. This impasse gave rise to no fewer than five official draft conventions, and numerous unofficial alternatives, of varying degrees of abstraction.

The final convention appears to be a useful compromise, but on closer examination it is in fact an agreement to disagree. Article 3 contains a general provision, concerning the transfer of ownership on sale with regard to all persons other than the parties to the sale. This looks like a major concession by the 'abstract' states, who were originally unwilling to concede any distinction between the property relations of the parties to the sale relative to each other and relative to third parties. However the convention contains no general provision concerning the property relations of the parties to the sale, containing instead only a small number of specific rules in Article 2, some of which are discussed above in relation to the 1985 Hague Sales Convention. Therefore the abstract states remained largely free to use the general concept of ownership in their international private law of sale.

The 'concrete' states were not however satisfied with this concession, still considering the convention too abstract. Accordingly, Article 10 provides for reservations on ratification. Crucially, Article 10(a) permits the restriction of Article 3 to the property relations of the buyer and the seller's creditors. Therefore the concrete states remained largely free to apply concrete solutions in their international private law of sale. If the property relations of the parties to the sale which are not covered by Article 2 are considered, it is clear that the abstract states could analyse them in terms of ownership, and the concrete states could see no property issues at all. A similar diversity of interpretation would be possible regarding property relations which do not involve the creditors of buyer or (unpaid) seller and the seller or buyer.

The 1958 convention may be seen as a remarkable practical reconciliation of the theoretically irreconcilable, or as an illustration of the final conceptual insularity of the participating states. Several times during the negotiations proposals were made regarding a general distinction of the proprietary effect of the sale with regard to the parties to the sale and with regard to third parties. These proposals received inadequate discussion, being summarily dismissed by the abstract states largely on the grounds of the conceptual unity of property law and in bald statements of the difficulty in deciding who should be classified as a third party. The concrete states found the vagueness of a general concept of a third party unacceptable. This true compromise seems thus to have fallen between the stools of polarised interests. This need not prevent reappraisal of this solution by individual systems of international private law, since it provides a potentially useful tool with which to reconcile legal systems of great diversity. It has been suggested in Chapter 3,B,1) that Scots law should adopt such a distinction, to the extent that it has not already done so.

Having noted the agreement to disagree under the 1958 Convention at the basic conceptual level, it should also be noted that there was fairly general agreement as to the solutions to be applied to the major practical problems of buyer, seller and their respective creditors. However some of these solutions seem to be placed at a peculiar conceptual level, as a result of the source of many of the final provisions in concrete drafts of the convention. Some of these solutions appear to be too concrete to be effective, and indeed some tend to
favour certain types of substantive result, perhaps as a further result of their rather concrete level.

Thus Article 4 concerns the ranking of the rights of the seller against those of the buyer's creditors. Such a formulation might be rather useful, were it not that the category of seller is further restricted to that of 'unpaid' seller. Article 3, when returned to its concrete roots by the ratification restrictions of Article 10(a), concerns the rights of the buyer against the seller's creditors, lacking any connection to the fulfilment of the sale by the seller. Such an imbalance in the structure of the convention scarcely aided its viability. This in fact is an example of the latent ambiguity of the convention. In its abstract form Article 3 would seem to cover the rights of the seller against the buyer's creditors as well as the rights of the buyer against the seller's creditors. This would make Article 4 a special choice of law rule for unpaid sellers in the abstract version of the convention, as opposed to the distorted mirror image it presents to the concrete version of Article 3. Such structural ambiguity must also have detracted from the viability of the convention.

Furthermore, the reservation of title by a seller is characterised as a right of the unpaid seller33, applying Article 4 rather than Article 3. This presupposes a certain substantive approach to reservation of title, which may as easily be characterised, more neutrally, as a matter concerning the rights of the buyer against the seller's creditors in terms of Article 3, or in a more neutral Article 434 as a matter concerning the rights of the seller against the buyer's creditors35.

The substantive emphasis of the convention is continued when the approach of Articles 3-5 to the conflit mobile is examined. Article 3 permits the buyer to 'add up' each consecutive lex situs to his benefit, when faced by the claims of the seller's creditors36, this being what Eherenzweig might term a 'buyer's preference'. Article 5 contains a similar 'bona fide purchaser's preference'. The unpaid seller, on the other hand, is left by Article 4 with only the lex situs at the time of his claim37.

The treatment of the conflit mobile may be criticised on further grounds: the appropriateness of the method of addition of consecutive leges situs, and the manner in which documents of title and possession are incorporated into that addition system. Article 3, for example, proceeds from the standpoint of considering primarily the lex situs at the time of a 'claim', to which rights under prior leges situs are added. This retrospective approach to the conflit mobile, arising from the arguments of the concrete states, also exists in Article 5. It is not in itself objectionable, but it seems to have led to the position that no significant act need have taken place in terms of any previous lex situs in order that the buyer might have acquired a right38. This seems needlessly mechanistic.

The law of the place where documents of title are received provides a further benefit to the buyer under Articles 3 and 5, and the situation of the documents at the time of a seizure relating to the goods provides a further detriment to the unpaid seller under Article 4. Similarly, the lex situs at the time of the receipt of possession by a purchaser from a non-owner provides an additional law to benefit the bona fide purchaser under Article 5. The receipt of a document of title or of possession seem concepts too imprecise to be useful in this context, in the same manner that the mere previous situation of an item of
property is an inappropriate criterion of decision in itself. Similarly, receipt of documents or possession pre-supposes certain types of substantive laws. A more important question must be what the effect of such such receipt is under a given law; the indorsement of documents of title is often as important in comparative law as the possession of property is unimportant. These rules accordingly seem to operate at too concrete a level.

Yet another example of the excessively concrete approach of the convention is the separation of sales by a non-owner from sales by an owner, Article 5 governing the former, limiting article 3 to the latter. Here it would seem that a purchaser from a non-owner is not quite so preferred as a purchaser from an owner, since the purchaser from a non-owner may only take the benefit of the lex situs at the time of the claim against him or the law of the place where he obtained possession. Again, the level of this formulation appears to be too concrete.

The substantive emphasis of the 1958 convention is illustrated by several decisions of the Dutch courts, which, although The Netherlands has not ratified the convention, appear to attempt to follow its terms. The substantive bias displayed is surely unjustifiable.

Several conclusions may be drawn from these international conventions which may be of use to the Scots international private law of sale. Firstly, the property relations of buyer and seller relative to each other may usefully be distinguished from property relations involving persons not party to a sale. Quite apart from the fact that such a distinction is an appropriate a priori basis for separate choice of law rules, given the basis of knowledge and certainty of parties and third parties, it is also a distinction which might be internationally effective and acceptable. Such a distinction was partially adopted in the 1955 and 1958 Hague Conventions, and its adoption in relation to reservation of title seems particularly telling. The continuance and extension of this distinction in the 1985 Hague Convention tends to support this proposition.

Secondly, it is clear from the 1958 Hague Convention that a balance has to be struck as to the level of abstraction of choice of law rules in this field. It is also clear that the balance struck by the 1958 Convention was at too concrete a level, leading to excessive result-orientation; a 'buyer preference' being most acceptable if you are a buyer. The level of abstraction ought to be such as to permit the integration of different conceptual systems, without undue distortion to any system. The level of abstraction adopted ought also to be practically useful, and provide appropriate and just choice of law rules.

Here again the property relations of the parties to a sale may usefully be distinguished from property relations involving persons not party to a sale. This inevitably leads to the distortion of the laws of both concrete and abstract states. It makes little sense to analyse the legal relations of buyer and seller as proprietary in a concrete legal system, and so it seems sensible for a different legal system to observe this fact. In theory, the same is true of the collective classification of third parties, which the concrete systems see as a series of autonomous legal relations. However, these autonomous legal relations have a common proprietary characteristic, and it is not unreasonable for a different legal system, observing from the outside, to characterise these relations in common. It is a similar distortion of an abstract legal system to
divide the unity of real rights, and so to distinguish ownership in its effects with reference to the parties to a sale and with reference to persons not party to a sale. Again, when observed from the outside, some sort of practical distinctions exist between situations involving only the immediate parties to a sale and situations which involve a person not immediately party to a sale. It would, for example, be difficult for a concrete legal system to observe any intelligible distinction between a claim for specific implement and a *rei vindicatio* by a buyer against a seller when no person other than buyer and seller is involved.

It may be possible to make further distinctions at a more concrete level, perhaps between types of third party. Care is however required, in order to avoid substantive bias. A distinction of *mortis causa* successors from creditors, or of either from purchasers or similar successors *inter vivos* might be intelligible, if it is neutral in operation, although it is suggested that unnecessary distinctions should not be drawn so as to avoid needless complexity.

Thirdly, the distinction of the situation of the unpaid seller from that of other sellers in Article 4 of the 1958 Hague Convention might perhaps provide the basis for an exceptional or subsidiary choice of law rule, if perhaps in accordance with a slightly less concrete classification. Article 4 appears to have been designed principally to regulate institutions such as seller's liens, stoppage in transit and *résolution*. As discussed in section B.5) above, it may be just and appropriate to regulate such institutions in accordance with a special subsidiary choice of law rule. The experience of the 1958 Convention is such as to indicate that the level of abstraction of such a special rule ought to be carefully considered.
CHAPTER 5
SECURITIES

A. Introduction.

This chapter principally concerns the voluntary creation of securities over corporeal moveables. As mentioned in Chapter 4, A.1 above, it is not straightforward to distinguish many of the issues discussed in this chapter from those discussed in Chapter 4. So too, many of the issues discussed in Chapter 4 are of direct relevance to security transactions, as should become clear below.

General theoretical issues are discussed in the next section, after which the approach of Scots international private law to general and certain particular issues is outlined. The chapter concludes with a discussion of special difficulties arising in respect of equitable and functional securities.
B. General issues in securities.

1) Radical theories of choice of law.

As explained below, the usual approach to choice of law regarding securities in corporeal property is to assume the application of the lex situs, as the basic rule. Thereafter many theorists differ as to how this basic rule should operate. However, some theorists have attempted to abandon this usual basic rule regarding corporeal moveables. A notable example is Georges Khairallah, who argues forcefully in 'Les Sûretés Mobilières en Droit International Privé' (Paris 1984) against the application of the lex situs to the form and essential validity of securities in moveable property. He favours the application of the 'proper law' of the security, as reflecting the autonomy of granter and grantee of that security. This autonomous 'proper law' is considered to apply indiscriminately to both corporeal and incorporeal moveable property. His analysis is powerful and perceptive, but ultimately seems to suffer from basic flaws in its reasoning.

At the risk of over-simplifying a subtle argument, Khairallah bases his criticisms of the current lex situs doctrine upon three points. The first is the fragile basis of historical justifications for the application of the lex situs, the second is the contention that the application of the lex situs serves to 'paralyse' foreign securities, and the third is the assertion that lex situs theories ignore the source of the security right in the volition of granter and grantee.

Khairallah's historical analysis is very interesting (pp. 117 & seq.). Basically he concludes that the old maxim 'mobilia sequuntur personam' reflected a conscious policy distinction between moveable and immovable property, with the personal law being considered appropriate to govern moveable property because of its moveable nature and the lex situs being considered appropriate to govern immovable property, partly for reasons of sovereignty. He accordingly rejects the argument that the owner's personal law was applied to moveable property as a fictional lex situs, and maintains that it is not safe to draw conclusions regarding moveable property from theories which concern immovable property. The assertion that trite approximations of moveables to immoveables are made, while it is true, leads him, among other things, to assume a certain rationale for the application of the lex situs to corporeal moveables by more recent theorists. This point is discussed further below. At the level of historical analysis Khairallah's arguments are very attractive, particularly his assertion that moveable property was not ignored by early theorists, as 'res vile'. It is not however clear how relevant this historical perspective is to more recent analytical studies of corporeal moveable property.

Khairallah then argues very forcefully that for several reasons the lex situs rule 'paralyses' foreign securities. He argues that the lex situs rule leads to the cumulative application of both the lex situs and the proper law of the contract with which a security is connected, and that this minimises the international validity of any given security. This argument is to some extent convincing, but Khairallah tends to over-stress the difficulties which exist in the distinction and integration of 'real' and 'personal' issues. Thus, for example, he argues that according to theories distinguishing real and personal issues some equivalent security to that of the lex situs must exist by the proper law of the security contract in order that the security of the lex situs

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might be considered valid (p.60). More subtle integration of real and personal issues is surely possible, and this matter is discussed further below. Furthermore, it is not clear that Khairallah's own theory might not give rise to just as much cumulation, of the proper laws of security and security contract (pp. 259-60.).

Khairallah also argues that foreign securities are paralysed by the conflit mobile, to which the lex situs rule inevitably gives rise (pp. 62 & seq.). This is certainly true of the approach of French international private law to the conflit mobile in securities, which tends to apply the last (French) lex situs (or lex fori?) even to the existence of a security right, whether by translating it on some theory of equivalence of institutions or by refusing to recognise those securities not complying with the French closed categories of real rights. It would seem that the solution to this problem is not the suppression of the conflit mobile, by the replacement of the choice of law rule, but the reform of the insular French approach to the conflit mobile and closed categories of rights. Such insular approaches to foreign securities are discussed further below.

Khairallah's last major point concerns the way in which lex situs theories 'ignore' the source of the property right in question (e.g. pp. 175-6.). Thus he maintains that the unity of a security transaction is ignored in a quest for unity in property law. It is suggested that the unity of property law is more important than the unity of a security transaction, but that some semblance of unity can be given to a security transaction by the subtle integration of its real and personal aspects. Beyond this, Khairallah seems to understand the unity of property law to be the coherent structural balance of a single legal system, that of France. In an international context the unity of property law is more subtle, concerning the just and coherent integration of the property systems of several legal systems. The crucial unity of the international private law of property is thus in the comparison and relative evaluation of property rights deriving from different transactions and different legal systems. Khairallah ignores these problems of ranking, which are far too important to be left, as he leaves them, to the vagaries of the lex fori (pp.293-4.). In a similar way, Khairallah ignores the difficulties in the integration of bankruptcy with securities, tritely assuming the predominance of the law governing the bankruptcy and rather oddly considering (pp.295-7) securities not to relate to bankruptcy in their main function!

Khairallah also considers that ignoring the source of a security right has led lex situs theorists to lay excessive emphasis upon the protection of third parties (p.175). This is possibly a valid point, and one which may be resolved by regulating the effect of the security between the parties to it by a different law from that regulating its effect with regard to third parties. However, Khairallah rejects such a distinction of parties and third parties and concentrates on the excessive emphasis of the lex situs theories upon third party protection. He concludes that the lex situs rule does not in fact achieve third party protection, on the basis of a rather narrow analysis of the operation of registration of securities and possession in French internal law (pp. 183 & seq.).

He is correct, but seems to have asked the wrong question, largely as a result of his historical analysis and the rather concrete level of his study of French internal law. Thus he cogently criticises theorists such as Pierre Mayer who
apply the property law of the lex situs as 'lois de police' because of the manner in which such laws protect third parties. This protective analysis as lois de police is then traced to the protective territorial function of the lex situs in land in Statutist theory (pp. 131-43). However, third party protection is not the modern rationale for the application of the lex situs, and this undermines the basis of Khairallah's analysis. The rationale of the lex situs rule is third party certainty, not third party protection, since it is more important that a third party knows whether he is or is not protected than that he actually is or is not protected. Khairallah does not deal properly with this rationale for the application of the lex situs. He does however argue at one point that the conflit mobile destroys the certainty of third parties, and to some extent he is correct (p.175). It would seem, on the other hand, that the greatest possible certainty for most third parties is achieved by the application of the lex situs, with its conflit mobile. Khairallah's argument that an autonomous proper law better achieves this aim is particularly lame.

Khairallah proceeds to replace the lex situs with the 'proper law' of the security, arguing, among other things, that this rule is often employed in the guise of the lex situs by subterfuge (pp. 219 & seq.). It must be said that this choice of law rule seems to raise as many problems as it solves. It does not completely eliminate the problems of the cumulation of applicable laws, nor even the conflit mobile and it clearly prejudices third party certainty. Khairallah's theory also seems to require the extension beyond capacity to contract of the rather unusual French doctrine of 'excusable ignorance of foreign law'. Furthermore, the rule proposed does not even seem to be particularly autonomous, given its automatic application of the law of the place of registration of the likes of ships, the law of the place of incorporation of the grantor of a floating charge and the law of the place of registration of a vehicle mortgage to the validity of the given security. This fictional autonomy seems even less credible than much of the fictional (and actual) situs analysis it replaces, giving rise to odd images of Savigny's more doubtful instances of the 'voluntary submission' to a given law!

It would therefore seem that Khairallah's radical analysis of choice of law in securities does not justify the wholesale abandonment of lex situs theory.

Significant diminution of the role of the lex situs in securities is advocated by FK Jeunger. He argues convincingly that conventional lex situs analysis does not provide the certainty upon which it is supposedly based in a number of situations, particularly as regards 'mobile goods' and export transactions. The application by Article 9-103 of the US Uniform Commercial Code in certain situations of, respectively, the law of a debtor's 'location' and the law of the place of destination of goods has certain attractions. It is, however, suggested that Jeunger's call for 'a modern version of the domiciliary approach once advocated by Story' removes certainty from many other situations. While the 'location' and 'destination' criteria may well apply to a great many situations in which choice of law becomes contentious in this field, it is notable that such situations remain exceptions to the basic lex situs structure of Article 9-103, despite the role described by Jeunger of American 'policy evaluation' theory in its development. It is suggested that Jeunger's argument does not justify wholesale abandonment of lex situs theory either.

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2) Uniform laws and related techniques.

A further alternative to a simple lex situs analysis of securities is some type of uniform law. It was concluded in Chapter 4, D that uniform laws do not appear to work as regards property issues in the field of sale, unless their scope is very narrow. The 1976 UNIDROIT Draft Uniform Law on the Bona Fide Acquisition of Corporeal Moveables has not fared very well; a general uniform law on the law of securities might be expected to fare even less well. A general Model Law, along the lines of the U.S. Uniform Commercial Code, might be expected to suffer a similar fate in an international context, given political, economic and conceptual diversity.

Narrower and more practical techniques might lead to greater uniformity and integration of legal systems. Thus uniform laws concerning the retention of title on sale might yet have some prospect of success. Similarly it is to be hoped that the 1988 UNIDROIT Convention on International Finance Leasing will be successful. Of course such uniform laws still require to be integrated with those parts of the law not unified, particularly the international private law of property!

Two other practical solutions have been advocated by Professor Drobnig. These concern the unification of registration requirements for securities and international agreement on equivalent types of security. Both of these proposals, if implemented, would certainly minimise the practical difficulties involved in creating securities which are internationally valid. As Professor Drobnig admits, they are by no means the whole solution.

All of these techniques might achieve more satisfactory solutions than exist at present, but all leave considerable residual problems of international private law. It is therefore interesting that the UNIDROIT Finance Leasing convention, for example, contains specific provisions on choice of law.

3) Paralysis of foreign securities: the conflit mobile.

One of Khairallah's major criticisms of the lex situs rule is that it 'paralyses' foreign securities; and one of his explanations of this paralysis is the manner in which the conflit mobile operates. Thus if a comparatively unusual security is granted over an item of property while it is situated in a state which permits a broad range of types of security in its internal law, that security is unlikely to be upheld in the courts of another state to which it is later moved, if that state permits only a narrow range of securities in its internal law. It is important to examine how and why this paralysis often occurs, so that the perceived evil of this paralysis might be eliminated.

An explanation is relatively simple from the viewpoint of the policy of the second state: third parties dealing with a given item of property will often not be in a position to suspect that a foreign security exists in that item of property. On the other hand the essence of security, from the viewpoint of the security holder, is that it is secure. A security is not very secure if it is valid only in the territory of legal systems which permit a similar or broader range of securities or have a similar security structure in their internal laws to that in the internal law of the state of creation of a given security. However a security holder is often in a better position to protect himself from the risk of the movement of the security subjects than are third parties to
The solution to this problem is evident in the development of American statutory solutions to this problem of the conflit mobile. In the early part of this century it became clear that the chattel mortgage and conditional sale statutes of each state in the U.S.A. ought to pay specific attention to chattel mortgages, conditional sales and analogous security devices originating in other states. Statutes therefore began to make express requirements as to the registration of foreign securities, where previously the courts had been faced with the task of interpreting registration statutes which had been drafted without any consideration being paid to their inter-state consequences. These new statutes generally required a foreign security to be registered in the state to which security subjects moved in order to be given effect there. They did however vary among themselves in many respects. Thus in particular, some statutes required a foreign security to be registered within a certain period of the entry of the security subjects into the state, and other statutes required registration within a certain period of the awareness of the security holder of the entry of the security subjects into the state. Article 9 of the US Uniform Commercial Code adopts the former position, resolving this difficulty in favour of the third party in the second state.

This solution is perhaps the best compromise available: the security holder is usually in a better position than the third party to protect himself, but he is given a period of grace in which to effect this protection, during which time his security remains secure. However the technical manner in which this solution operates may be important, and perhaps even more important is the technical manner in which legal systems which do not have a statute relating specifically to foreign securities deal with such securities. The technical operation of this and other solutions to the problem of the conflit mobile is important at the broader international level, particularly with regard to the way in which other legal systems perceive a given legal system's solution. Various technical approaches to solutions to the conflit mobile problem are discussed next.

a) Public policy. It is possible for a legal system to protect third parties who act in their territory from foreign securities by application of the public policy doctrine. In Scots and English international private law the public policy doctrine operates to exclude an otherwise relevant foreign law from application to the facts of a specific case, and applies the lex fori in its place. It is thus exceptional, coming into operation once an ordinary choice of law rule has been applied. The circumstances in which it may be invoked are very restricted, basically to excluding foreign laws which give rise to effects which are repugnant to the forum. This repugnancy is usually moral, but might be political, economic or conceptual. The degree of repugnancy must however be extreme to justify the exclusion of a law which the forum has already indicated to be appropriate by means of its choice of law rules. This is particularly true of conceptual repugnancy, since international private law could not exist without
the conceptual reconciliation of differing legal systems. The public policy doctrine should also be applied sparingly because it is unilateral in operation and insular in outlook, undermining international harmony of result, one of the aims of international private law.

As discussed in section D.1) below, the public policy doctrine has however been invoked to exclude the law giving rise to a creditor's security right. As a consequence of this exclusion of foreign law, it would seem to follow that that foreign law would have been applicable to the essential validity of the creditor's security right but for the repugnancy of its operation in the facts of the given cases.

It does not seem to be acceptable as a general rule to exclude foreign securities which do not correspond to those of the forum from operation on the grounds of public policy. The public policy doctrine gives rise to ad hoc exceptions to general rules and so should not itself operate at a general level. Nor does it seem acceptable to apply the public policy doctrine very frequently to foreign securities even on an exceptional basis. Firstly the law of security of one legal system is not likely to be sufficiently repugnant to another legal system as to justify the invocation of the public policy doctrine, since the two legal systems are likely to differ only in technical structure and degree of favour shown to security holders. Secondly the interests of the security holder are entitled to similar consideration to those of persons acting in the forum state, and thirdly the application of the public policy doctrine is not likely to achieve its aim of protecting persons acting in the forum state or providing them with any degree of certainty, since its operation is irrelevant to a different forum.

There is however one security situation in which foreign law may justifiably be excluded on the grounds of public policy. This situation is 'fraud à la loi', where a security holder has manipulated choice of law rules in order to provide himself with a security which he might not otherwise have obtained. Thus it is not acceptable that a creditor might be able to persuade a debtor to move an item of property from a state in which security is difficult to grant into a state where security is easy to grant in order to grant a security which will be valid in the state from which it was originally removed. As in the avoidance of taxes, a rule against fraud à la loi gives rise to difficulties of degree in its application, for example when a debtor's business operates in several different legal systems. Such a situation is not a reason to reject this rule, but a reason to deal with the whole problem expressly by statute. Until such a statue exists the doctrine of fraud à la loi may deal with this exceptional situation more effectively than might a blanket exclusion of foreign securities as contrary to public policy.

Professor Graveson argued that this doctrine is not part of English international private law. While there is slight authority for Graveson's position, it is suggested that his view has little to support it in theory or policy. The doctrine of fraud à la loi seems to be a logical extension of the public policy doctrine of both Scots and English international private law, and in the absence of compelling authority there seems much to commend it.

b) Lois de police. Some theorists have argued that the current lex situs is applicable to the validity and effect of securities created abroad because security laws are 'lois de police', or even because security law is a matter of
'ordre public'. This analysis is not uncommon in France and in legal systems influenced by French law. It also as needlessly insular as the potential exclusion under Scots international private law of foreign securities on the grounds of public policy.

This suggested application of the lex fori seems to be the combined result of the historical development of the ordre public doctrine in continental European theory and of more recent theoretical justifications for the application of the lex fori. The theory of ordre public of some legal systems is not quite the same as the public policy doctrine in Scots and English international private law. Its operation as an exception to a choice of law rule is still not quite so clear as that of the Anglo-American public policy rule, despite Batiffol & Lagarde's assertion (para.355) of its modern operation as an exception to a rule.

There are various historical reasons for this diversity in theory. One is the influence of Mancini's 'Italian School' on continental European theory, and in particular his influence upon the French jurist Pillet. Mancini's emphasis on nationality as the major criterion of choice of law tended to view any criterion by which a different law was applied as exceptional. These exceptions were accordingly sufficiently large as to make them more akin to distinct rules than exceptions. One of these exceptions was the territorial application of local law by reason of ordre public to matters of territorial importance, ascertained by Pillet in terms of references in the French Code Civil to 'lois de police et de sûreté'. This 'exception' seems to have performed the function both of a choice of law rule distinct from nationality and of a true equivalent to the public policy exclusion of foreign law. While the influence of Mancini's views was fading, this dual function of ordre public seems to have continued to some extent, blurring the operation of choice of law rules.

The history of ordre public may thus have given rise to a less formal structure of choice of law in the legal systems of continental Europe than in Anglo-American and other legal systems. Thus ordre public, unlike the public policy doctrine, appears not to be a strictly defined exception to the application of a given foreign law but a justification for the application of the lex fori which blurs the distinction between a choice of law and its exclusion. This remains so to a certain extent, despite Batiffol & Lagarde's assertions to the contrary.

Several more recent developments in international private law should be considered in the light of the history of ordre public. One is Francescakis' theory of 'lois d'application immédiat'. Roughly speaking, a loi d'application immédiat is a law which is directly binding upon the forum, which the forum must apply to the case before it. In Anglo-American terms, such a law contains its own unilateral choice of law rule, or is in other words what Nussbaum termed a 'spatially conditioned rule'. Such laws exist in Anglo-American legal systems, for example in the consumer and economic field, but they tend to have express statutory sanction. In a codified system a loi d'application immédiat is not so easy to identify.

The circle is then completed by the use in more recent years of the term loi de police as a synonym for loi d'application immédiat. A law of great local importance, such as a law protecting ordinary creditors from latent securities, is then easy to apply as a matter of ordre public or as a loi de police, or as both. Such usage of the concepts of ordre public and of lois d'application
immediat displays indefensible insularity and not a little confusion in reasoning. It ought therefore to be abandoned.

(c) Exceptional and subsidiary rules. The difficulties of the conflit mobile in securities may be alleviated to some extent by the use of exceptional or subsidiary choice of law rules. This is particularly true of the dilemma described above concerning the innocent security holder and the innocent third party. Thus in the 1920's the argument arose in the U.S.A. that the validity of a security would be governed by the lex situs at the time of its creation, unless the security holder consented or ought to have become aware of the removal of the security subjects to another state. Upon this eventuality, the laws of that second lex situs became applicable to the validity of the security. This theory was largely the work of Beale. At the level of policy this choice of law structure favours the innocent security holder over the innocent third party, but at least places some sort of responsibility upon the security holder to protect himself when possible.

Structurally the basic choice of law rule indicated that the lex situs at the time of the creation of the security governed its validity, and that that right would normally remain 'vested'. An exceptional choice of law rule then applied a subsequent lex situs, when the security holder would often be in a position to protect himself. This choice of law formulation has been extensively criticised. At the level of general theory, Beale's assertion that the second lex situs would only have 'jurisdiction', in the sense of legislative competence, over the relevant chattel if the security holder had exercised some sort of volition with regard to its change in situation is certainly not tenable in an international context. It echoes strongly of Savigny's less credible theories 'voluntary submission' to different legal systems.

However the most important criticisms of Beale's formulation are of its exceptional nature and the manner in which it is expressed. All exceptional rules give rise to difficulties in their integration with the general rules to which they are exceptions. They ought therefore to be avoided if possible. Similarly Beale's criterion for the application of the second lex situs, the creditor's consent to or knowledge of the movement of the security subjects, misses the crucial point, although its practical effect might be quite acceptable. The reason for the application of the second lex situs is that it provides third parties in that state with certainty in their transactions. The right of the debtor to move the security subjects to that state is not an important factor from the viewpoint of such persons, and neither is the state of knowledge of the creditor. The likelihood of such movement having taken place is the crucial factor, and one which would appear to balance the interests of the secured creditor and third party more fairly.

A subsidiary choice of law rule, invoked by this sort of criterion, might give rise to a more flexible solution to these problems. Such a solution has been proposed for situations not very different from those envisaged by Beale. Thus Professor Drobnig has argued in favour of the application to the validity of securities in export transactions of the law of the place of destination of goods, but similarly to Professor Stoll's argument in international sales, for the application of this law only if a prior lex situs has not created a right for any other third party, such as a creditor using diligence. This flexible structure, which was described in Chapter 3,B,3) as a passive permissive renvoi, seems to integrate consecutive leges situs much more effectively than might an
exceptional choice of law rule. It also contains, in the distinction of export and internal transactions, a more useful criterion for regulating the positions of innocent security holder and innocent third party than does Beale's emphasis upon the volition and knowledge of the security holder. There is little authority for such a rule.

4) Translation by the extinction and creation of rights. It is possible to deal with the conflit mobile by automatically 'translating' a foreign security as a local security from the moment it has crossed a border. At first sight this technique reconciles the interests of the foreign security holder and the local third party, since the foreign security holder has a security but this security is one which the local third party ought to expect. This reconciliation is however deceptive, since the translation process itself can limit or negate the effect of the foreign security. Thus a non-possessory hypothec might be translated as a pledge, greatly limiting the creditor's rights. Similarly a mortgage operating by reservation or transfer of ownership might be translated as a void mortgage of such type, or an extinguished pledge, limiting the creditor's rights rather more!

A distinction may be drawn between conscious translation and unconscious translation. Conscious translation of this sort may be acceptable, since the legislative competence of the second lex situs can be in no doubt, given that the choice of law rule indicates its applicability. Accordingly the 'refiling' provisions of Article 9 of the US Uniform Commercial Code might give rise to the situation where an English Bill of Sale or an Illinois security interest remains such for the period of grace following the entry of the security subjects to California, but is translated as a Californian security interest from the moment of refiling, or is extinguished if refiling does not take place on time.

Unconscious translation is less acceptable, as perhaps when a German reservation of title is translated as an unregistrable, and therefore void, Swiss reservation of title, or a narrow Italian reservation of title is translated as a broad German reservation of title. It is not credible to ascribe such dramatic unconscious effect to the second lex situs as a matter of interpretation. It is, for example, odd unconsciously to translate as a pledge a chattel mortgage under which ownership is transferred to the creditor, since this involves transferring ownership from the creditor to the debtor and vesting a lesser possession related real right in the creditor.

It may be that this translation effect is not derived from the interpretation of the second lex situs at all, but from the structure of the choice of law rule of the forum. Thus, as a matter of choice of law, the second lex situs may be applicable to the content or validity of the security right, from the moment the property enters the territory of the second lex situs. This approach to the conflit mobile seems to derive from arguments concerning the operation of laws in time, termed in French 'droit transitoire'. The interaction of droit transitoire with the conflit mobile is discussed in Chapter 3.6, and it is argued there that conclusions regarding the conflit mobile cannot be drawn automatically from droit transitoire.

One rule of thumb in droit transitoire is that a change in law shall normally take immediate effect upon existing legal relations. Some theorists are in favour of applying this general rule of droit transitoire to any conflit mobile, and accordingly to the situation where an item of property moves from one state
to another. This reasoning is flawed in several ways. Firstly the rule in droit transitoire is merely a rule of thumb. Secondly it is not tenable to draw conclusions as to solutions to problems of conflit mobile automatically from solutions to problems of droit transitoire. There is, thirdly, no reason to apply the same solution to all problems of conflit mobile. The sophistry of this 'logical' argument is exposed when it is seen that it does not even consider the substantive issue involved: the manner in which to decide whether to favour the security holder who derives his right from the first lex situs or the third party who acts with the second lex situs in mind. The immediate application of the second lex situs on the grounds of 'logic' does not give any credence whatever to the interests of the security holder. Furthermore, it is not clear how this doctrine of 'lois d'application immédiat', derived from droit transitoire is related to the doctrine described above of the 'loi d'application immédiat' as a unilateral choice of law rule which applies the lex fori. It may be that the fact that the lex fori is often also the second lex situs has facilitated the confusion of two separate doctrines and their cumulative application to this problem of conflit mobile.

Whether or not the second lex situs is applied to extinguish and create rights as a matter of interpretation or by virtue of the 'immediate' application of the second lex situs, it is clear that many legal systems translate foreign securities as a matter of course. This analysis is common in continental Europe\(^3\), and would seem to be the major reason for Kairallah's views that foreign securities are 'paralysed' in international private law. It is suggested that this paralysis is unnecessary and results from the translation of security rights at too early a stage in the choice of law process: at the stage of the creation and extinction of rights rather than at the stage of ranking.

e) A preferable option? If a foreign security is translated at the stage of the ranking of rights rather than at the stage of the creation and extinction of rights it is far less likely to be paralysed by the second lex situs. It is of course true that a foreign security may have to be translated at an earlier stage in the choice of law process, for example to see how it affects or is affected by a new transaction under the second lex situs, such as a judicial sale. This concerns the interpretation of the second lex situs in its application to a new transaction and not as a matter of the immediate effect of the second lex situs upon the security itself by virtue of a change in situation alone.

Thus if a non-possessory mortgage is created in S1, where there is no registration requirement for such mortgages, and the property is moved to S2, where it is later seized by the owner's creditors, the choice of law structure could be as follows. The creation of the security right could be referred to law S1 in the first instance. If it has been validly created under law S1, law S2 could be examined to see if it contains a statute directed towards foreign securities. If it has such a statute then any extinctive or creative effect upon the real rights of the security holder or any other person ought to take effect. In the absence of such a specific statute the non-possessory mortgage of law S1 need not then be translated as its equivalent in S2, whether law S2 bans non-possessory mortgages or requires their registration in terms of its internal law\(^3\).

Upon seizure of the property by the owner's creditors the S1 mortgage may be translated roughly as its equivalent in law S2, to see whether the seizure has any effect upon the mortgage or whether the mortgage has any effect upon the
creation of the rights of the seizing creditor. Having considered the position, and if neither has extunctive or creative effect with regard to the other, the S1 mortgage may then be translated as its equivalent in law S2, so that it may be ranked with the right of the seizing creditor in terms of a common legal system: law S2. This translation need not take place by examining the internal law of S2 and deciding that the S1 mortgage is void for non-registration or because it does not depend upon possession, since differences are bound to arise between legal systems on such matters and such a narrow translation would paralyse the foreign security. The validity of the mortgage has, in any event, already been decided. A broader equivalence is required, if necessary to the general concepts of security and ranking of law S2. In this way the interests of the security holder and the third party in the second situs may be reconciled.

Thus if an extended retention of title takes place in Germany and the relevant property is moved to France, a sub-purchaser from the original buyer may obtain ownership and the German retention of title may be extinguished under Art. 2279 of the Code Civil, according to the principle that 'possession vaut titre'. This need not result from the translation of the German security as a void French 'pacte commissoire' as it crosses the border into France, but could result from the operation of Art. 2279 upon French security rights, to which the German retention of title is approximated for the purposes of the creation and extinction of rights at the time of the sub-sale. Since Art. 2279 extinguishes most French security rights it should probably also extinguish a German one. This structure of choice of law leaves it open to the original German seller to argue that Art. 2279 has not been fully complied with in some respect, whereas automatic translation of the German retention of title as a void pacte commissoire leaves Art. 2279 an irrelevance.

If the original German seller can argue successfully that Art. 2279 is inapplicable his security will remain intact, to be ranked with any right which the French sub-purchaser might have. If the German retention of title is translated as a void pacte commissoire this ranking stage is never reached.

A similar situation would arise if the original buyer had been bankrupted in France rather than sub-selling the property. If it is assumed that French bankruptcy law does not extinguish securities as a general rule, the stage of ranking is reached. The German retention of title must be ranked both with the rights of the French bankruptcy administrator and with the rights of claimants upon the bankrupt's estate. The German retention of title ought to be translated as its equivalent in French law for the purposes of this ranking. It is needlessly insular to translate the German retention of title as a void pacte commissoire or as a French retention of title which has not complied with the formality requirements of French law. Such a translation ignores the fact that the right involved is a security right in terms of its German source. It ought accordingly to be translated as its nearest French equivalent, or if such an equivalent is lacking it ought to be ranked in accordance with the general French law of security and ranking. Since the right to be ranked has a foreign source French law ought in this context to abandon its closed categories of real rights.32.
C. The general Scots rule.

As in sale, in the first instance Scots international private law seems generally to refer issues concerning the essential validity of securities over corporeal moveables to the *lex situs* at the time it is alleged that a given security right has become real and issues concerning the ranking of securities to the *lex situs* at the time of ranking. This basic structure is evident in a number of Scots cases.

**Mitchell v Burnet and Mouat 1746 Nor 4468** is often referred to in support of the basic *lex situs* rule in securities. In this case London merchants had arranged for two consignments of goods to be sent from the West Indies to two separate Aberdeen merchants, Sinclair and Mitchell, to be landed initially at Campvere *en route*. Both consignments were placed in Burnet and Mouat's warehouse in Campvere in Sinclair's name. Sinclair thereafter shipped his consignment to Scotland, having received an advance from Burnet and Mouat, and left Mitchell's consignment in the warehouse. Burnet and Mouat refused to deliver Mitchell's consignment unless Sinclair's debt to them was paid, alleging that it had been 'impignorated to them for security'.

It was initially held that the consignment belonged to Mitchell, despite the relevant bills of lading having been in Sinclair's name, and that the 'impignoration', though relevant, had not been proved. A 'new allegiance' as to the custom of Holland, applicable at Campvere, was thereafter upheld. According to this custom a factor receiving goods and giving credit to the person from whom the goods were received was entitled to 'detain' the goods in respect of that credit against their true owner, provided he believed at the time credit was given that the goods belonged to the person from whom they were received.

While the alleged 'impignoration' was held relevant, the law governing it was not made clear. Although the Dutch custom applied to prefer Burnet and Mouat was possibly characterised as a type of lien existing by operation of law rather than a type of 'impignoration', it is also unclear whether such a distinction was considered significant. Nor is it clear that the Dutch custom was applied because it was the *lex situs* or because the transaction between Sinclair and Burnet and Mouat took place there. Accordingly the case cannot be regarded as very strong authority for the application of the *lex situs* to the creation of securities over corporeal moveables, despite its later interpretation to that effect.

The English House of Lords decision in **City Bank v Barrow (1880)5 App Cas 664** concerned a similar situation, although it is clearer that a security right of pledge rather than a lien was claimed. An English leather merchant sent hides to Quebec to be tanned there. The tanner pledged the bills of lading relative to the hides with the Toronto Bank in respect of his own bank account. The transaction was held invalid under the Quebec Civil Code. The law of Quebec was applied because, in the words of Lord Blackburn (at 677), 'the pledge upon which the Defendants claim was made in Canada in respect of goods then in Canada'. As in **Mitchell v Burnet and Mouat**, no clear distinction was drawn between the *lex situs* and the law of the place of the transaction.

The *lex situs* was more clearly applied in **Inglis v Robertson & Baxter (1897)14 R 758, (1898)15 R(HL) 70**. The facts in **Inglis** are well known. A consignment of whisky was held in a Glasgow bonded warehouse and sold to an English purchaser.
The English purchaser indorsed the delivery warrant for the whisky in England as security for a loan from an English lender. The whisky was then arrested in Scotland, prior to any intimation to the warehouse keeper of the indorsement of the delivery warrant.

It was averred that by English law the indorsement of the delivery warrant transferred ownership of the whisky to the English creditor\(^4\). English law was argued to be applicable to the 'rights of the parties' since it was the \textit{lex loci contractus} of the agreement to grant the security, its place of execution, the place of indorsement and delivery of the warrant and the common domicile of indorser and indorsee. It is not clear to what extent these arguments were considered cumulative or alternative.

The arresters' argument to the contrary (Court of Session p.772) seems completely convincing. They argued that 'the contract would fail to be determined by the law of England... but where the party having right under the contract sought to vindicate his right in and to the thing itself against third parties, then the question depended not upon his contract, which affected only the contracting parties, but upon whether or not he had obtained a real right in the thing itself which he could vindicate against all the world. This question could be determined only by the \textit{lex situs}. The personal rights of the various competing parties might depend upon... different laws, but when these parties sought to vindicate their rights in the subject, and to determine their preferences, they must appeal to the law of the country in which the subject was situated to determine which of them was, or in what order of priority they were, in fact vested with real rights in the subjects'. They further argued (p.774) that the application of the domiciliary law of the transferror would lead to extensive and needless enquiries into the domicile of the transferror in commonplace transactions, and the anomaly, for example, of a domiciled Scot being unable to give a bill of sale over his furniture in England while a domiciled Englishman could grant a bill of sale over his furniture in Scotland.

The arresters' argument on choice of law was upheld throughout. The Lord Ordinary, Lord Kyllachy, clearly accepted this application of the \textit{lex situs} (p.765) and the majority of the Whole Court affirmed this point. The judgement of Lord Pearson is particularly clear upon the choice of law issue. His Lordship stated\(^6\) that 'It may be necessary to be informed, in the first instance, what are the rights and obligations of the contracting parties in England... But I entertain no doubt that Scots law must in the end decide upon the competition of alleged real rights in moveables locally situated in Scotland; and that we are entitled to carry our examination of the matter back to the point at which it is alleged that the real right accrued in order to ascertain whether the requirements of Scots law have been substantially observed. Thus, if intimation be necessary to complete the real right in Scotland, the question whether it has been made must be determined by the law of Scotland; and I am further of opinion that the question whether intimation is necessary must also be determined by that law.'

Lord Watson was the only judge in the House of Lords to comment upon this issue. His Lordship clearly favoured the application of the \textit{lex situs} to the creation of real rights in the whisky, remarking (at 73) that 'the \textit{situs} of the goods was in Scotland. The Scottish creditors who claim their proceeds did not make any English contract; and in order to attach them they made use of the execution which the law of Scotland permits for converting their personal claim against

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\(^4\) England.

\(^6\) Lord Pearson.
the owner into a real charge upon the goods themselves. It would, in my opinion, be contrary to the elementary principles of international law, and, so far as I know, without authority, to hold that the right of a Scottish creditor when so perfected can be defeated by a transaction between his debtor and the citizen of a foreign country which would be according to the law of that country, but not according to the law of Scotland, sufficient to create a real right in the goods.

Lord Watson continued to comment that 'the crucial question is whether [a pledge of a delivery warrant] ... vests ... not a jus ad rem merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there held in actual possession by a custodian for Goldsmith as the true owner. That state of title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scottish law, the effect of vesting the property of the whisky, or in other words, a jus in re, in the pledgee'.

The sole dissenting voice in Inglis was that of Lord Young in the Inner House. Lord Young dissented, as he had done in Todd v Armour (1882)9 R 901, on the ground that the transfer of moveable property was governed by the domiciliary law of the owner, on the basis of the maxim mobilia sequuntur personam. His Lordship did not however clearly distinguish this reason for applying English law to the effect of indorsement of the delivery warrant from the argument that the contract pursuant to which the indorsement took place was 'English' and therefore that its effects ought to be governed by English law.

Lord Young referred to Erskine ii.2.40 and Wallace v Davies (1853)15 D 639 for the domiciliary theory. Erskine probably did support this theory, but clearly, even if Erskine's views accurately reflected the law at the time he wrote, the law had changed and the old continental domiciliary theory had been abandoned in Scotland long before Inglis came to be decided.

The support to be gleaned from Wallace is rather more tenuous. In the first place, Wallace concerned incorporeal property, and in the second place the Inner House in Wallace decided that intimation of the relevant assignation had in fact taken place in terms of Scots law, while passing no comment upon Lord Rutherford's opinion upon the choice of law issue in the Outer House. Furthermore, Lord Rutherford appeared to be more frustrated by the restrictive intimation rules of Scots law than concerned to establish clear and coherent choice of law rules, a charge which might similarly be levelled at Lord Young.

If reference to cases relating to incorporeal property was appropriate, Lord Young should perhaps have considered Strachan v McDougle (1835)13 S 954 rather than Wallace v Davies. In Strachan v McDougle the validity of a security over an insurance policy was referred to Scots law as, it would seem, the law under which the policy was taken out. The equivalent law regarding corporeal property appears to be the lex situs rather than the domiciliary law of the owner.

Lord Young referred to Professor More's Notes to Stair (pp.i-ii) for the proposition that the effects of a contract ought to be governed by the law governing the contract. There is no indication in More's Notes that this proposition was intended to apply to the effects which a contract might have in relation to third parties, although More does make specific reference to the
application of the domiciliary law to rights in and to moveable property in the contexts of bankruptcy and succession. It would thus seem that Lord Young's reference to More does not support his Lordship's proposition.

On the other hand, Lord Young merely stated that the arresters' argument was 'unsound' without explaining why the interests of third parties (like the arresters) should be ignored and those of the parties to a foreign contract preferred without any attempt being made to integrate all of the interests involved. This lack of clear analysis is reflected in his Lordship's interpretation of North-Western Bank v Poynter (1895)22 R(HL) 1, which was approached (see p.807) solely from the point of view of the parties to a complex 'pledging' arrangement rather than the third parties involved. It is of note that Lord Young was criticised by Lord Watson in the House of Lords (in Inglis) for his analysis of Lord Watson's own opinion in Poynter. Furthermore, Lord Young did not distinguish the cases, such as Connal v Loder (1868)6 M 1095, which the arresters cited in support of their arguments. Lord Young's dissenting judgement is, in short, woefully inadequate.

Connell v Loder (1868)6 M 1095 does indeed provide substantial support for much of the reasoning in Inglis. The facts in Connal were fairly similar to those in Inglis. A quantity of pig iron was held by a warehouse-keeper in Glasgow, who issued delivery warrants in respect of the iron. The English owner of the iron indorsed the delivery warrants to an English creditor, in England, as security for a loan. The indorser was then bankrupted in England, prior to the intimation of the indorsement to the warehouse-keeper, which in turn took place prior to a series of arrestments of the iron. The crucial issue was the ranking of the indorsee relative to the English inspectors on the bankrupt estate of the indorser, and a point central to this issue was the nature of the indorsee's right in or to the iron at the time of the registration of the English deed of arrangement.

The indorsee's principal argument was that English law governed the effect upon the iron of the indorsement of the warrant, since the parties to the indorsement were all English and it had taken place in England. This argument is broadly similar to that rejected in Inglis nearly thirty years later. The bankruptcy inspectors argued that the indorsement did not transfer the iron under either English or Scots law and therefore that it remained a part of the indorsers' estate so as to vest in them under the English bankruptcy statutes, because effect was to be given in Scotland to their title. They argued further that Scots law was in principle applicable to the constitution of the indorsee's right in the iron.

Unfortunately the arguments of the parties and the reasoning of the judgements are blurred by a failure completely to distinguish questions relating to the corporeal iron from questions relating to the incorporeal right to demand delivery of the iron under the delivery warrants. It is nonetheless clear that the lex situs was considered applicable to the constitution of real security rights in the iron itself.

Thus Lord Cowan was of the opinion (at 1105) 'that the transference of this iron, being locally situated in Scotland, must be regulated by the law of Scotland. I say nothing about personal rights under the law of England; but as regards the real right of property, I apprehend the law of Scotland must rule... The mere transference of the personal right could not carry the real right to
the pig-iron'. Similarly Lord Neaves commented (at 1101) that 'when that or any other document is sought to be made available against funds or goods which, though moveable, are locally situated in Scotland, in competition with diligence or other documents, a great part of the case depends upon Scotch law... The completion of the right is a matter of Scotch law'. The indorsee was therefore considered only to have a personal right to the iron at the time of the English bankruptcy.

It was then held that this personal right defeated the right of the English inspectors in bankruptcy, as a matter of English law. This aspect of Connal is discussed further in section D.3) below. It is suggested that the decision ultimately reached in Connal may have been incorrect as a result of misunderstandings by English counsel of questions put to them in this regard and misunderstandings by the court of their answers to such questions.

North-Western Bank v Poynter (1894)21 R 513, 22 R(HL) 1 is a further significant authority as regards the international private law of securities. It has, however, been extensively misinterpreted and over-simplified by commentators upon this subject, largely as a result of drawing trite conclusions from a dictum of Lord Watson in the House of Lords' 15. The facts and the law involved were far more complex than such conclusions would infer, somewhat undermining their persuasiveness.

In Poynter a consignment of phosphate was purchased abroad for an English merchant, and while it was at sea the merchant obtained the bills of lading relating to the consignment and indorsed them in blank to an English bank as security for a loan. The bank re-indorsed the bills to the merchant, expressly in trust, so that he might realise the phosphate on behalf of the bank. The English merchant gave the bills to his Scots agents who sold the phosphate to a Scots purchaser. Meanwhile the ship had docked in Glasgow, delivery of the phosphate was taken and payment of part of the purchase price was made. The Scots agents proceeded to arrest the remainder of the purchase price in the hands of the Scots purchaser with regard to a separate debt owed to them by the English merchant. The Scots purchaser then raised a multiplepoinding, after the English bank had claimed the proceeds of the phosphate later that same day.

The fundamental issues seem to have been to whom the Scots purchaser owed the balance of the purchase price, subject to what other rights that debt was owed and how the rights involved were to be ranked. The issues were thus strictly matters of incorporeal property law, to which issues of rights in and to the phosphate itself were strictly incidental.

Complex issues of the international private law of trust, agency and unjustified enrichment were ignored. Thus it seems to have been assumed rather than argued that the arrestment attached nothing if the bank had owned the phosphate at the time the Scots agent sold it to the Scots purchaser, since the purchase price would then be owed to the bank rather than the Scots agent or the English merchant. An alternative assumption seems to have been that if the bank had some sort of express security right, like a pledge, in respect of the phosphate, then this security right would also subsist over the proceeds of the sale of the phosphate, and prefer the bank to the arrester, while leaving the arrestment valid.
It may well have been the case that the Scots and English laws of contract, agency, incorporeal property, trust, constructive trust and tracing were sufficiently similar as to justify these assumptions. This does not however alter the fact that the corporeal property issue was logically postponed to many prior issues. Furthermore, its incidental nature was not really noted, and so the vexed question of how to approach such incidental questions was not considered at the level of choice of law.

Poynter also contained several specialities of corporeal property law. The phosphate was in fact never situated in England, nor destined for England, and was in fact on the high seas at most of the critical times. It was also dealt with throughout by means of bills of lading. Again the different laws which may have been potentially applicable may have led to similar results, as indeed Lord Watson asserted in the House of Lords, yet the special circumstances of corporeal property firstly in transit and secondly being dealt with via documents of title were not canvassed at the level of choice of law. The dicta in the House of Lords, favouring the application of English law to the security transaction, might therefore be based upon the absence of a current lex situs to apply to the effect of the transaction upon the phosphate, and an exceptional or subsidiary application of English law as what would now be termed the lex actus or the lex situs cartae.

No mention of international private law was made in the Inner House. All of the comments made in the House of Lords regarding the law applicable to the effect upon the phosphate of the indorsement of the bill of lading to the bank and its re-indorsement to the English merchant indicate that English law was applicable to the effects thereof.

Herschell L.C. displayed little understanding of Scots property concepts and applied English concepts on the basis that (at 10) there was no 'substantial ground for holding that the law of Scotland is different'. This lack of understanding is reflected (at 7) in his Lordship's analysis of the sale by the Scots agent to the Scots purchaser in terms of 'agreement to sell' and 'sale', prior to the imposition of these English concepts upon the Scots law of sale in the 1893 Sale of Goods Act. It is also reflected (at 7) in his Lordship's failure to perceive, through a veil of the 'reversion of entire property', the fundamental difference in Scots law between securities operating by means of ownership transfer and those operating by means of lesser real rights. Nevertheless the Lord Chancellor did comment upon the choice of law issue, considering English law to be applicable, were it to have been pleaded. This dictum might explain his Lordship's usage of English property concepts relative to the security, but it does not justify that usage since his Lordship was purporting to expound Scots law and a Scots choice of law rule. This makes the choice of law rule expounded harder to accept as a part of Scots international private law, since it is explained by one who evidently did not understand Scots property law.

Herschell L.C. considered (at 6) that 'as a transaction between a merchant in England and a bank in England, and the rights which arise out of that transaction...cannot...fall to be determined by anything but the law of England'. It is not clear whether his Lordship had in mind the domicile of the owner, the common domicile of the parties to the transaction, the law of the 'transaction', the lex actus, the lex loci contractus or some combination thereof.
Neither is it clear what sort of rights 'which arise out of the transaction' were considered governed by English law as the contractual, transactional or domiciliary law. Doubts as to this latter point are evident in his Lordship's further comment (at 6) that he 'does not for a moment intend to dispute that...there may be proceedings or transactions in Scotland which would render a recourse to the law of Scotland necessary to ascertain the rights which had arisen in respect of transactions relating to the contract though it had its basis and origin in England'. His Lordship proceeded to consider such matters 'quite beside the present case', on the ground that the 'real nature' of the security transaction was determinative of the case. One might wonder what would not be 'beside the case' if a sale in Scotland by a Scots agent to a Scots purchaser and the arrestment of the sale price by the agent are so considered.

However this last comment at least recognises the possibility that a third party might exist who claims under a separate transaction and that the interaction of the two transactions cannot be determined solely by the law governing the first transaction. The Lord Chancellor's judgement would therefore seem to indicate that English law was applicable only in limited circumstances, perhaps, given the evidence of his Lordship's background in the relative concepts of English property law, as regards the property relations of the parties to the security transaction.

Lord Watson commented (at 12) that '...when a moveable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question of to which of them it belongs is prima facie one of English law' and continued to maintain that 'the respective rights of [the English merchant]...and the..bank depend on transactions which took place between them in England'. Again it is not clear whether English law was considered applicable as the owner's domicile, the common domicile, the law governing the transaction, the lex actus, the lex loci contractus or some combination of these laws.

These comments also appear to relate to two different issues: the ranking upon an incorporeal fund and the effect of a transaction upon corporeal phosphate. It may be permissible to apply to the ranking of two claimants of property a law which is common to them's, particularly when their respective claims derive directly from the same transaction. It does not seem permissible to apply this law when a claimant in the ranking process derives his claim directly from a different legal system, and only indirectly from the other system involved. Thus Lord Watson fails to notice that the ranking is between the Scots arrester and the English bank and not between two English domiciliaries. His Lordship's second comment also seems to reflect this apparent oversight and also raises the further possibility that Lord Watson considered property relations relative to the phosphate to be governed by English law, but only as between the parties to the 'English' transaction.

It is indeed hard to interpret Lord Watson's comments so as to favour a broad application of the domiciliary or contractual law to matters of real rights in property in the light of his Lordship's judgement in Inglis. In Inglis Lord Young attempted so to analyse Lord Watson's dictum in Poynter, but was criticised in the House of Lords for so doing, by Lord Watson himself. Thus it seems that in Poynter Lord Watson had in mind a narrow ranking rule, the property relations of the parties to a given single transaction or an exceptional (and anomalous) application of the common domicile in limited circumstances. There may of course have been a judicial change of mind!
Accordingly, Poynter does not seem to be authority for the application in general of the domiciliary law to the creation and extinction of real rights in corporeal property or of the proper law of the contract or transaction from which such rights are alleged to derive. It may, however, be authority for the proposition that the property relations of the parties to a transaction are governed by the law governing that transaction in other respects, and perhaps also authority for the proposition that when the essential validity of competing rights is governed by the same legal system their ranking in the system is governed by that system. It may also be authority for the application of the lex situs cartae to property being dealt with via documents of title, and authority for the application of that law, the domiciliary law or some 'proper law' to property in transit or without an actual situs.

The basic lex situs rule in Inglis v Robertson & Baxter has been substantially reaffirmed by a number of recent Scots cases relating to the international effects of reservation of title on sale of goods. At the time they were decided, internal Scots law appeared to adopt a restrictive attitude towards such reservations of title, whereas in the internal laws of legal systems such as Germany a more liberal attitude was adopted. In these cases the validity of reservations of title in import transactions from Germany has been considered by the Scots courts. In all of these cases the basic choice of law was for the lex situs, although some difficulties arose as to the exclusion of foreign law on the grounds of public policy and the integration of contractual issues with issues of real rights in the property in question.

In Hamer & Sohne v H.W.T. Realisations Ltd. 1985 SLT (Sh.Ct.) 21 some items of jewellery were imported from Germany, and the seller purported to retain ownership of them until all sums due to him from the buyer had been paid. A receiver was then appointed in Scotland to the property of the buyer. Such a reservation of title was unexceptionable in German internal law, but considered ineffective in Scots internal law. Sheriff Jardine was of the view that German law was inapplicable to the validity of the security, although the ratio of this decision is not clear. The seller argued firstly that the contract was governed by German law, and that the security was therefore governed by that law; secondly that the property rights as between the buyer and seller ought to be governed by that law; thirdly that the mode of performance of the contractual obligation ought to be governed by that law and fourthly that German law governed as the first lex situs.

All of these arguments reflect those made in the earlier cases. The first is similar to part of the argument of Lord Young in Inglis; the second is reminiscent of the arguments of Lord Watson and Herschell L.C. in Poynter and is subject to the same criticism for ignoring the presence of a genuine third party in the ranking process; the third resembles the difficulty encountered in Connal v Loder in distinguishing issues of corporeal and incorporeal property law and the fourth reflects the basic favour shown in the earlier cases for the lex situs. The receiver argued that Scots law was applicable as the current lex situs, under reference, inter alia, to Inglis and Mitchell v Burnet & Mouat.

Sheriff Jardine accepted Anton's remark that it is 'a well settled rule that the lex situs governs the creation of securities over moveables', but also made reference to the dépeçage of a contract at the level of choice of law and the application of Scots law as the law of the place of performance. The Sheriff also noted that the order for delivery was being sought in a Scots court and

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invoked the doctrine of the exclusion of foreign law on the grounds of public policy. The reference to the public policy doctrine is certainly inconsistent with the other reasons stated for applying Scots law, in that it infers that German law was applicable by virtue of some choice of law rule. It would seem to be spurious, but an alarming invitation to insularity. It is discussed in section D,1 below.

The Sheriff’s references to both the lex loci solutionis and the current lex situs are less easy to analyse. The most that can be said is that the lex situs argument is more or less in conformity with the earlier authority and that the lex loci solutionis argument had previously been made with reference to an incorporeal obligation, but not with reference to real rights in an item of corporeal property. The current lex situs argument, as proposed by the receiver, would on balance seem to be the most obvious ratio in what seems a rather obscure judgement. It is in any event odd that Sheriff Jardine did not even discuss the seller’s subsidiary argument that German law was applicable as the first lex situs, applying the current lex situs without question. This issue is discussed further in section D,2 below.

A second reservation of title case, Zahrrad Fabrik Passau Gmbh. v Terex Ltd. 1986 SLT 84, concerned the import of vehicle components from Germany and their incorporation into complete vehicles in Scotland, prior to the appointment of a receiver to the property of the buyers. Title was reserved to the seller until full payment had been made for the components. The sale contract also contained a further clause purporting to apply the German law of specificatio to manufacturing processes involving the components. The validity of the reservation of title itself was not the major issue in the case, which largely concerned the law applicable to the extinction and creation of rights in property by specificatio and the effect in this regard of the purported application of German law thereto. While the regulation of specificatio may not be considered part of the law of securities, its application in the context of a security may be of some relevance to securities in general and certainly reinforces the need for a broad approach to choice of law regarding property issues.

Lord Davidson seemed to consider the lex situs to be applicable to the creation and extinction of real rights by specificatio. His Lordship also considered the reservation of title to be valid, but did not clearly state by which law this issue was governed, although it seems likely that the lex situs was also considered applicable to this issue.

It is in fact hard to draw firm conclusions from this case since it was inadequately pled. Thus the sellers did not plead the precise application of the German law of specificatio, rendering it irrelevant, and the buyers did not argue that the specificatio clause invalidated the reservation of title clause as a matter of Scots law, as they might have done. Instead, the receiver relied upon an averment that specificatio had taken place in accordance with Scots law.

Lord Davidson held that this argument had not been established and therefore that the receiver had not put forward any relevant defence.

It does however seem clear that Lord Davidson accepted the receiver’s basic argument that the creation and extinction of real rights by specificatio were governed by the lex situs at the time of alleged specificatio, and that this argument was also accepted in relation to the issue of reservation of title (at 88K). His Lordship proceeded to consider the Scots lex situs to be sufficiently
flexible to permit an incidental reference to another legal system, in this instance the German proper law of the contract. This argument is discussed in section D,5) below.

In Armour v Thyssen Edelstahlwerke A.G.22 a consignment of steel was imported from Germany by a Scots corporation, having been sold subject to a very broad reservation of title clause, even by German standards. Once the steel had been delivered in Scotland the buyers went into receivership in Scotland. The receivers contended that ownership of the steel had passed to the buyer under Scots law, despite the terms of the reservation of title clause.

Lord Mayfield considered23 that there was 'clear authority that the lex situs governs the creation of real rights in corporeal moveables', referring to Lord Watson's judgement in Inglis. His Lordship continued to assert that 'it is also clear that whether or not a security has been created (or the effectiveness or otherwise) has to be determined by the law of the place where the goods are actually located', under reference to the Mitchell v Burnet and Mouat case, and to express the 'further view' that 'if a security has been created then Scots law governs'. These comments are quite emphatic in their favour for the lex situs. They might also be taken to infer the application to the creation of a real right of the lex situs at the time of litigation rather than the lex situs at the time of the alleged creation of the right in question. As mentioned above, this issue is discussed further in section D,2) below.

Lord Mayfield also considered German law to be excluded on the grounds of public policy, and seemed to give some support for the argument that the Scots lex situs might permit an incidental reference to a different legal system. Again both of these matters are discussed further in section D below. It should be noted here that the apparent application of the public policy doctrine in Thyssen was, as in Hammer, largely inconsistent with the finding that Scots law was applicable in terms of the relevant choice of law rule.

The Scots cases concerning the law applicable to the essential validity of securities over corporeal moveables would accordingly seem to give substantial support to the application of the lex situs24. The Inglis, Connal and Thyssen cases are of particular force in this regard. They do, however, leave many uncertainties as to the precise operation of the lex situs rule.
D. Detailed operation of the lex situs rule.

A number of the cases discussed in section C above contain indications as to the more detailed application of the basic lex situs choice of law rule regarding securities. Issues of public policy have been discussed, as has the operation of the conflikt mobil and the ranking of rights involved. Similarly, the operation of real property rights as between the parties to a transaction has been noted, as has the integration of real and personal property rights. These issues are discussed below, along with issues relating to the registration of securities.

1) Public policy exclusion of foreign securities.

The exclusion of foreign law on the grounds of public policy has been discussed in several of the Scots securities cases. The part which it has played in the ratio of these cases is not however clear. This is because the issues of the application of choice of law rules and the exclusion of foreign law have not always been clearly distinguished. This failure to distinguish the applicability of a foreign law and the exclusion of that applicable foreign law tends to minimise the importance of these public policy comments, since it cannot now be doubted that in Scots international private law the public policy exclusion of foreign law is logically subsequent to the choice of law rule which invokes that foreign law. Foreign law was not considered ultimately applicable in any of these cases at the level of choice of law and therefore the comments made with regard to the public policy rule are at best obiter and based upon the hypothesis that foreign law was applicable. There certainly seems to be nothing in the cases concerned which might justify the invocation of the drastic public policy doctrine.

The public policy doctrine was adverted to in Connal v Loder in the nineteenth century and more recently in the Hammer, Thyssen and Terex cases. In Connal Lord Justice-Clerk Patton rejected a request for a proof that by English law iron could be transferred by indorsement and delivery of delivery warrants without intimation to the holder of the iron. His Lordship found (at 1110) the averment that intimation was unnecessary in English law 'repugnant to the principle of our law' since it would have followed that 'our law could not subsist' if the English rule were accepted. This argument would always exclude foreign law which differs in effect from the lex fori and there can be no doubt that Lord Justice-Clerk Patton could not have intended to subscribe to so broad a proposition.

His Lordship continued to remark 'that the fundamental principle upon which we introduce foreign law as affecting the rights of contracts or otherwise, is only to the effect of introducing such law when it is not in direct contradiction to the principles upon which our law is governed'. This might seem to be a further exclusion of English law on policy grounds. It more likely reflects the 'comity' rationale prevalent at the time as regards the selection of the appropriate law to govern a given legal situation. Thus in the following sentence the Lord Justice-Clerk argued 'that in a question of competition ... with respect to a right to moveables intra territorium ... we must, where there is a conflict and competition, go according to the law of Scotland'. Similarly, subsequent references made to Poelix and Savigny suggest that his Lordship's arguments were directed more towards why the lex situs was appropriate at the level of choice of law rather than towards why the otherwise appropriate English law ought to be rejected.
The comments of Sheriff Jardine in *Hammer* and of Lord Mayfield in *Thyssen* cannot be explained in such a way, since it is now abundantly clear that the nineteenth century concept of comity plays little part in the determination of an appropriate choice of law rule.

In *Hammer* Sheriff Jardine commented (at 23) that an 'all sums' reservation of title clause was 'a provision which is fundamentally at odds with a principle of Scots law'. Prior to this it was indicated that 'an order for delivery is being sought in a Scottish court in respect of goods situated in Scotland'. The Sheriff then quoted the classic dictum of Lord Chancellor Herschell that 'an agreement which was opposed to a fundamental principle of the law of Scotland founded upon considerations of public policy could not be relied upon and insisted upon in the Courts of Scotland'. The syllogism was then implicitly completed so as to exclude the German agreement.

This conclusion was an inappropriate application of the public policy doctrine for two reasons. Firstly it was logically inconsistent with application of the Scots *lex situs* as a matter of choice of law, since if Scots law was ultimately applicable in terms of that choice of law rule German law was completely irrelevant. Secondly, it was a very poorly reasoned application of the public policy doctrine, if German law had been relevant. Sheriff Jardine completely failed to take account of the distinction between Scots public policy in internal law and Scots public policy in international private law, and therefore did not even attempt to consider the criteria by which a relevant foreign law may be excluded. Sheriff Jardine's comments on public policy should not therefore be followed.

Similar criticisms may be levelled at the comments of Lord Mayfield in *Thyssen*. His Lordship clearly considered the *lex situs* to govern the creation and extinction of real rights in the steel in question (456D) and upon this basis that the reservation of title in question was ineffective by the Scots *lex causae*. Lord Mayfield then commented that 'in any event I have come to the conclusion that the condition ... is ineffective in Scotland because it is contrary to fundamental principles of Scots law and public policy', quoting Lord Chancellor Herschell's dictum from *Hamlyn* and Lord Watson's comment in the same case that '[there] may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy, that [our] Courts would be justified in declining to recognise them'. His Lordship then considered the (supposed) rule of Scots law that security cannot be created over corporeal moveables without the creditor's possession of the security subjects to be such a fundamental principle and matter of local policy.

This remark was clearly *obiter*, and therefore not strictly inconsistent with his Lordship's application of the *lex situs* as a matter of choice of law. Lord Mayfield did not, however, provide adequate reasons for the application of the public policy rule to the facts before him. The only reason given for the application of the public policy doctrine was that Lord Mayfield regarded the purpose of the possession rule in Scots security law, the protection of creditors, to be a 'fundamental principle and a matter of local policy' in the sense of Lord Watson's *dictum*.

This argument again fails to take account of the distinction between public policy as a matter of internal law and as a matter of international private law.
It was indeed startlingly insular to regard a German security as fundamentally opposed to Scots public policy in international matters when that security differed at that time from its Scots equivalent only in degree. It is equally surprising that Lord Mayfield did not notice that Scots law itself permitted hire purchase and finance leasing to prejudice local creditors. However the most surprising aspect of his Lordship's remarks is that the expectations of the German creditor were completely ignored. These dicta cannot be regarded as a correct application of the public policy doctrine in Scots international private law. The reversal by the House of Lords in Thyssen itself of the application of Lord Mayfield's 'fundamental policy' in reservation of title in internal Scots law reinforces this view of Lord Mayfield's dicta.

There is some support for the rejection of the public policy doctrine of Hammer and Thyssen in Lord Davidson's judgement in Terex. In Terex the issue was not a straightforward security matter in that the security in question was a reservation of title coupled to a choice of German law with regard to the extinction and creation of rights by *specificatio*. It is however instructive to note that Lord Davidson regarded (at 88L) the difference between the scope for volition in the Scots and German laws of *specificatio* to be 'merely one of degree' and one which 'could not be regarded as fundamental'. The more enlightened approach of Lord Davidson in Terex to the public policy doctrine is much to be preferred to that of Sheriff Jardine and Lord Mayfield in Hammer and Terex.
2) **Conflict mobile.**

Many of the Scots security cases concerned situations in which the security subjects have remained situated in Scotland throughout the relevant period of time. However in the *Hammer*, Terex and Thyssen cases the property over which an alleged security existed had been imported from Germany under reservation of title. This situation raised the issue of whether German law, Scots law or both laws were applicable as the *lex situs*. This issue was considered, rather inadequately, in *Hammer* and *Thyssen* and largely passed over in *Terex*.

In *Hammer* the pursuer's agent argued (at 22) that the *lex situs* at the time when the security contract was made was German law, while conceding the *lex situs* at the time of the action to be Scots law. However, the precise relevance of the distinction between the first and second *leges situs* does not appear to have been fully argued by the parties. It was certainly not discussed fully in the judgement of Sheriff Jardine, who merely stated (at 23) 'that the effectiveness or otherwise of the security falls to be determined by the law of the place where the goods in question are actually located'. Sheriff Jardine referred to *Mitchell v Burnet & Mouat and North* regarding this proposition. Neither of these authorities contains any comment upon nor is of any relevance to this point, *Mitchell* concerning property at all relevant times situated in Holland and North making no comment upon a change in situation of security subjects.

The discussion of this issue in *Thyssen* was equally trite. The defenders argued (at 456B) that 'the correct law to apply [is] the *lex situs* of the moveable property at the time of the transaction'. Lord Mayfield rejected this argument stating (at 456D) that 'it is also clear that whether or not a security has been created (or the effectiveness or otherwise) has to be determined by the law of the place where the goods are actually located'. His Lordship also referred to the irrelevant *Mitchell* case but provided no further argument to support this proposition.

These two *dicta* do not seem either helpful or persuasive. Arguments may be made at the level of policy or legal theory as to whether the first or second *lex situs* or some combination of both ought to be applied. Some of these arguments are discussed in section B,3) above. Such arguments do not appear to have been considered in either of these cases. Furthermore, other cases in which this precise issue was decided the other way, such as *Todd v Armour* (1882)9 R 901, *Cammell v Sewell* (1860)5 H & N 728 and *Vinkworth v Christie* [1980] Ch 496, were not even mentioned in *Hammer* or *Thyssen*. So to the decision in the Irish case *Re Interview Ltd* [1975] IR 382 seems contrary to the *dicta* in *Hammer* and *Thyssen*.

The decision of the Australian High Court in *Luckins v Highway Motel (Carnarvon) Pty Ltd* [1975]133 CLR 164 was not referred to in *Hammer* or *Thyssen* either. In this case a floating charge was granted by a Victorian company over all of its assets, including a bus which was then situated outwith Western Australia. The bus was later attached by a creditor in Western Australia, after the floating charge had been crystallised by the appointment of a receiver. While the decision turned on the interpretation of the charge registration provisions contained in the Companies Act of Western Australia, several judges made *obiter* remarks regarding general choice of law issues. Gibbs J, in particular, noted (at 174-175) that 'in general the validity of a charge on chattels is to be determined in accordance with the law of the place where the chattels are
situated when the charge is created', continuing to observe that 'if the bus had been validly subjected to a charge in Victoria, the debenture holder ... would not lose his rights simply because the bus was moved from Victoria to Western Australia'.

It is suggested that the dicta of Gibbes J rather than those in Hammer and Thyssen should be followed by the Scots courts in future cases of conflit mobile in securities. As discussed in Chapter 4, B, 2) above, in Todd v Armour, Cammell v Sewell and Winkworth v Christie reference was made in a situation of conflit mobile arising in the context of sale to each consecutive lex situs. Although the issue was not really addressed in the Terex case, it seems clear that Lord Davidson considered the lex situs at the time of alleged specificatio to be the appropriate lex situs in that case. Lord Davidson's view seems to accord more with the approach to the conflit mobile in Luckins, Todd v Armour, Cammell v Sewell and Winkworth v Christie than that in Hammer and Thyssen. Special conflit mobile rules for import transactions have, as mentioned in section B,2) above, been suggested by Professor Drobnig. While the facts in Hammer and Thyssen may be distinguished from those in Luckins, Todd v Armour, Cammell v Sewell and Winkworth v Christie on this basis, it would not seem that any such distinction was made in any of these cases.
3) Ranking.

Several of the Scots security cases contain comments upon the ranking of competing rights in and to property. It is not always clear what was intended by these comments, largely because the lex fori and the (unchanging) lex situs were both Scots law in the cases in question. On balance it does however seem that Scots law was applied to determine the ranking of rights as the lex situs.

Ranking issues were noted in several of the judgements in Inglis v Robertson & Baxter. Most of the comments were ambiguous or obscure. Lord Moncreiff was (at 817), for example, 'of opinion, however, that the law of Scotland, which is the lex situs as well as the lex fori, applies, the question being one ... as to a competition of alleged real rights in moveables locally situated in Scotland'\(^\)\(^1\). It is unlikely that the coincidence of the lex fori with the lex situs was considered strictly important by Lord Moncreiff as a matter of choice of law, as perhaps a choice of law rule involving the cumulative application of lex situs and lex fori in the manner of the 'double delict' rule in Phillips v Byre (1870)LR 6 QB 1. It is more likely that his Lordship did not consider distinctions between the scope of application of the lex situs and the lex fori to be significant to the case before him.

There may be several explanations for the adoption of this position. The most likely is that it was assumed that real rights involved would rank by date and prevail over personal rights, by whatever law determined this issue, and so ranking was not perceived as being an issue of any importance when compared with the issue of the creation of the rights to be ranked. The reference to the two laws does however remain, and if each is to be given a separate scope of application that scope of application must be ascertained. There is no doubt that the references to the lex situs concerned at least the creation of real rights. If the reference to the lex fori is not to be considered spurious, it is probable that the ranking of the rights created was referred to that law. However, these dicta seem somewhat weak in this regard.

Inglis nevertheless contains one dictum which clearly favours the application of the lex fori to the ranking of rights in and to property. Lord Trayner remarked (at 814-5) that 'these parties are now competing for a subject situated in Scotland, and have submitted their conflicting claims to the adjudication of the Courts in Scotland, where alone the claims of the parties can be made effectual. In these circumstances it appears to me that the question must be determined according to the rules and principles of the lex situs of the goods and the lex fori of the competition'. These remarks are at least relatively clear. They do not however provide much justification for the application of the lex fori to ranking, nor did Lord Trayner refer to any authority in support of such a rule.

The remarks of Lords Pearson, Kincairney and Stormonth-Darling in Inglis seem rather more persuasive. They all advocated applying the lex situs to ranking. Lord Pearson entertained (at 796) 'no doubt that Scots law must in the end decide upon the competition of alleged real rights in moveables locally situated in Scotland'; Lord Kincairney commented (at 784) that 'the nature of the right acquired by Inglis from Goldsmith falls to be determined in accordance with the law of England ...; on the other hand, the nature and quality of the arrester's right must depend upon the law of Scotland; and I have no doubt that the competition for the goods warehoused in Scotland raises a question of Scotch law'; and Lord Stormonth-Darling remarked (at 788) that 'the competition
between these two claimants must, I think, be determined by the law of Scotland as the law of the situs.

Lord Stormonth-Darling provided no further argument or authority for his proposition, whereas both Lords Pearson and Kincairney referred to Donaldson v Ord (1855) 17 D 1053 and Scottish Provident Institution v Cohen (1888) 16 R 112. The passage in Donaldson to which Lord Pearson adverted (at 797) was the statement in the decree in Donaldson (at 1071) that 'a competition of diligence as to the attachment of a fund situated in Scotland ... must be determined by the rules of the law of Scotland'. While Donaldson related to incorporeal property, this statement must be a fortiori regarding corporeal property, where the situation of the property is not fictional 12. As regards this point this authority was not adequately considered in the other judgements in Inglis. Lord Kincairney provided some further insight into the problems involved in ranking in international private law by noting the possibility that rights which require to be ranked may derive from different legal systems. This fairly simple observation is evidence of the identification of a problem and an attempt find a rational solution to it.

As mentioned above, most judges favouring the application of the lex situs to ranking did not in fact draw any distinction between the creation of rights and their ranking, arguably considering only one choice of law rule to apply to the creation of a right and its relationship with other rights. Similarly, it may be argued that ranking was considered of little importance in these judgements when compared with the creation of real rights, upon the assumption that real rights ranked by date and prevailed over personal rights.

It is however clear from the passage from Lord Kincairney's judgement which is quoted above that this is not the case, at least with regard to Lord Kincairney. His Lordship clearly decided that the nature of a right was determined in accordance with certain choice of law rules, and then its interaction with other rights determined thereafter in accordance with a separate rule. Thus the contractual effect of the English security contract was considered to be determined by English law and the real effect of both that contract and the Scots diligence to be determined by the Scots lex situs. Thereafter the ranking of the personal right under English law against the right of the arrestee under Scots law was considered to be determined by the Scots lex situs. This separation of the creation and ranking of rights and recognition of the distinct importance of ranking is also present in Lord Pearson's judgement, if less overtly.

Connal v Loder appears at first sight to be authority against the application of either the lex situs or the lex fori to the ranking of rights in and to corporeal property, in so far as the property involved may be considered corporeal. It may indeed be analysed as authority for the application of the law governing a foreign insolvency process to ranking issues arising thereunder 13. It is however a case of some obscurity in this regard, and on closer examination seems to favour the application of the lex situs, or perhaps the lex fori, to asset ranking issues. Clearly the creation and extinction of a security right in the iron in question itself was considered governed by the Scots lex situs. Similarly the scope of an English deed of arrangement was considered to be governed in the first instance by English law, to be allowed its effect thereunder in Scotland as a universal transfer 14.
However, the interaction of the failed real security right with the deed of arrangement then appears to have been inadequately analysed. It was suggested in section C above that the ultimate decision in Connal may have been incorrect, as a result of misunderstandings between English counsel and the court. These misunderstandings appear to have related largely to ranking issues.

Thus English counsel were asked (at 1100-1) firstly what the effect of the deed of arrangement was in English law regarding vesting in the inspectors in bankruptcy of the bankrupt's moveables, and for the benefit of whom such vesting took place. They were asked secondly how the rights of the inspectors ranked relative to prior pledges and personal contracts. English counsel answered both questions together, considering that in the circumstances of the case the deed of arrangement had no vesting effect and provided no preference to the inspectors over rights to the property of the bankrupt depending upon contract.

English counsel appear not to have isolated issues the Second Division considered governed by Scots law, such as the constitution of security rights in the iron in question, and to have considered the case as if it had arisen in an entirely English context. Despite the rejection of arguments that the opinion of English counsel was incomplete, it is nonetheless suggested that the Second Division failed to take note of this point and may, as suggested in section E,2) above, inadvertently have given effect to an English equitable security in relation to assets in Scotland.

The ratio of Connal as regards ranking issues may be best assessed from the questions asked and the reaction of the Second Division to the answer given. The first question appears to have attempted to assess what effect English bankruptcy law purported to have with regard to property of the bankrupt, possibly with a view to giving it effect as a transfer of property in Scotland upon theories of universal transfer if it purported to have such effect under English law. Although possibly deriving from a choice of English law as that governing ranking issues, the second question may also have been asked with a view to ascertaining the purported effect of the English deed of arrangement, so as to establish the effect of English law from a Scots point of view and thus to integrate the two systems.

Lord Neaves was of the opinion (at 1101) that 'when that or any other document is sought to be made available against funds or goods which, though moveable, are locally situated in Scotland, in competition with diligence or other documents, a great part of the case depends upon Scotch law. The power given by this deed of arrangement is one thing. The competition that may ensue between that and other rights are or may be matters of Scotch law, or of international law'. His Lordship then proceeded (at 1103), on the opinion of English counsel, to consider the English deed of arrangement to be no 'impediment' to the later intimation of the assignation. It would seem that Lord Neaves considered the English inspectors to have no right to be ranked, apparently misunderstanding the opinion of English counsel.

Despite rejecting counsel's contention that the opinion of English counsel was incomplete, Lord Cowan seems to have been labouring under a similar misapprehension by considering the inspectors to be 'assignees of an inferior character' (at 1105-6). Although Lord Cowan made no express reference to the law governing the ranking of the rights of the assignee with those of the 'inferior assignee', it is clear that his Lordship considered Scots law
applicable. Lord Justice-Clerk Patton's judgement upon this point is very similar to that of Lord Neaves (p.1109). It is not clear whether this apparent application of Scots law to ranking issues by the Second Division derived from its status as lex situs or lex fori.

The views of English counsel in Connal may have been influenced by the fact that both of the competing parties in Connal were English and derived their respective claims from 'English' transactions. It might therefore have seemed sensible to determine their relationship inter se by English law, albeit that it may not have been intended to take the opinion of English counsel upon this issue. This type of reasoning may underlie the rather obscure comments of Lord Watson in North-Western Bank v Poynter. Connal cannot credibly be regarded as authority to such effect.

In Poynter Lord Watson commented (at 12) that 'when a moveable fund, situated in Scotland, admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is prima facie one of English law'. It was argued in section C above that this dictum ignores the Scots arrester of the fund in medio and that it cannot support a broad proposition of Scots international private law in the light of his Lordship's later opinion in Inglis. It is however interesting to analyse this dictum as a subtle approach to ranking in international private law. In Inglis Lord Watson commented (at 73-4) upon his earlier dictum, considering 'the relative rights of the pledger and pledgee' to have depended upon English law.

This proposition has much to recommend it as a subsidiary choice of law rule with regard to ranking. It may however be doubted that the common domiciliary law of the parties to be ranked is an appropriate law to apply in a subsidiary role, since the personal law is rather more suited to matters of status than commerce. In Inglis Lord Watson also made reference (at 73) to 'mercantile transactions which can reasonably be characterised as English', a characterisation also alluded to in Poynter.

Thus two parties with contractual claims governed by the same proper law might be ranked inter se in accordance with that law. As noted in chapter 3,B,3), such a rule provides flexibility in international ranking without detracting from certainty and coherence. It must of course be restricted to the ranking only of persons sharing a common legal system, and it is Lord Watson's application of his dictum as regards the ranking of the Scots arrester in Poynter which undermines his Lordship's judgement in that case. Some care ought however to be taken regarding this dictum, which may, when coupled with his Lordship's remarks in Inglis, merely reflect a judicial change of mind.

A further possible subsidiary ranking rule was discussed in Chapter 4,B,5) above, in relation to liens and analogous rights arising on sale. Under the ranking structure discussed, all rights relative to a given item of property could be ranked initially by the lex situs at ranking and subsequently re-ranked in accordance with the lex situs at the time rights re-ranked first co-existed, after which subsidiary ranking rules concerning rights deriving from the same system and concerning special insolvency rankings could operate. As also discussed, there appears to be no authority regarding the re-ranking of rights by the lex situs at co-existence.
The ranking of securities over ordinary corporeal moveables would seem, on balance, to be governed in Scots international private law by the lex situs, subject to a possible subsidiary reference to a law common to competing rights. As discussed in Chapter 6, C, (6), cases relating to insolvency also appear, on balance, to favour the application of the lex situs to asset ranking issues.

However the ship cases discussed in Chapter 3, C, (4) arguably favour the application of the lex fori to ranking issues. While ships may be considered a special category of property as regards choice of law, the complexity of the ranking of rights relative to ships must provide some persuasive authority as regards other property to choice of law rules as regards the ranking of rights in and to ships. The lex fori and the lex situs have coincided in the relevant ship cases, and this at least suggests that if the lex situs is to be applied to ranking issues, the lex situs at the time of ranking is, in the first instance, the only practicable lex situs to apply.

The ship cases similarly suggest that, while attempts can be made to translate foreign rights for the purposes of ranking, foreign rights may be translated rather too readily as invalid domestic rights. It is suggested that the broader approach to such translation discussed in Chapter 4, B, (5) relative to liens and similar rights arising on sale should be taken in general to securities.
The operation of real property rights, as distinguished from personal contractual rights, between only the parties to a transaction may have been discussed in several of the Scots securities cases. Doubts must however remain with regard to this issue since it is not clear that the dicta involved related to this precise point. Some support may be gleaned from some of the cases for a distinction at the level of choice of law between rules relating to the operation of real rights between the parties to a transaction and the operation of the real rights with regard to third parties.

Several dicta in Inglis v Robertson & Baxter tend to favour such a distinction. The strongest support for this distinction lies in the comment of Lord Trayner (at 814) that 'the validity of the transaction or contract between Goldsmith and Inglis, and its effect in any question between them, may, indeed, be matters for determination according to the law of England'.

Similarly Lord Pearson remarked (at 797 & 798-9) that 'the effect of these documents upon the rights of the contracting parties themselves is primarily a question of English law' and argued that 'it would not be enough for Inglis to make out that these documents do, according to English law, import a pledge of documents of title to goods within the meaning of the Factors Act' since English law was irrelevant in this context and so Inglis could not find a law 'which enjoins that the contract between Goldsmith and Inglis is to be deemed effectual to constitute a jus in re in goods situate in Scotland, and that not merely between the contracting parties, but to all effects and against outside creditors'. Furthermore Lord Kinnear agreed (at 778) with counsel for the assignee 'that the law of England must regulate the effect of the English agreement, as between the parties to that agreement'.

These dicta are all ambiguous, and may merely reflect a rather untidy approach to the personal contractual rights existing between the parties to a security transaction. They do however indicate a potentially useful dépéçage of the main choice of law rule. As discussed in Chapter 3,A and B above, if the justification of the main lex situs rule is the third party certainty and the coherence which it provides, there seems little reason to apply this rule with regard to real property rights in relation to issues arising between the parties to a security transaction. As mentioned in Chapter 4,C and D, there has certainly been a degree of support, in theory, for the adoption of such an approach in sale. Accordingly these dicta should perhaps be taken at their face value.
5) Incidental contractual rights.

The law governing the contract to which a security right relates has been discussed in several Scots cases. In the nineteenth century cases, such as Inglis v Robertson & Baxter, Connal v Loder and North-Western Bank v Poynter, it was canvassed by the security holder as the principal choice of law rule, in preference to the lex situs. This argument was rejected, as indicated above.

More recently the proper law of the security contract has been incorporated more subtly into the choice of law process, as an incidental question to the validity of the security according to the lex situs. As discussed in Chapter 3.C, this development has much to recommend it, since it introduces an element of flexibility into the lex situs rule. Such flexibility in the choice of law structure is welcome since the property laws of most legal systems are far from rigid, permitting varied degrees of volition within the structure of the property system in question. The volition of the parties to a security transaction may therefore enter the choice of law process as an incidental question, as and when the structure of the lex situs allows, rather as it enters the structure of internal property laws. This structure also maintains third party certainty and thus the basis of the basic lex situs choice of law rule.

This incorporation of personal rights into the lex situs choice of law structure is evident in both Zahnrad Fabrik Passau Gmbh v Terex Ltd and Armour v Thyssen Edelstahlwerke AG. In the Terex case Lord Davidson applied the Scots lex situs to issues of specificatio and seems to have applied that same lex situs to the validity of a reservation of title clause on sale. His Lordship considered the relevant provision of Scots law to be s.17 of the Sale of Goods Act 1979, and proceeded to remark that 'if, as s.17 of the Sale of Goods Act 1979 provides, the parties to a contract are entitled to agree when property is to pass, then I think it is wrong to regard the lex situs as being an inflexible corpus of law. Agreeing with counsel for the pursuers on this point, in a contract regulating the rights and obligations hinc inde of two contracting parties, prima facie I see no reason why they should not incorporate into the contract one or more provisions of a foreign legal system.'

These remarks were obiter, since the provisions of Scots and German law did not conflict on the facts of the case. They are also quite explicitly in favour of permitting reference to the proper law of a security contract when the lex situs permits a degree of volition to enter a security transaction. While reference to s.17 of the 1979 Act should have been considered irrelevant under the Scots lex situs to the specificatio issue Lord Davidson was discussing, it is nevertheless suggested that these dicta are of importance in relation to that section and more generally as regards Scots choice of law rules regarding sale, security and other property issues.

The Thyssen case provides some support for Lord Davidson's proposition. In Thyssen a quantity of steel was imported into Scotland from Germany, upon a very broad reservation of title clause which was of doubtful validity even in German law. It was accepted that Scots law at that time permitted the reservation of title in order to secure only the sale price. A proof of German law then took place, at which the sellers attempted to argue that by German contract law the clause in question only purported to reserve title for the sale price, for the purposes of the Scots lex situs, which was clearly applied to the existence of real rights in the steel in question. The case went to a proof of German
contract law and this suggests that the Scots *lex situs* gave rise to an incidental question as to the effect of the security contract by its German proper law. It was held that the sellers had not proved that the clause in question was a price only clause in German contract law, and so it was held invalid according to the Scots *lex fori* and *lex situs*.

German law may, however, have been strictly irrelevant in *Thyssen*, since Lord Mayfield indicated (at 457E) that a proof of German law would have been unnecessary had the parties agreed a translation of the clause into English. The reason for this conclusion is not wholly clear. It may, as discussed in section 1) above, have been based upon the exclusion of German contract law as contrary to public policy, whereupon German law would have been *prima facie* applicable to the contract as a matter of choice of law. Alternatively it may have been based upon a restrictive view of what the property law of the Scots *lex situs* permitted buyers and sellers to intend with regard to the passing of ownership, and so a simple translation would have disclosed this abstract intention without any reference to German law. In either event, Lord Mayfield did not seem to doubt the defender's contention that in appropriate circumstances an incidental reference might be made to a different legal system by the *lex situs*.

As the *lex situs* and *lex fori* in the *Terex* and *Thyssen* cases were both Scots law, no distinction could be drawn between the determination of the law governing the security contract in question in accordance with the *lex situs* and the *lex fori*. It is suggested, as further discussed in Chapter 3, (C,1), that this incidental question be resolved in accordance with the *lex causae*, and that the choice of law rules of the *lex situs* should accordingly be applied for the purpose of assessing the existence and ranking of real rights in the property in question. The choice of law rules of the *lex fori* might then be applied to other contractual issues, in the light of the position established regarding real rights.
6. Registration of securities.

There are two approaches conventionally taken to registration of securities: asset registration and personal registration. The distinction between these approaches lies in the manner in which the relevant register is arranged. Thus in asset registration information in the register is organised with reference to the asset in question and in personal registration such information is organised with reference to a person acting relative to assets, conventionally the person granting a security. Third parties ascertain the presence or absence of certain securities by searching relevant registers accordingly. It may sometimes be necessary to search both types of register.

a) Asset registration. Registration of securities tends to arise on this basis when ownership of the relevant asset is registered. Land is probably the most common example of asset registration in this context, although such registration also arises in relation to the likes of ships, aircraft and certain intellectual property rights. As discussed in Chapter 3, C.3) and 4), exceptional or subsidiary choice of law criteria may be considered to apply to certain of such types of property. Registration of the asset itself is one reason for applying such criteria and registration of securities with reference to such assets should not, therefore, give rise to separate choice of law problems. Indeed the general role played by identification of a given asset for the purpose of asset registration of securities accords with the role played thereby in the general choice of law structure proposed. It may therefore be suggested that this type of security registration does not raise any particular choice of law problems of its own.

b) Personal registration: general. As mentioned above, securities may also require to be registered if they are granted by certain persons or relate to their assets. The relevant provisions under Scots law are presently contained in Chapter II of Part XII of the 1985 Companies Act. These provisions are to be replaced by a new system 24, once the relevant provisions of the 1989 Companies Act are brought into force. Chapter II of Part XII of the Companies Act contains separate provisions regarding the registration of ‘charges’ with the Registrar of Companies in Scotland, at the registered office of a company and in relation to certain charges associated with debentures. It is often necessary to comply with more than one of the charge registration regimes under the Companies Act and also separate asset registration provisions as referred to above. Only the Companies Act provisions relating to registration of charges with the Registrar of Companies are discussed here.

Although registration of charges under the Companies Act is based principally upon the type of person granting a security and the acquisition by that type of person of assets subject to a security, the categories of asset and the type of security involved are also significant. A list of registrable charges is thus set out in s.410(4) of the Companies Act, and thus, for example, most securities over goods are not registrable under s.410. It is similarly thought that some devices operating as securities, such as trusts, will not constitute ‘charges’ registrable under s.410, even if they relate to assets falling within the categories set out in s.410(4). The new system under the 1989 Act will retain expanded registrable categories of assets, but will introduce a potentially broader concept of ‘security interest’ 26. The latter innovation may render registrable in Scotland more foreign securities having no precise equivalent under Scots law than are presently registrable in Scotland.
c) Personal registration: Scots companies. Section 411 of the Companies Act sets out special provisions regarding 'property situated outside the United Kingdom' and s.410(5) provides that 'company' normally means 'an incorporated company registered in Scotland' for the purposes of the registration provisions. Thus, although not expressly stated, the charge registration provisions generally apply to companies formed and registered in Scotland under the Companies Act, but to all of the assets of such a company wherever situated and governed otherwise by whichever laws. The category of persons in respect of whom charge registration is necessary is accordingly theoretically narrow, if, geographically, all of the assets of such a person are available to fall within the more limited categories of registrable types of assets and charges.

Charges created by a company are registrable under s.410(1) of the Companies Act and charges over property acquired by a company are registrable under s.416. Charges are registrable under s.416 if they would have been registrable under s.410 if created by the company after acquisition of the property in question. A period of 21 days is provided in which to submit prescribed particulars of the charge in question to the Registrar of Companies. This 21 day period is linked, by ss.410(1) and 416(1) respectively, to the date of creation of the charge and the date on which the transaction was settled by which the company acquired the relevant property. Sections 411(1) and 416(2) add, obscurely, postal times from, it would seem, creation of the charge and settlement of the acquisition transaction in respect of charges created outwith and comprising property situated outside, respectively, the United Kingdom and Great Britain.

The date of creation of a charge may be difficult to assess for the purpose of registering securities over foreign assets. The date of creation of a charge is defined in s.410(5) in the case of a floating charge as 'the date on which the instrument creating the floating charge was executed by the company creating the charge' and, in any other case 'the date on which the right of the person entitled to the benefit of the charge was constituted as a real right'. 'Floating charge' is defined in s.744 of the Companies Act to include a floating charge in the Scots statutory sense under s.462 of the Companies Act. Foreign floating charges which do not comply with s.462 may therefore be registrable within 21 days after the date of execution of the relevant instrument, assuming their essential validity in other respects.

Constitution of other foreign securities as real rights may be more difficult to assess. The Registrar of Companies would appear to accept that the incidence of a given foreign security relative to third parties should be assessed in accordance with the law governing the essential validity of the security in question, with a view to assessing whether or not the security holder has a real right, in the sense of Scots law, in the security subjects. The Registrar accordingly appears to accept that an English equitable charge over English book debts may be considered created for the purposes of registration on execution of the charge, prior to any notice thereof being given to the granter's debtors. Scots assignments in security of Scots book debts are, on the other hand, only considered 'created' on the intimation thereof to the relevant debtors26.

Under the new system the Scots 'creation' criteria are the same as before, subject to the proviso that 'a charge created under the law of Scotland' shall be taken to be created at the relevant time27. Parallel provisions will also define when a 'charge created under the law of England and Wales shall be taken to be created'28. The new s.414(4) then states that 'where a charge is created in
the United Kingdom but comprises property outside the United Kingdom, any
further proceedings necessary to make the charge valid or effectual under the
law of the country where the property is situated shall be disregarded in
ascertaining the date on which the charge is to be taken to be created'.

The meaning of the new s.414(4) is obscure, particularly the phrase 'is created
in the United Kingdom'. It could, for example, refer to the execution in the
United Kingdom of a security relating to property outwith the United Kingdom.
The existing s.411(2) contains similar wording and performs a similar function
to the new s.414(4).23 The existing s.411(1) refers to charges 'created out of
the United Kingdom comprising property situated outside the United Kingdom'.
Although the meaning of the existing s.411(2) is obscure, it may be argued that
its juxtaposition with the existing s.411(1) and the correspondence of the new
s.414(4) with the existing s.411(2) suggest that the new s.414(4) refers to
charges over foreign property executed in the United Kingdom.

Although requiring slightly creative interpretation, the new subsection as a
whole might then be interpreted to the effect that a security executed in the
United Kingdom will be considered created for the purposes of registration upon
its execution, irrespective of the requirements of the law governing the
essential validity of that security. On this interpretation there is no specific
 provision defining the creation of securities over foreign property when executed
outwith the United Kingdom. The references in the new ss.414(2) and 414(3) to
creation 'under the law of' England and Wales and Scotland tend to suggest that
the creation criteria set out in those subsections are not applicable to
securities governed by other legal systems, and if they may be interpreted
otherwise, it cannot be categorically stated that the Scots rather than the
English criteria would be applicable to securities registrable in Scotland over
foreign assets which are executed outwith the United Kingdom.

The phrase 'is created in the United Kingdom' in the new s.414(4) could, on the
other hand, refer more generally to the preceding provisions whereby a charge is
created under the laws of Scotland and England and Wales. If this is the case,
again it cannot be categorically stated that the Scots rather than the English
criteria would be applicable to securities registrable in Scotland over foreign
assets. If the Scots criteria are so applicable to all securities over foreign
property, it would seem that there will be little change in this aspect of the
law on introduction of the new system, except perhaps as regards securities the
essential validity of which is governed by the law of England and Wales.24 It
may be argued that s.414(4) would thus be deprived of substantial effect, as
'further proceedings' will very often be necessary to constitute a real right
under the law governing the essential validity of the security in question. It
is nevertheless suggested that the new provisions be interpreted in this latter
manner.

d) Personal registration: overseas companies. Section 424 of the Companies Act
extends [the charge registration provisions] to charges on property in Scotland
which are created, and to charges on property in Scotland which is acquired, by
a company incorporated outside Great Britain which has a place of business in
Scotland'. The Registrar of Companies initially interpreted this provision
purposively, such that registration was only necessary if the charge in question
was created by or subsisted over property acquired by a company registered in
Scotland as an overseas company under Part XXIII of the Companies Act. It was
held in NV Slavenburg's Bank v Intercontinental Natural Resources Ltd. [1980]
All ER 955 that the foreign company in question need not itself be registered under Part XXIII of the Companies Act for a charge to be registrable pursuant to s.409 of the Act, the English equivalent to s.424. This case led to the creation of the inconvenient 'Slavenburg' registration system for such companies.

It should also be added that the reference in s.424 to a 'place of business' in Scotland differs from the equivalent reference in s.409 to companies having 'an established place of business' in England and Wales. Section 409 appears to correspond more closely than s.424 with the 'establishment' by an overseas company of a place of business for the purposes of Part XXIII of the Act31. It was held by the Court of Appeal in England in Re Oriel Ltd. [1985] All ER 216 that holding and mortgaging property in England did not constitute having an 'established place of business' there. It seems probable that such activity would not constitute having a 'place of business' either, although it has been suggested in Palmer (para.13.415.) that this aspect of the decision in Re Oriel is not wholly reliable in Scotland32.

The Slavenburg case is to be reversed by the new system, under which ss.409 and 424 are to be replaced by a new Chapter III inserted into Part XXIII of the Companies Act to deal with 'the registration in Great Britain of charges on the property of a registered overseas company'33. The charge registration system is thereby rationalised, but narrowed. It seems unlikely that withdrawal of the sanction of the Slavenburg case will persuade more foreign companies to register themselves under Part XXIII of the Act and then publicise their charges than presently register charges under the existing Slavenburg system without registering under Part XXIII. The result is likely to be more latent securities over the property of foreign companies.

The existing system does not elaborate what is meant in s.424 by property 'in Scotland'. It is suggested that this expression be interpreted such that s.424 is applicable to securities the essential validity of which is governed by Scots law. Thus, for example, s.424 should apply to corporeal property situated in Scotland and contracts having a Scots proper law.

The new s.703D refers to property 'situated in Great Britain'. The situation for this purpose of some types of property is then elaborated in the new s.703L. Thus ships, aircraft and hovercraft are considered situated in Great Britain if, and only if, they themselves are registered in Great Britain, and other vehicles are considered situated in Great Britain on any day if, and only if, the management of the vehicle is directed at any time on that day from a place of business of the company in question in Great Britain. So too future property is treated as situated in Great Britain unless the relevant charge relates exclusively to property of a kind which cannot, after being acquired or coming into existence, be situated in Great Britain. It is suggested that the law will not otherwise be changed, and thus a contract having a Scots proper law will continue, for the purposes of charge registration, to be considered 'in Scotland' and thereby 'situated in Great Britain'.

e) Personal registration: con\textit{flit} mobile. The \textit{conflit mobile} is not addressed in relation to Scots registered companies, because the situation of and the law otherwise governing relevant assets is not relevant to the requirement to register charges over the assets of such companies. The existing system does not, however, provide specifically for the \textit{conflit mobile} in relation to oversea companies.
It would seem, from the Oriel and Slavenburg cases, that the significant conflit mobile relates more to the existence of a place of business in Scotland of the company in question than to the situation of or law otherwise governing the relevant assets. Thus Lloyd J. was of the view in the Slavenburg case that the overseas company provision 'triggered' the provisions relating to English registered companies such that 'thereafter the charge is to be treated as if it were for all purposes a charge created by an English company'. There is no reason to suppose that the Scots courts would not adopt a similar approach.

In the Slavenburg case a charge was considered registrable when created while the company in question had an established place of business in England, irrespective of whether or not there was any such place of business at a later date. This approach also suggests that if the assets in question had been removed from England after creation of the charge in question, the registration provisions would still have been applicable. It similarly suggests that the acquisition of an established place of business in England would not render registrable in England charges over property in England created by the company in question prior to the establishment of that place of business, and, in turn, that a charge created over property initially abroad by a company with an established place of business in England at the time of creation of the charge would not be registrable if the property were subsequently brought to England.

The Slavenburg case is ambiguous on this last point as Lloyd J. also held (at 966) that a floating charge over future property created by a company with an established place of business in England would be registrable in England in respect of such future property arising in England. It is suggested that Lloyd J.'s remarks apply only to floating charges over future property, as otherwise an overseas company would have to attempt to register in England charges over existing property situated abroad within 21 days of their creation or refrain from bringing all such property into England.

There is no reason to suppose that a different approach would be taken by the courts to the acquisition by an overseas company of property subject to a charge. Thus in order that a charge be registrable the property in question would require to be 'in Scotland' at the time it was acquired by a company having a place of business in Scotland at that time, with later changes in the situation of the property in question or the later loss of such place of business being irrelevant to the requirement to register a charge over such property.

The new system seems more coherent than the existing system as regards the conflit mobile, as under the new ss.703B and 703D on registration as an overseas company prescribed particulars of all existing registrable charges over property in Great Britain will require to be delivered to the Registrar of Companies along with the documents required for its general registration under Part XXIII of the Companies Act as an overseas company. Particulars of charges created over property in Great Britain and of charges over property in Great Britain acquired by a registered overseas company must then be delivered to the Registrar within the conventional 21 day period, unless the property in question is no longer 'situated in Great Britain' at the end of the 21 day period.

The new s.703D(3) then provides that 'where [the provisions mentioned in the previous paragraph] do not apply and property of a registered overseas company is for a continuous period of four months situated in Great Britain and subject to a charge, it is the company's duty before the end of that period to deliver
the prescribed particulars of the charge ... to the registrar'. Accordingly a charge over property situated outwith Great Britain at the time of the creation of the charge or its acquisition subject to the charge will be registrable on the property being brought into Great Britain. The four month period of grace should prevent administrative difficulties in relation to property only temporarily in Great Britain, although third parties may doubtless be misled.

f) Personal registration: characterisation. At first sight it may appear obvious that the charge registration provisions relate to the existence of a charge. It is, however, suggested that the existing provisions, and, more clearly, the new provisions should be considered to relate to the ranking of registrable charges. It is further suggested that the charge registration provisions may be regarded by the Scots courts, correctly or incorrectly, as *lois d'application immédiat*, that is directly binding on the courts irrespective of conventional choice of law rules.

Only the provisions relating to the creation of charges will be discussed here. The sanction for failing to register charges under s.415 and the new s.398 over property acquired is criminal. These provisions would therefore seem irrelevant to the existence and ranking of the charges themselves as a matter of civil law, and, it would seem, to the characterisation of the other provisions.

Under the present s.410(2) failure to deliver prescribed particulars concerning the creation of a charge within the appropriate time renders the charge 'void against the liquidator or administrator and any creditor of the company'. As this sanction is expressed in relative terms it resembles a specific rule of ranking. It would have been easy for s.410(2) to have stated that an unregistered charge is void.

It was suggested in *Re Monolithic Building Co. Ltd.* [1915]1 Ch 643 that an unregistered charge remains valid relative to the company granting it. This point may be taken to support an analysis of s.410(2) as a rule of ranking. However, given the possible distinction between security issues arising between the parties to a transaction and security issues involving third parties discussed in section 4) above, such a distinction in internal law may not justify characterisation of the rule containing it as a rule of ranking rather than a rule relating to the creation and extinction of rights. Section 410(2) does not expressly state an unregistered charge to be void against, for example, a purchaser of the relevant property from the granter. This issue appears undecided. If an unregistered charge were valid against such a person s.410(2) should probably be characterised as a rule of ranking.

The existing power of the court under s.420 of the Companies Act to extend registration periods and rectify inaccuracies in registered particulars may also suggest that the registration provisions in general concern the ranking rather than the existence of charges. Failure to comply with the general registration provisions is effectively 'forgiven' by the court when it is equitable to do so and an opportunity is given to the security holder to obtain the position to which he should otherwise be entitled, altered equitably relative to other secured and unsecured creditors. It seems more credible that the general rankings of charges under s.410 are altered equitably under s.420 than that void charges under s.410 are validated equitably under s.420.

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The effect under the new system of failure to deliver accurate particulars of a charge on time, the rectification of inaccuracies and the late delivery of particulars is very complex. It is difficult to analyse this Byzantine structure of degrees of relative 'voidness' in terms of the constantly changing existence and partial existence of a charge. There can be little doubt that this new structure is a structure of ranking rules.

It is also notable that a charge does not become registrable under either the existing or new systems until it has been 'created'. As discussed in sub-section c) above, it is arguable that in most cases, under both the existing and new systems, a charge is considered created when constituted as a real right, or when it has otherwise become effective. It may thus be argued that a charge exists before it is registered and that registration therefore more credibly concerns the ranking of an existing charge than its existence.

However, the Slavenburg case may suggest that the present registration provisions relate to the existence of charges rather than to their ranking. It was argued in sub-section e) above that the Slavenburg case was authority for the view that the existing registration provisions relative to overseas companies apply to property after it has been removed from Scotland. This suggests that a charge does not come into existence under the Scots lex situs until such time as the registration provisions have been complied with.

Such analysis is also consistent with the invocation in the Slavenburg case of the registration provisions by a foreign liquidator, as it may be argued that only the rules of the lex situs relating to the existence of the security would have been relevant, with ranking being referred to the law under which the liquidation had commenced. On the other hand, it may be argued that general ranking rules of the lex situs are applicable on insolvency and that the registration provisions were applied on this basis for the benefit of a foreign liquidator. As the lex fori in the Slavenburg case coincided with the lex situs, it may perhaps even be argued that the registration provisions were applied as ranking rules of the lex fori.

It is, however, suggested that the registration provisions were applied in the Slavenburg case as lois d'application immédiat, which the court felt bound to apply to the case before it, irrespective of general choice of law criteria. Such analysis of the registration provisions best explains their applicability to both foreign assets of Scots companies and assets of foreign companies in Scotland which are subsequently taken abroad.

It is suggested that the registration provisions be characterised as general ranking rules, extended unilaterally by legislation. Foreign courts may then give effect to the registration provisions in accordance with conventional choice of law rules. It was suggested in Chapter 3.B.3) that the lex situs at the time of a ranking process should be applied initially to ranking issues. A foreign court may therefore ignore the charge registration provisions as regards property which is outwith Scotland at the time of ranking, irrespective of whether or not it has previously been situated in Scotland. It is suggested that this approach to 'personal' charge registration in general is to be preferred.
E. Equitable and functional securities.

1) Introduction.

As mentioned in Chapter 2,E, the choice of law structure proposed for the analysis of property rights in general derives largely from Civilian property theory. As other theories of property rights have had extensive influence in the field of securities it is worthwhile to consider separately securities deriving from legal systems adhering to such other theories.

The principal approaches to security outwith traditional Civilian analysis derive from English Equity and North American functional analysis. The principal examples of the equitable and functional approaches are, respectively, the English equitable charge and Article 9 of the Uniform Commercial Code of the U.S.A.1.

The general approach of Equity to property issues is discussed in Chapter 2,G, where it was suggested that equitable property rights should, in strict theory, probably be classified as class rights rather than real or personal rights in the Civilian sense. It was also suggested that such rights should be considered real rights for the purposes of choice of law, given the generality of their incidence against third parties. So characterised, equitable property rights may be integrated with property rights deriving from other legal systems in a relatively just and coherent manner, without distorting their nature excessively.

Functional analysis cuts across the analysis of legal issues in traditional conceptual terms. Accordingly, broadly speaking, any device constructed in terms of traditional property concepts which performs a security function, such as reservation of title on sale, will fall within the provisions of Article 9 of the Uniform Commercial Code. Functional analysis would not in itself seem to raise great theoretical problems for the basically Civilian choice of law structure proposed regarding property matters, as the effectiveness of a given legal device relative to third parties appears to underlie both a functional approach and the proposed choice of law structure. As discussed below, difficulties are more likely to arise at a more concrete level, regarding functional security interests created as such outwith traditional conceptual structures.

2) Equitable securities.

In English law2 equitable securities generally subsist either in respect of specific assets, as in equitable mortgages and fixed equitable charges, or in respect of funds of assets, as in floating charges. Such securities prevail, broadly speaking, over rights later acquired by all persons other than those acquiring their rights for value and without notice of the equitable security in question. It is accordingly difficult to conclude that equitable securities should be characterised for the purposes of choice of law other than as real rights.

However the English courts have tended to adopt an internal characterisation of such securities when considering their international operation, attempting to 'bind the conscience' of the whole world with individual personal duties under English Equity. The English courts have accordingly been prepared to give effect to equitable securities over foreign property, contrary to the lex situs, and even
to foreclose equitable mortgages over foreign land. It is suggested that such insular and unilateral actions by the English courts should be resisted.

a) The general Scots position. The Scots courts appear, on the other hand, largely to have referred the validity of equitable securities to the lex situs. Some of the relevant cases have related to land. It is nevertheless suggested that a similar approach should be taken to other property.

Thus a foreign lex situs appears to have been considered applicable to the validity of equitable securities in Ogilvie v Dundas (1826)2 W&S 214. In this case a Scotsman who had resided for many years in Jamaica returned to Scotland and married shortly thereafter. Under the marriage contract an annuity to the wife was to be secured upon the husband's sugar estate in Jamaica and, in the event of his acquisition of Scots heritage the annuity was to be secured over that heritage, whereupon the Jamaican estate was to be released. No formal security was executed over either the Jamaican estate or heritage subsequently acquired in Scotland.

After the death of the husband a dispute arose as to whether the annuity should be paid from the Jamaican estate or the Scots heritage or both. It was ultimately decided by the House of Lords that the annuity should be paid in the first instance entirely from the Jamaican estate. The main reason for this decision derived from interpretation of the marriage contract. However the initial finding by the House of Lords (at 219) was that 'by the marriage-articles, the annuity .. became, in equity, an express charge upon the Jamaican estate, according to the law of Jamaica; agreeably to which law, the said articles are to be construed against all persons claiming interests on that estate, under the testamentary dispositions, or other acts taking effect after the date of the said articles". Thus while the major issues should perhaps be characterised as relating to the laws of succession, executy and matrimonial property, there is no doubt that the effect of the marriage contract as an equitable security was also considered important.

The law of Jamaica was clearly applied to the interpretation of the marriage contract relative to the Jamaican estate and applied equally clearly to the effect of the marriage contract to create a charge over the Jamaican estate. While the basis of application of Jamaican law to each of these issues was not explicitly stated, and indeed a distinction between these issues not explicitly drawn, the emphasis throughout the Lord Chancellor's judgement upon the situation of the Jamaican estate is clear. It must surely be inferred that Jamaican law was applied as the lex situs.

Stewart v North (1889)16 R 927, (1890)17 R(HL) 60 may be a further example of the Scots courts giving effect to foreign equitable securities, in this instance in relation to incorporeal property. In Stewart v North an obligation to pay an English judgement for costs was arrested in Scotland. Subsequently the solicitors for the creditor under that decree obtained a charging order from the court in England over that obligation in respect of their fees. Under English law the charging order 'converted' their previous 'inchoate lien' into an 'actual charge' with retrospective effect, making the solicitors 'owners in equity' of the obligation in question. English law was considered applicable and the solicitors were accordingly preferred. While the view was clearly taken that the obligation to the solicitors' client was 'defeasible' property, it seems that its flaw
derived from a form of equitable security arising by operation of the English law generally governing that property.

As in Ogilvie v Dundas, interpretation of a document was also the central issue in Kerr's Trs. v Kerr's Curator ad litem 1907 SC 678, in the latter case the terms of a trust disposition and settlement in Scottish form. The testator was a domiciled Scot who had resided and carried on business in England. He had empowered his trustees to borrow 'for repaying bonds or mortgages on my heritable property which may be called up' and to grant securities over heritable property relative to such borrowing. He had granted equitable mortgages in England over two English properties and had also purported to do so in relation to heritage he had acquired in Scotland, depositing his title deeds with the English lender with a memorandum binding him to grant more formal security relative to that property.

A petition under s.3 of the Trusts (Scotland) Act 1867 for power to borrow on the security of the Scots heritage to pay off the lender holding the equitable mortgage relative to that property was refused by the Lord Ordinary, but allowed by the Second Division. The Second Division adopted a broader approach than the Lord Ordinary to the intentions of the testator, considering him to have intended to include purported equitable mortgages over Scots heritage within the power referred to above. Nevertheless, everyone appears to have agreed that the equitable mortgage had no security effect upon the Scots heritage itself. Thus Lord Ardwell was of the view (at 685) that 'if the question had been whether the equitable mortgage over [the Scots heritage] was "a bond or mortgage on heritable property in Scotland" I do not think, strictly speaking, we could have answered that question in the affirmative'. The respondent argued (at 683) that this resulted from the application of Scots law to the issue as the lex loci rei sitae. It is suggested that the respondent's argument on this issue was accepted.

A less straightforward approach to equitable securities may have been taken in Connal v Loder (1868) 6 M 1095. This case may indeed suggest that an English equitable security may be allowed indirect effect in relation to assets in Scotland. As discussed in section C above, Connal v Loder related to the indorsement in England of delivery warrants issued in respect of pig iron held by a Glasgow warehouse, and is authority for the application of the Scots lex situs to the creation of real rights in that iron.

The indorsees of delivery warrants were, however, preferred to English inspectors appointed to the bankrupt estate of the indorser prior to intimation of the indorsements to the warehouse keeper, on the basis that, on the opinion of English counsel, the rights they had prevailed over those of the inspectors in bankruptcy under English law. Accepting that a transfer under the English bankruptcy could take effect in Scotland from its date®, it is possible that rights of the indorsees in English equity were given effect in Scotland in relation to assets in Scotland to prefer them to the inspectors in bankruptcy.

It was suggested in section D,3) above that the decision in Connal v Loder may have resulted from a misunderstanding by English counsel of the questions asked of them and a misunderstanding by the court of the answers thereto. English counsel were asked firstly what was the effect of the English insolvency process as to vesting in the inspectors of the bankrupt's moveables, and for the benefit of whom any such vesting took place. They were asked secondly how the rights
of the inspectors ranked relative to prior pledges and personal contracts. English counsel answered both questions together, considering that in the circumstances of the case the English process had no vesting effect and provided no preference to the inspectors over rights to property of the bankrupt depending upon contract.

This answer suggests that English counsel were considering how the case would have been decided in an entirely English context, without isolating issues the Second Division considered governed by Scots law, such as the effect of indorsement of the warrants without intimation as constituting a security right in the iron. Arguments that the opinion of English counsel was incomplete were however rejected. It is nevertheless difficult to believe that the inspectors in bankruptcy were, as Lord Cowan maintained (at 1106) 'assignees of an inferior character' under English law.

If, however, the decision in Connal v Loder proceeded on the basis of a supposed defect under English law of the title of the inspectors in bankruptcy, the case cannot be considered authority for allowing effect in relation to assets in Scotland to equitable securities, whether directly or by means of ranking rules under foreign insolvency processes. Indeed Connal v Loder may infer that equitable securities arising under English law from securities only partially completed under the lex situ will not be given effect in Scotland. Similar inferences may probably be drawn from Inglis v Robertson & Baxter (1897) 14 R 758, (1898) 15 RHL 7010. As mentioned below, in Carse v Coppen 1951 SC 233 Lord Keith considered Connal v Loder and Inglis v Robertson & Baxter authority to this effect.

Some hostility on the part of the Scots courts to equitable securities was evident in Liquidator of the Salt Mines Syndicate Ltd., Noter (1895) 2 SLT 489 and Carse v Coppen, even when such securities were competent under the relevant leges situ. In both of these cases it was held that debenture documents did not create equitable securities over property situated in foreign jurisdictions in which such securities were competent.

In the Salt Mines Syndicate case a company carried on a salt working business under three leases of land in Ireland. It entered into an agreement with trustees for debenture holders expressly governed by Scots law under which security was to be granted to the trustees over one of the leases and plant relative to that lease prior to the issue of debentures. The agreement also obliged the company to grant a valid security over its whole premises11. The first security appears to have been granted. The further securities were not granted and the company went into liquidation.

The debenture trustees argued that under Irish law the two leases in respect of which no formal security had been granted had been 'carried' by the agreement, presumably in equity. The Lord Ordinary, Lord Stormonth Darling, held that the issue related not to Irish conveyancing but to the construction of a Scots contract, to which Scots law was applicable. The agreement was then considered not to constitute a title to the leases in question and no valid security over the relevant leases considered effectually created. Equitable securities would thus appear to have been characterised in contractual terms.

It is suggested that Lord Stormonth Darling took too narrow a view of Irish conveyancing and that Irish law should have been considered applicable to the
requirements of constitution of a security over the property in question. Had, perhaps, a present intention to grant a security been required under rules of Irish equity, Scots law would, presumably, have been relevant to the construction of the contract in that regard, perhaps leading to the same decision. As the company was probably registered in Scotland, it is interesting that the issues of policy, powers and capacity which were so anxiously discussed in Carse v Coppen do not seem to have been raised in the Salt Mines Syndicate case.

Carse v Coppen may be regarded as the leading Scots decision concerning choice of law in relation to equitable securities. It is, however, quite difficult to discern from it a clear ratio in relation to issues concerning the essential validity of the charge in question. The facts were quite simple. A Scots company with assets and a place of business in England granted in Scotland two debentures in English form securing loans obtained. Each debenture purported to create a floating charge over the company's whole undertaking, property and assets. At that time the floating charge was not a competent form of security in internal Scots law. A receiver was appointed under the debentures on the authority of the English courts in respect of the company's property in England. The company resolved shortly thereafter that it be wound up and the liquidator petitioned the court to determine the validity of the floating charge in relation to the English property.

The Lord Ordinary, Lord Birnam, was of the view (at 235), under reference to Re Anchor Line (Henderson Brothers) Ltd. (1937) Ch 483, that issues concerning the validity of the charge were referable to the law of the domicile of the granter of the charge irrespective of the lex situs. Assimilating the place of registration of a company to its domicile for this purpose, his Lordship accordingly held that the charge was invalid in relation to the English property. While Lord Birnam did not refer expressly to doctrines of universal transfer of the whole of a person's property, as are sometimes applied on insolvency, his Lordship's views seem implicitly to characterise the floating charge in such a manner.

Lord Birnam's decision was upheld by the majority of the First Division, although his Lordship's reasoning was rejected. Lord Keith dissented. It is, however, arguable that Lord Keith's views upon the essential validity of the charge represent the general views of the court in this regard.

Lord Keith clearly considered (at 245-246) the issue of the essential validity of the charge to be referable to the lex situs as regards items of property alleged to be subject to it, under reference inter alia to Inglis v Robertson & Baxter and Connal v Loder. The arguments adopted by Lord Keith in this regard were very clear and precise. His Lordship's explicit rejection of the validity of the charge relative to assets in Scotland accordingly derived from the application of this general choice of law rule. It is of further interest that Lord Keith considered that the ineffectiveness of the charge in relation to Scots assets did not prejudice its effectiveness in relation to English assets.

It would seem that where the opinions of Lord Keith and the majority diverged was in relation to issues of the power and capacity of the company to grant the charge. While not expressly considering these issues to be governed by Scots law, Lord Keith clearly felt (at 245) that the company had ample power and capacity under Scots law to grant the charge.
Lord Carmont stated (at 243) that 'the powers of a Scottish company in the matter of its general obligations are different from those of companies registered in other countries. Those differences are fixed by the law of Scotland as the domicile of the company. It may be that on certain matters the problem has to be approached from the standpoint of the lex rei sitae. For example, a Scottish company having a heritable subject in France may validly mortgage or bond that subject by an instrument executed to that end. But not only would the instrument have to be executed according to the law of France but also the Scottish company would require to show a power in its memorandum and articles of association so to execute mortgages before the home court would recognise the propriety of what had been done. It might be that the French Court would exercise effective control in regard to the heritage there by reason of situs, but I have little doubt but that the Scottish Court would examine closely the action of directors who had mortgaged or lost heritage belonging to the company unless they had acted properly and within the terms of the powers of the company as detailed in the memorandum and articles and in this way the law of the domicile would claim and obtain attention'.

Lord Carmont would appear to have referred issues of essential validity to the lex situs. It is not, however, clear whether his Lordship considered reference of issues of power and capacity by the courts of the lex situs to the lex situs to be exceptional or reference of such issues by the courts of the domicile to the domiciliary system to be exceptional. It is not therefore clear whether Lord Carmont applied Scots law to the power and capacity of the company to grant the charge as a matter of choice of the domiciliary system or exclusion of the English lex situs. As discussed below, some of the comments made by Lord President Cooper may be analysed as an exclusion of English law for reasons of public policy. Although Lord Carmont did feel (at 243) that 'the law of Scotland does not recognise and can attach no meaning to a floating charge', it is nevertheless suggested that Lord Carmont referred issues of power and capacity to the Scots domicile of the company as a matter of choice of law'?

Lord Carmont considered the company to lack the power and capacity to grant the charge under Scots law and appears to have doubted whether insertion of the necessary provisions in the company's memorandum or articles of association could have remedied the situation, particularly as regards general charges over all of its assets wherever situated. Lord President Cooper was more forthright on such matters, considering (at 242) that Scottish companies could not create floating charges even if they were specifically restricted only to English assets.

It is difficult to assess the scope of either the suggested domiciliary choice of law rule or the scope of the Scots law applied. Carse v Coppen may even be considered authority for the application of the domiciliary system to all issues of capacity in property law or security law. While issues of capacity have not generally been discussed, it was suggested in Chapter 3,B,4) that issues of capacity and essential validity be governed by the same legal system, the lex situs. Alternatively Carse v Coppen may be considered to relate to narrower issues of corporate powers and capacity, that is the more limited field of ultra vires. While there seems little theoretical reason to distinguish choice of law regarding the powers and capacity of real and artificial persons, there may be practical reasons for doing so.
In turn the Scots doctrines apparently applied may have related only to floating charges over all assets, such charges purporting to include assets in Scotland, floating as opposed to fixed securities in general or all equitable securities. They might equally have concerned only corporations and the doctrine of ultra vires rather than broader issues of capacity. A narrow rule of Scots law may perhaps be suggested by the comparison drawn (at 241) by Lord President Cooper between protective rules in the 1948 Companies Act regarding receivers appointed to English companies and their absence regarding Scots companies. It may even be arguable that the introduction into Scots internal law of the floating charge by the Companies (Floating Charges) (Scotland) Act 1961 and the effective abolition of the ultra vires rule in Scots law by s.108 of the 1989 Companies Act has eliminated or minimised the scope of a narrow choice of law rule regarding corporate capacity and the potentially far reaching general consequences of the decision in Carse v Coppen.

The approach taken by Lord President Cooper appears to have been broadly similar to that taken by Lord Carmont. Thus the Lord President considered (at 241) it to be 'of special significance that the company is a Scottish company and not a foreign company', continuing to observe that 'the law which determines the nature and extent of the powers of any corporation is the law of the country in which it is incorporated'.

It is, however, arguable that the Lord President adopted a special narrow approach to the issues in the case, influenced to some extent by general policy issues. Thus the Lord President briefly set out (at 240) various theories of choice of law regarding property issues, the 'bewildering permutations' of which led his Lordship 'to abandon the search for an overhead solution' and to 'prefer to particularise the problem more narrowly', as a competition arising in a Scottish court between the liquidator of a Scottish company and an English receiver. This situation was contrasted with that arising in an English court of Chancery, which would enforce an equitable charge in personam as it could, although the courts of the place of situation of the relevant property might intervene. As the charge was (see 241) an attempted 'universal or general assignment', the protective machinery of the 1948 Companies Act regarding receivers appointed to English companies was absent regarding Scots companies and in his Lordship's view (at 239) 'a floating charge is utterly repugnant to the principles of Scots law' his Lordship felt (at 242) that 'Scottish companies cannot create floating charges'.

If the Lord President was applying what might now be termed a 'policy evaluation' approach to choice of law it would appear to have been both unprecedented and not later adopted in Scots international private law. Similarly, his Lordship's remarks (at 239) that a floating charge 'is not recognised by us as creating a security at all' and that 'in Scotland the term "equitable security" is meaningless' must in their context refer to Scots internal law rather than an exclusion of foreign law on policy grounds. Application of a public policy exclusion would, of course, suggest that the law excluded was initially applicable as a matter of choice of law. It would also seem startlingly insular in this context.

It may, in the alternative, be possible to argue that Lord President Cooper characterised equitable securities as personal rights, which could not therefore ground a preference in a Scots liquidation, or even as personal rights enforceable only by an English court of Chancery. Such a general line of
reasoning is not, however, explicit in the Lord President’s judgement and does not lie easily with the ‘special significance’ attached to the place of registration of the granter of the security. An alternative characterisation may have been as preferential rights in insolvency, to which the law governing the insolvency process was applied. Again such a line of reasoning is not explicit. It also seems unsupported by other authority.

One point which seems fairly clear is that Lord President Cooper did not apply Scots law in relation to the floating charge because it was a ‘universal or general assignment’, even if his Lordship felt (at 241) that ‘it is as a universal assignment that [the] efficacy [of the floating charge] must be judged’. Such an application of Scots law would seem inconsistent with his Lordship’s rejection (at 239–240) of the reasoning of the Lord Ordinary to this effect. It is suggested that the charge was characterised in such a manner for the purposes of assessing the powers of the company under Scots law rather than for the purposes of assessing which law was applicable. Lord Keith’s characterisation of the floating charge (at 244–245) as a ‘special assignment’ for the purposes of choice of law appears more credible.

As mentioned above, Lord President Cooper would, on balance, appear to have refused effect to the charge in relation to the English assets because Scots law was applied to the power and capacity of the company to grant the charge and because under Scots law the company had no such power. As also mentioned above, there is a strong argument that the majority decision in Carse v Coppen was not opposed to Lord Keith’s reference of issues of the essential validity of equitable securities to the lex situs. It may indeed be further argued that were it otherwise some of the cases referred to above may usefully have been considered in Carse v Coppen, the reports being not quite so silent on equitable securities as Lord President Cooper suggested (at 239).

It may be concluded, on balance, that in Scots international private law the general choice of law rule referring the essential validity of securities to the lex situs applies in general to equitable securities. It may also be concluded that equitable securities are generally considered to give rise to real rights for the purposes of applying the general choice of law rule. Some specialities may nevertheless arise in relation to floating charges and in relation to the conflict mobile.

b) Floating charges. As mentioned above, it may be argued that floating charges should be characterised as universal transfers for the purposes of choice of law and that choice of law rules applied to other such transfers, such as those arising on bankruptcy, should be applied to floating charges. As floating charges relate to funds of assets rather than individual assets such analysis is theoretically attractive.

It is, however, argued in Chapter 6 that universal transfers arising on insolvency take effect because the laws generally governing the assets comprised in the insolvent fund in question sanction certain universal transfers, whether actively or passively. While receivers appointed under floating charges may be able to act in a representative capacity in relation to given assets subject to the charge under which they have been appointed, it is suggested that floating charges will not generally be given effect as universal transfers unless there is a degree of compliance with the lex situs.
Thus in Carse v Coppen Lord Keith considered (at 245) a floating charge not to be 'a universal assignment (of which examples are a sequestration or a transmission by death), but the creation of a charge, albeit over the whole assets of the company', continuing to observe that 'even if this were a general assignment, that does not, in my opinion, conclude the question of the effect of that assignment as authorising the transference to the assignee of goods situated abroad'. As mentioned above, Lord President Cooper did characterise the floating charge in Carse v Coppen as a universal assignment, but not, it was suggested, as a matter of choice of law. As discussed below, Lord Keith's approach appears to be supported by later Scots cases.

The floating charge was introduced into internal Scots law by statute in 1961. Receivership was introduced into internal Scots law more than ten years later. The alien equitable nature of the floating charge has caused difficulties in its integration with the rest of Scots law, and it has sometimes been suggested that as the floating charge is purely a statutory creation in Scots law problems arising should be resolved by narrow reference to the relevant statutes. The hostility shown by internal Scots common law in Carse v Coppen to the floating charge does not appear to have been entirely eliminated. The difficulties in Scots internal law relating to the floating charge may be expected to be of some influence in the approach taken by Scots international private law to floating charges.

The attention of the Scots courts has been focussed more recently upon the crystallisation of floating charges rather than upon their competence. Emphasis would again appear to have been placed upon the lex situs, although specific statutory provisions have obscured this issue.

In Gordon Anderson (Plant) Ltd. v Campsie Construction Ltd. & Anglo Scottish Plant Ltd. 1977 SLT 7 an English company granted a floating charge over all of its assets, pursuant to which a receiver was appointed in England. Shortly thereafter goods in Scotland belonging to the company were arrested by one of its creditors.

The case was decided almost entirely on the basis of the interpretation of ss.1(2) and 15(4) of the 1972 Act. Section 1(2) stated that 'all floating charge ... shall, on the commencement of ... winding up ... attach ... subject to the rights of any person who ... has effectually executed diligence ... as if the charge were a fixed security over the property to which it has attached'. Section 15(4) stated that 'all receiver ... of the property ... of a company incorporated in England which has ... property in Scotland shall have in relation to such part of that property as is attached by the floating charge ... the same powers as he has in relation to ... property attached by the floating charge which is situated in England, so far as those powers are not inconsistent with the law of Scotland'. The receivership equivalents in the 1972 Act to s.1(2) did not apply to English registered companies.

The arrester argued that the charge attached to the property arrested in Scotland as if it were a fixed security only when the granter was later wound up, preferring it to the claim of the receiver. The receiver argued that s.15(4) should be interpreted such that the charge attached as if it were a fixed security upon his appointment. The Sheriff favoured the receiver's argument, the Sheriff Principal favoured the arrester's argument and the majority in the First Division agreed broadly with the Sheriff, preferring the receiver's claim. There
can be little doubt that the relevant statutory provisions were, and remain, defective and that the majority in the First Division indulged in some extremely purposive statutory interpretation.

As the Campsie Construction case turned on a statutory provision directed specifically at the rights of English receivers regarding property situated in Scotland its general relevance to choice of law issues might be doubted. However, the proviso to s.15(4) as to consistency with Scots law suggests that Scots law has some general application to the rights of English receivers in relation to property in Scotland. Furthermore, it is clear that in the absence of s.15(4) the arrester would have been preferred, suggesting in turn that Scots law is generally applicable to the crystallisation of floating charges over property situated in Scotland. The analysis of the changes in Scots internal law by both majority and dissenting judges in terms of greater and lesser degrees of withdrawal from the position in Carse v Coppen tend to support this view. Accordingly Scots law would seem to have been considered generally applicable as the lex situs to the crystallisation of floating charges as regards property situated in Scotland.

Lord President Emslie indeed considered (at 13) that 'there is nothing to be gained by considering what effect the law of England would give to the appointment of a receiver of the assets of an English company subject to a floating charge for it must be the law of Scotland, the lex situs, which determines the effect of such an appointment upon assets in Scotland'. Lord Avonside adverted (at 16) in his dissenting judgement to reservations regarding the application of the lex situs deriving from the judgement of Lord President Cooper in Carse v Coppen. His Lordship nevertheless continued to consider the Scots lex situs to forbid security arising from a floating charge except on winding up.

A similar approach seems to have been taken in Norfolk House Group plc v Repsol Petroleum Ltd. 1992 SLT 235, in which an English company granted a fixed and floating charge under English law which contained a clause whereby the floating charge crystallised automatically upon the occurrence of certain events of default. A receiver was appointed shortly after the occurrence of an event of default and obtained declarator that he had title to grant dispositions of certain heritable properties in Scotland.

It had been argued that the automatic crystallisation clause, although effective under English law, could not take effect in relation to assets in Scotland, but that the purported automatic crystallisation of the floating charge relative to assets in Scotland had the consequence of preventing later conversion of the floating charge into a fixed charge by the appointment of the receiver. It was held that the floating charge did not crystallise in relation to Scots assets on the occurrence of the event of default but that it remained floating in relation to such assets until crystallised in relation to those assets by the appointment of the receiver.

No written opinion was issued by the Lord Ordinary, Lord Penrose, but it would appear that the receiver's arguments that the lex situs determined the criteria of crystallisation were upheld. It would also seem that a relatively pragmatic view was taken of crystallisation relative to property situated in the territory of several legal systems, such that the charge remained floating in respect of assets situated in Scotland until the crystallisation criteria of Scots law had

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been satisfied and yet had crystallised in relation to assets situated in England on the occurrence of the event of default. The approach taken to such issues of partial crystallisation by Lord Keith in Carse v Coppen was thus preferred to that taken by Lord President Cooper, although the law governing the validity of partial crystallisations does not seem to have been discussed in detail.

The decisions in the Campsie Construction and Norfolk House cases appear to support a relatively restrictive application of the Scots lex situs to floating charges, continuing to some extent the hostility to equitable securities shown in Carse v Coppen. It is therefore suggested that the present Scots statutory provisions are likely to be restrictively interpreted in other situations.

The Scots courts are accordingly unlikely to adopt the relaxed approach taken to foreign floating charges by the English Court of Appeal in Cretanor Maritime Co. Ltd. v Irish Marine Management Ltd. [1978] 1 WLR 966. In this case an Irish all assets floating charge was considered to have crystallised in relation to an English certificate of deposit by the appointment of a receiver in Ireland. Given the effect of the charge in equity from the date of its creation and its perfection by crystallisation, the receiver was then considered entitled to have an English Mareva injunction affecting the certificate of deposit discharged even though it was obtained prior to his appointment.

Irish law would appear (See 969) to have been considered applicable at first instance. However, on appeal, Buckley LJ analysed (at 978) the effects of the Irish floating charge in terms of English law. It is not clear whether his Lordship would have been so relaxed about the charge, or applied English or Irish law thereto, had relevant differences between English and Irish law been alleged. References (at 977) to dicta in Galbraith v Grimshaw (1910) AC 508 concerning the limiting effect on foreign bankruptcy transfers of a person's ability under English law to transfer property in England suggest that the effect of foreign floating charges could be similarly limited in relation to assets situated in England by the English lex situs.

As there are few statutory provisions in Scots law applicable to floating charges granted by foreign companies, it is suggested that such floating charges will be given only limited effect by the Scots courts in relation to Scots assets. It is suggested, for example, that the appointment of a receiver in Ireland will not cause an Irish floating charge to crystallise in relation to assets in Scotland, as s.72 of the Insolvency Act 1986, the predecessor of which was applied in the Campsie Construction case, applies only within Great Britain and to companies registered under the the Great Britain Companies Acts. An Irish receiver may nevertheless be entitled to act on behalf of an Irish company in relation to its Scots assets if he is considered to represent the company. It is, on the other hand, probable that such a charge would crystallise in relation to assets in Scotland on the winding up of an Irish company, as 'company' is defined for the purposes of the relevant provisions of the 1985 Companies Act as 'an incorporated company (whether a company within the meaning of this Act or not)' as opposed to its definition regarding most of the relevant provisions of the Insolvency Act as such a company 'which the Court of Session has jurisdiction to wind up'.

The emphasis placed by the Scots courts upon the lex situs as regards equitable securities in general and floating charges in particular also suggests that the Scots courts will consider Scots floating charges to have crystallised in respect
of assets situated abroad only if and in the manner determined by the *leges situs* in question. The relevant provisions of the Companies Act and Insolvency Act are not so restricted. Neither do they require foreign *leges situs* to be ignored. While receivership and the crystallisation of Scots floating charges may be considered universal insolvency processes which the Scots courts might seek to give extra-territorial effect as such, the preferable analysis of floating charges as securities over many individual items of property is noted above, as is the disapproval in *Carse v Coppen* of the use of personal jurisdiction by the English court in the *Anchor Line* case to give effect to an English equitable security contrary to a foreign *lex situs*.

The general controlling role of the *lex situs* in relation to property subject to floating charges also appears to be accepted in France and the USA. At first sight the Cour de Paris in its decision of 19th January 1976 gave effect to a floating charge granted by an English company, Josef Shaftel Productions Ltd., in relation to assets seized in France by one of its other creditors after crystallisation. However, the decision rested upon the invalidity of the seizure under French law, as the English judgement upon which it was based could not be enforced in England because the floating charge had crystallised. Lagarde has argued convincingly that the seizure should have been considered valid and has suggested further that a floating charge itself should not be given security effect relative to assets in France because of its conceptual incompatibility with French property law.

It has also been argued that the definition of 'security interest' in Article 9 of the Uniform Commercial Code of the USA is broad enough to include floating charges, but that it would be necessary to comply with the registration requirements of Article 9 to ensure its effectiveness relative to American assets. The difference between the approaches of the laws of France and the USA in this regard probably derive from the relative breadths of securities available under each system.

As suggested above, even if a floating charge is denied effect as a security over specific assets, a receiver may often be able to act on behalf of the company relative to which he has been appointed by reason of choice of law concerning agency or the representation of corporations. As the seizure in the French Josef Shaftel case was invalid, it would appear that the receiver was permitted in this case to claim the assets seized on such a basis.

c) Conflit mobile. General problems concerning the *conflit mobile* in securities are discussed in section D,2) above. These general problems also seem to arise in relation to equitable securities. Two further specific problems are apparent as regards equitable securities. The first relates to their frequently latent nature and the second to the acquisition by *bona fide* third parties of competing rights for value.

Foreign securities of all types are often latent to third parties acting with reference to a *lex situs* subsequent to that under which the security was created. However, equitable securities may often arise in situations in which third parties normally referring to other legal systems will not expect them, as perhaps from obligations to create a security. Such a distinction of equitable securities from other securities is, of course, a matter of degree and care in considering previous *leges situs* should prevent third parties being misled. It
is nevertheless possible that equitable securities will be more readily considered extinguished by subsequent \textit{leges situs} than will other securities.

There is a dearth of authority regarding the movement of property subject to equitable securities. It is, however, surprising that situations such as the movement to Scotland of English plant subject to a fixed equitable charge under English law do not seem to have been the subject of reported decisions. It may be arguable that the absence of such authority results from the obvious ineffectiveness of equitable securities in such a situation. The further argument may then arise that equitable securities should be treated differently from other securities as regards the \textit{conflict mobile}, applying the \textit{lex situs} at the time of litigation to the essential validity thereof.

It was mentioned above that the Article 9 of the Uniform Commercial Code appears to allow floating charges to take effect as regards assets situated in the U.S.A., provided the registration requirements thereof are complied with. This argument was made largely in the context of assets brought into the U.S.A., such that failure to register the security within the appropriate period of grace would nullify the charge. It is suggested that the general rules regarding the \textit{conflict mobile} in securities should be applied in this manner to equitable securities as to other securities. It is further suggested that rules of subsequent \textit{leges situs} delimiting types of competent security or prohibiting certain types of security should not be broadly interpreted so as to extinguish foreign equitable securities. Given the decisions discussed above of the Scots courts relative to foreign reservations of title, it does, however, seem quite possible that the Scots courts would quite readily consider foreign equitable securities to be extinguished on the subjects thereof being brought to Scotland, if the foreign security in question fell outwith the narrow bounds of the Scots floating charge, the only equitable security not, in the words of Lord President Cooper in \textit{Carse v Coppen}, 'utterly repugnant to the principles of Scots law'.

Support for applying the general \textit{conflict mobile} rule to equitable securities may however be drawn from Lord Keith's judgement in \textit{Carse v Coppen}. His Lordship criticised the decision in \textit{Re Anchor Line (Henderson Brothers) Ltd.} [1937] Ch 483 for enforcing an equitable security over the proceeds of Scots assets taken to England. To the extent that such proceeds may have been considered governed consecutively by Scots and English law, Lord Keith's comments suggest at least that English law should not have been applied to the exclusion of Scots law.

Characterisation problems arise regarding the effect of equitable securities relative to persons acquiring competing rights \textit{bona fide} and for value when the security subjects are the subject of a \textit{conflict mobile}. It was stated above that equitable securities probably give rise to class rights. They may accordingly be considered 'weaker' than Civilian real rights in security. If a third party acquires a right in the security subjects under a subsequent \textit{lex situs} \textit{bona fide} and for value, but outwith any provisions of that \textit{lex situs} protecting \textit{bona fide} acquirers, it would distort the equitable security to prefer the security holder to the \textit{bona fide} acquirer because he had a real right.

Subtle translation of the equitable security for the purposes of ranking under the \textit{lex situs} at that time may prevent such distortion in many situations. In other situations it is suggested that a subsidiary reference to the law from which such a 'weak' security derives could be made at the stage of ranking, in order to alter rankings initially determined under the \textit{lex situs} at that time.

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It may perhaps be argued that such a reference was, as mentioned above, made in *Connal v Loder* to restrict the ranking of 'weak' rights held by English inspectors in bankruptcy.

3) **Functional securities.**

As mentioned above, functional analysis of security devices based upon traditional conceptual structures should not raise great problems for the general choice of law structure proposed for property rights, as effectiveness of a given device relative to third parties seems to underlie both. Thus, as discussed above, even floating charges over property taken to the U.S.A. may be considered 'security interests' for the purposes of the registration and other provisions of Article 9 of the Uniform Commercial Code. So too a possessory pledge under the laws of a given state of the U.S.A. can, on the subject thereof being brought to Scotland, presumably be integrated with Scots property law in a similar manner to that in which a similar French pledge might be so integrated, even if it is considered a 'security interest' for the purposes of the registration and other provisions of Article 9 of the U.C.C.

The logical progression from functional analysis of traditional devices as 'security interests' is the creation of functional security interests as such. Such securities may be unlikely to be allowed effect as regards property situated at the time of perfection of the security interest in the territory of legal systems not adopting a functional approach to securities, rather as the differing theoretical approach of equitable securities generally appears to give rise to no security effect as regards property situated at that time in states under the legal systems of which such securities do not exist. Similarly, while there is no reason in principle why subsequent *leges situs* should automatically extinguish such security interests on a *confit mobile*, it is possible that they may do so, as they may do to equitable securities. It is difficult to speculate how the Scots courts might react to such functional security interests. It is suggested that they may be allowed effect as regards Scots assets as floating charges, if granted by corporations and appropriately drafted. It is further suggested that such security interests should continue in effect on the subjects thereof being brought to Scotland.
CHAPTER 6
INSOLVENCY PROCESSES

A. Funds analysis and funds in international private law.

1) Funds and individual assets.

It is common to approach particular difficulties in property law either by treating an item of property as a part of an ideal fund or by dealing with that item of property on an individual basis. These two analytical methods would appear to be mutually exclusive. Thus you may deal with a sheep as part of a flock or as a sheep, but not as both at the same time. The distinction between the two analytical methods would seem to lie in the manner in which the individual item of property is identified, whether directly or via the characteristic which makes it part of a separate ideal unit.

Each method appears to be more appropriate than the other in different legal situations. Thus it is a lot more convenient for a trustee in sequestration to have a fund comprising a bankrupt's assets vest in him than it is for him to obtain individual conveyances of assets comprised in that fund. In the context of a single legal system it is not very difficult to integrate analysis in terms of funds with analysis in terms of individual items. It is merely decided which analytical model is going to prevail. Having made that decision it is useful, for reasons of certainty and coherence, to attempt to integrate the one with the other. Thus in Scots law when a floating charge over a fund of a company's assets crystallises, the crystallisation of the charge takes effect as if the charge were, on crystallisation, an appropriate fixed security granted over each individual item of property comprised in the fund to which the floating charge relates.

2) Integration of analyses at an international level.

In an international context it is rather more difficult to integrate funds analysis with the analysis of property as individual items. Part of the explanation for this increased difficulty is the different degree to which different legal systems favour funds analysis as opposed to analysis in terms of individual items of property. Further explanation lies in the different fields of law in which funds analysis is adopted, and perhaps in different methods by which analysis in terms of funds and in terms of individual items are integrated. The English trust, for example, gives rise to a fund which is hardly known outside common law systems, and Chancery's equitable charge, whether fixed or floating, adopts a funds analysis in the relatively unusual field of securities.

Comparative differences give rise to difficulties in choice of law, even within the choice of law structure of a single legal system. Such a difference gave rise to the classic renvoi in Re Ross (1930) Ch 377. The English choice of law rule concerning succession to immoveables referred to the lex situs and the Italian lex situs did not distinguish between moveable and immoveable funds for the purposes of succession, referring all to the law of the nationality at death, as a single fund.

Similarly, it is difficult to integrate, within a single legal system, those choice of law rules which appear to relate to funds with those which relate to
individual items of property. As discussed below, bankruptcy may sometimes be said to give rise to the universal transfer of a fund, comprising the bankrupt's 'estate'. On the other hand, the execution of diligence upon an individual item of property comprised therein is usually said to be governed by the lex situs. On the occurrence of both bankruptcy and diligence a potential conflict of choice of law rules arises.

When the choice of law structure of several legal systems is considered at the same time the difficulties presented by analysis in terms of both funds and individual items of property are further exposed. As discussed below, a truly universal bankruptcy seems hopelessly unattainable, since the disagreement of only one legal system with the idea or operation of such a universal bankruptcy is sufficient to distort its universal effect. It is thus of little avail to an English bankruptcy to be universal in theory if the seizure of an item of property in France thwarts its aims.

It is suggested that several legal systems cannot be integrated justly and coherently by analysis of property both as funds and as individual items. This difficulty in integration arises from comparative diversity in funds analysis in the internal laws of different legal systems, diversity in choice of law rules and diversity in the integration of funds analysis with that of individual items in both internal laws and in choice of law systems. The draft EC Bankruptcy Convention, which is discussed in section D below, may well have foundered partly because of concerns regarding foreign funds analysis. Such concerns suggest that property is better analysed in general in international private law in terms of individual items as analysis in such terms is likely to be more effective than in terms of funds.

A preference at the level of choice of law for analysis in terms of individual items of property rather than funds need not eliminate funds, nor prevent the attainment of some of the aims of funds analysis. Thus funds may easily operate territorially, within a single legal system. If funds might operate on a territorial basis, it may then be possible to combine territorial funds in a pragmatic, considered and constructive way, to build increasingly unified and universal funds in an indirect manner. Such an indirect and co-operative approach is likely to achieve a far more unified and universal fund than can be achieved by each legal system making direct attempts to impose its own extra-territorial funds upon other unwilling legal systems. In this case at least the sum of the parts is probably greater than the whole.

It would appear that such a system operates relatively effectively in relation to the administration of estates on death. Further types of funds may be amenable to, or benefit from, such analysis. It is suggested in section D below that such a system could operate effectively as a basic framework for international insolvency funds. It is further suggested in section C below that such a system already exists, to a degree, in the Scots international private law of insolvency, with certain foreign insolvency processes being permitted, to a certain extent, to include Scots assets effectively in the funds of such processes, using reasoning broadly similar to the permissive renvoi outlined in Chapter 3,C,2) above.

3) Administration and representation.

Analysis by means of funds and individual items requires to be integrated in ranking situations or where other disputes arise. In such situations one person derives a claim directly from an ideal analysis of an item of property as a
part of a fund while another derives a claim from an individual analysis of the property or refuses to recognise the claim of the first person.

It is suggested that the concept of administration is central to this integration process. Persons who derive their claim to an individual item of property directly from the analysis of that item as part of a fund may be said to be engaged in the administration of the fund. Each administrative act then relates the funds analysis of the item of property to its analysis as an individual item. Thus in Scots law employees, agents, directors, liquidators, receivers, trustees in sequestration, judicial factors, executors, trustees and guardians may, for example, be said to be administrators in this sense. In an international context it is important to remember that different legal systems provide for types of such administrators unknown to other legal systems.

Representation is an important factor in most types of administration. Representation arises in this context in two senses. Firstly, an administrator often derives the justification for his administrative acts in relation to the fund from another person, for example its owner. Secondly, the administrator normally acts in relation to a fund for the benefit of another person. Thus, in a simplified sense, under Scots law a liquidator administers the fund of a company's undertaking as the representative of the company, having been appointed to that representative post by a court or the company. The liquidator also represents the creditors and shareholders of the company, in the sense that his administration takes place for their benefit. It will be seen in section C below that, as in relation to other funds, the recognition of administrators of insolvency funds and their representative capacities play significant roles in the endeavours of Scots international private law to facilitate the practical effects of unified and universal insolvency funds.
B. General Approaches to International Insolvency

1) Objectives, Policies and Methods of Insolvency Law

Insolvency law is complex within a single legal system. There are many reasons for this, among which are the practical difficulties in attaining its objectives and the breadth, diversity and potential conflict of these objectives. The policies applied to attain the objectives of insolvency law are many, varied, varying and sometimes conflicting. The technical methods used to apply the policies and attain the objectives of insolvency law are complex and similarly numerous and diverse, largely as a result of the necessity to apply such policies and attain such objectives across and through the existing technical structure of other legal fields in a given legal system. The complexity of the methods and the diversity and conflict of the policies and objectives of insolvency law are magnified in an international context, magnifying attendant problems.

There is a broad agreement about the main objectives of insolvency law. Few would disagree that one major objective is the protection of a person's creditors in the event of his insolvency by treating those creditors alike. Similarly few would disagree that the maintenance or restoration of an insolvent person in or to beneficial economic activity is an important objective of insolvency law. However, even these broad agreed objectives are restricted by other objectives of insolvency and other laws. Thus security law, among other objectives, aims to support a stable credit economy, and so secured and other preferred creditors are often treated differently from remaining creditors in the event of insolvency. Similarly, the restriction of the economic activity of the reckless and unscrupulous may be seen as an important objective of insolvency law, reflected, for example, in the disqualification of individuals from being directors of corporations after their actions as directors have contributed to the insolvency of a corporation.

Other economic and social objectives of insolvency law are more controversial. Thus, for example, in some legal systems the maintenance of employment or the punishment of the insolvent debtor are seen as legitimate objectives of insolvency law. Other legal systems disagree.

Clearly insolvency law also pursues further objectives leading to varying degrees of controversy. These need not be explored here at length, and it should merely be noted that in spite of apparent agreement as to the major objectives of insolvency law, differing views exist as to the priority to be ascribed to such objectives, particularly when the objectives in question may not be wholly consistent.

The policies adopted in relation to the objectives of insolvency law also fall largely into broad categories in respect of which there is broad agreement. Thus, for example, it is uncontroversial that insolvency laws generally deprive the insolvent person of the right to manage his property during his insolvency and strike down an insolvent person's dealings with his property prior to insolvency when such dealings prejudice the position of his creditors. However legal systems vary considerably in relation to the precise scope of application of these policies and their relation to other legal policies, such as, for example, the protection of persons acquiring property in good faith.
Again, some insolvency policies are controversial, such as those according to government agencies or 'ordinary' creditors a degree of preference over secured creditors, or those preventing or limiting the enforcement of securities by creditors in certain circumstances. Again, different views exist as to policy priorities, particularly when different policies may to some degree conflict.

The technical methods by which insolvency policies are put into effect vary greatly, although yet again there are groups of techniques in frequent use. One method by which to deprive an insolvent person of the power to manage his property is to transfer ownership thereof to a trustworthy third party. Another technical means to the same end is to deprive an insolvent person of the capacity to deal with his property and grant the management thereof to a trustworthy third party. Each method has its advantages and disadvantages and its technical consequences. Thus, for example, it is usually technically simpler, and similarly effective, to replace the directors of a corporation than it is to transfer all of the corporate property to a third party. The technical consequences of each method are not identical.

Similarly it is possible to strike at transactions prejudicial to creditors prior to technical insolvency by means of retrospective rules subject to exceptions in favour of persons acting in good faith or by means of narrower rules annulling transactions carried out in bad faith or on other bases. Again the effects of each are similar but the technical consequences are not identical. Several other technical variations will become apparent throughout the rest of this chapter.

2) Theories and methods adopted in international insolvency

A central policy of most of the internal insolvency laws of most legal systems is the establishment of a single coherent process of management or collection and distribution of all of an insolvent person's assets involving all of that insolvent person's creditors. It is not surprising that most legal systems also regard this policy as important in an international context. In an international context this policy is usually expressed as the 'unity' and 'universality' of a given insolvency process.

An international insolvency has unity if only one process is operating at any one time in respect of a given insolvency fund and an insolvency process is universal if it takes effect in respect of all of that insolvent fund's assets and creditors and in all legal systems. These concepts are closely related but not synonymous. Controversy has raged for a long time over the application of the concepts of unified and universal international insolvency as opposed to those of multiple territorial insolencies. This controversy may be summarised tritely by observing that a unified and universal international insolvency is a generally agreed policy which is generally agreed to be incapable of being put into effect.

There are both theoretical and practical difficulties in achieving true unity and universality in international insolvency. The theoretical difficulties lie largely in the interaction of a truly unified and universal insolvency process deriving from one legal system with the internal laws of other legal systems and with various choice of law rules, and indeed in establishing the ambit of the processes to which it is intended to accord universal effect. The practical difficulties lie largely in an unwillingness among states to co-operate fully in
the establishment of unified and universal processes and in establishing fair processes in the light of problems of distance, time and knowledge.

Thus, for example, the rights and powers of an insolvency administrator under the laws of the legal system appointing him frequently come into conflict with those of third parties dealing with the insolvent person's property situated in the territory of a different legal system. Similarly laws concerning economic regulation, such as special insurance or financial legislation, can give rise to difficulties in permitting full unity and universality of the insolvency of bodies falling within their scope. Further acute problems exist in relation to the restriction of the insolvency of a given person to a given autonomous business or the extension thereof to connected persons and businesses and in relation to the interpretation of generally accepted connecting factors, such as commercial domicile. Some of these and other difficulties are discussed in more detail below.

Various techniques and theories are used to combat these difficulties. One is the channelling of jurisdiction to institute insolvency processes to a single legal system, usually the commercial domicile of the insolvent person. If such processes are then universally 'recognised' and other legal systems prevent the institution of competing insolvency processes some degree of unity and universality is then achieved. One theoretical route to such recognition is to characterise a court decree instituting the insolvency process in question, if one exists, as a judgement of a competent court and accordingly to 'recognise' and 'enforce' the insolvency process; another is to apply the judgement or law of that legal system as a matter of choice of law.

Characterisation of the major effects of insolvency in terms of status or commercial status facilitates both the recognition and enforcement of the 'judgements' of the courts of the domicile or commercial domicile and the application of the laws of these legal systems in terms of a status defined choice of law rule. In a similar manner the characterisation of insolvency administrators as representatives of the insolvent person, and to a lesser extent as representatives of the insolvent fund or the insolvent person's creditors, facilitates the recognition and enforcement of judgements and the application of the laws of these personal legal systems.

An important alternative approach is to characterise the major effects of insolvency in terms of property transfer and to recognise, perhaps more as a matter of choice of law than of the recognition and enforcement of judgements, 'universal' transfers under the law of the domicile or commercial domicile.

However, major problems beset the attainment of truly unified and universal insolvency processes by the use of these and other techniques and theories. Not least of these is the fact that a single legal system may upset the whole unified and universal structure by adhering to theories of territoriality in insolvency. A very similar effect arises when one legal system places a different interpretation from other legal systems upon an agreed connecting factor, such as commercial domicile, and consequently ignores the effects claimed for a foreign insolvency process through the techniques and theories discussed above. In addition, anomalies can easily arise from adherence by different legal systems to different theoretical routes to unified and universal insolvencies.
Each individual theory is also subject to its own particular problems and limitations. Thus, for example, judgements theories are inappropriate for insolvency processes which do not involve a court and can give rise to unacceptable and inappropriate delays in the effectiveness of a foreign insolvency process, particularly when a detailed exequatur procedure requires to be followed\(^3\). Universal transfer theories are inappropriate when an insolvency process does not transfer assets and are in themselves theoretically questionable as they are often based upon the now untenable doctrine that *mobilia sequuntur personam*. Status theories, in turn, largely fail to correspond to current insolvency theory, as the role of status in insolvency is no longer predominant, if it ever was.

Accordingly, multiple insolvency processes are not uncommon and it is not unknown for each such process to claim unified and universal effect for itself. Similarly, it is not impossible for assets or creditors within a given legal system to be excluded entirely from all insolvency processes. Some legal systems have therefore adopted pragmatic approaches to the attainment of effective unity and universality of insolvency processes, or indeed directly pursued more general substantive objectives of insolvency law, such as the equality of creditors\(^4\).

Thus, where jurisdiction is effective, some legal systems attempt to prevent creditors from participating in competing insolvency processes or force such creditors to communicate the benefit of such participation to their own process. Some legal systems also provide auxiliary insolvency jurisdiction to assist in the recovery of assets and the payment of creditors under a foreign process considered to be entitled to universal effect, or, alternatively or in addition, discretionary jurisdiction which may be invoked for or against any given foreign process.

It must however be observed that conventional choice of law techniques are not always sufficient to resolve the problems of international insolvencies, as shown by the negotiated settlements in the *Herstatt Bank* case\(^5\). Subtler integration of the different legal systems involved is necessary. The most effective way to establish a unified and universal insolvency process to be through international conventions or, where possible, through federal or similar multi-system legislation and other uniform laws\(^6\). However, even these do not provide all of the solutions required.

3. Recurring problems in international insolvency

International insolvencies give rise to innumerable problems and it would clearly be impossible to discuss them all. There are however a number which are of particular theoretical or practical importance in relation to property issues, and it may be appropriate to outline some of these prior to turning to the relevant caselaw.

One of the most intractable problems concerns what is often termed the 'suspect period'. Most legal systems contain a number of devices which are designed, broadly, to prevent or nullify transactions or other actions prior to the formal commencement of an insolvency process which prejudice that process in some way. Thus Scots law provides that diligence commenced within 60 days of sequestration or liquidation is ineffective to secure a preference for a creditor using such diligence and provides for the nullification of unfair preferences and gratuitous
alienations received prior to the commencement of many insolvency processes. Other legal systems provide analogous devices. The policies underlying these devices are relatively clear and shared by different legal systems. There is however much variation in the technical methods adopted and the detailed rules applied. Thus, for example, the length of the period varies, its commencement may be determined by a court or not otherwise determined in advance, the defences available to third parties unrelated to the insolvent person or acting in good faith vary in nature and degree, the insolvency process in question may or may not be given strictly retrospective effect and the existence of a formal insolvency process may not even be necessary.

What is clear is that legal systems are often unwilling to give effect within their own territory to foreign rules on suspect periods and may even refuse to invoke their own to benefit a foreign insolvency process. This significantly distorts the unity and universality of insolvency processes and would seem to be based partly upon an unwillingness of legal systems to disturb third party certainty in what is seen as a retrospective manner when that certainty is itself largely based upon choice of law rules outwith insolvency.

A second problem concerns the ranking of claims in an insolvency process. Despite frequent simplistic characterisation of ranking as procedural, there can be no doubt that ranking is of paramount substance to a creditor making a claim in an insolvency process. It is clear that few legal systems accept that insolvency ranking should be based solely upon the criteria of a single insolvency system, however unified and universal it may be in other respects. Distortion arises, quite apart from anything else, from the fact that taxation debts often comprise a large part of the preferred claims in an insolvency process. Fiscal jealousy ensures that local fiscal authorities take from local assets, and the outmoded exclusion of foreign revenue laws ensures the exclusion of foreign fiscal debts.

Beyond this particular problem are those of creditors secured over assets or otherwise preferred and those deferred. A major purpose of asset security is to provide a creditor with a degree of certainty that he will be repaid, and therefore preferred in insolvency if, how, where and when that may occur. This certainty could perhaps be based upon the application of the law of the debtor's commercial domicile, if it were static, but is more satisfactorily based upon the application of the appropriate choice of law rule relating to property rights, as this provides coherence in property law and a relatively straightforward basis upon which to rank several rights relating to the same asset.

This manner of ranking asset securities is quite well established and in itself distorts unified and universal insolvency. It also gives rise to difficulties of integration with rights which rank on a different basis, such as employees' preferred rights or a preferred 'unsecured' fund, and which may or may not rank prior to asset securities.

Several further problems arise which derive from policy differences between legal systems. Thus several legal systems provide insolvency processes, or certain insolvency processes, only in respect of persons in certain categories, such as traders or corporations, or restrict such processes to the assets and creditors of distinct businesses of a given person, whether or not only to those
parts of such a business within the legal system in question, or extend such processes to directors and other persons having separate personality from the insolvent person. Similarly, legal systems vary as to the availability or conditions attached to legal discharge from debts without full payment. Some of these and further problems are also considered below.

The general historical trend in the Scots international private law of insolvency has been from apparent territoriality to apparent unity and universality. Earlier is quite as clear as at any appear. The present approach, quite briefly, seems to be no different jurisdiction to a court of any standing whatever of the insolvent person and give a transfer of possessions declared by a bankrupt court of that system prospective effect within Scotland. Other matters are not quite so straightforward.

12Development of the general Scots approach early cases and Struthers v Reed

Similarly territorial cases Mark of early Scots cases appear to reflect a strictly territorial approach to insolvency. Thus in Thorold v Forrest v the insolvency of Forrest & Nisbet on 1763 A 1764 for £35 & 450. It was held that Scots creditors holding both English and Scottish debts, who had not made any claims in the English realization of bankruptcy against their debtors would stand by on the bankruptcy in Scotland after assignment had been appointed under that English realization of bankruptcy, and that such assignment would be preferred to the English assignments. The bankrupts in Forrest appear to have been Scottish and English partners of an English firm, who were probably domiciled in England. There is also a strong argument that the debts asserted in Forrest were English debts.

Similar propositions appear to have been upheld in Forrest v Harris v Thorold 1767 for £256 and 1861, and in Glenfield v The Other Creditors of Abercrombie 1767 for £210 an assessment of a bankrupt's property in Scotland was preferred to assignees under an English realization of bankruptcy.

The inference from these cases may be, as the treatise argued in Forrest, that a foreign bankruptcy had little or no effect in Scotland, and perhaps further that a Scotia sequestration would be bothump and attractive while a foreign bankruptcy was in advances, and in any event relate only to property in Scotland. The latter point may be inferred from the sequestration of 'the whole personal estate ... without the jurisdiction of the county in Code's Planter 1779 for £210 of an Englishman where only that with Scotland was the presence of property there and not had constituted an Act of bankruptcy in England.

Clearly these general inferences are untenable in view of later cases, and the Thorold cases in particular were severely criticized in the seminal case of Struthers v Reid 1 July 1873 PG. However, on closer examination these cases may not be so territorial as they seem.
C. Scots Rules

Scots international private law of insolvency is relatively poorly developed, particularly outwith the field of traditional bankruptcy of individuals. There is a considerable degree of theoretical incoherence in the development which has occurred, resting as it does on many different theories and techniques and leading in turn to a somewhat pragmatic approach to a number of thorny theoretical problems. The result is a rather confused and uncertain system which does not reflect completely either unity and universality or multiplicity and territoriality of insolvency but contains elements of both. This system is nevertheless effective to a degree.

The general historical trend in the Scots international private law of insolvency has been from apparent territoriality to apparent unity and universality. Neither is quite so clear as it may appear. The present approach, quite tritely, seems to be to channel jurisdiction to a court of any 'trading domicile' of the insolvent person and give a transfer of moveables declared by a bankruptcy court of that system prospective effect within Scotland. Other matters are not quite so straightforward.

1) Development of the general Scots approach: early cases and Strother v Read

a) Early territorial cases. A number of early Scots cases appear to reflect a strictly territorial approach to insolvency. Thus in Thorold v Forrest and Sinclair 1762 & 1764 Mor 753 & 4561 it was held that Scots creditors holding both English and Scottish debts, who had not made any claim in an English commission of bankruptcy against their debtors, could arrest debts owed to the bankrupts in Scotland after assignees had been appointed under that English commission of bankruptcy, and that such arresters would be preferred to the English assignees. The bankrupts in Forrest appear to have been Scottish and English partners of an English firm, who were probably domiciled in England. There is also a strong argument that the debts arrested in Forrest were 'English' debts.

Similar propositions appear to have been upheld in Pewtrees and Roberts v Thorold 1747 Mor 756 and 4561, and in Ogilvie v The Other Creditors of Aberdein 1747 Mor 4556 an arrester of a bankrupt's property in Scotland was preferred to assignees under an English commission of bankruptcy.

The inference from these cases may be, as the arresters argued in Forrest, that a foreign bankruptcy had little or no effect in Scotland, and perhaps further that a Scots sequestration would be both competent and effective while a foreign bankruptcy was in existence, and in any event relate only to property in Scotland. The latter point may be inferred from the sequestration of 'the whole personal estate .... situate within the jurisdiction of the court' in Cole v Flammare 1772 Mor 4820 of an Englishman whose only link with Scotland was the presence of property there and who had committed an act of bankruptcy in England.

Clearly these general inferences are untenable in view of later cases, and the Thorold cases in particular were severely criticised in the seminal case of Strother v Read 1 July 1803 FC. However, on closer examination these cases may not be as territorial as they seem.
The precision of the longer report of the Forrest case is criticised by its editor. The shorter report states inscrutably that 'such of the creditor-arresters against whose diligence no objections were made, were preferable to the assignees'. The objections referred to may have been to the technical validity of the arrestments themselves under Scots law, but the possibility remains that the assignees chose not to object to some of the arrestments, perhaps those prior to the vesting of the estate in the English assignees, and were in fact preferred to those to which they objected. This argument is supported in part by the English assignees' reference in the subsequent Pewtrees case to their postponement in the Forrest case 'to those creditors who had used valid arrestments prior to the competition' and their preference 'to arrestments executed after it', and the indication in Forrest that most of the arrestments took place between the dates of the commission and the vesting of the estate in the English assignees.

Such analysis is however somewhat conjectural and the reference to the 'competition' may perhaps have been to an arrestment of the fund in medio by the English assignees, or even their participation in the forthcoming in Forrest. Indeed Pewtrees may indicate that an even later arrestment was preferable to the claim of the English assignees. On the whole the Thorold cases remain territorial in outlook.

The Forrest case does however contain several important strands of theory reflected in other cases. The first is the clear finding that the English assignees had 'title to compear and compete' rather than being completely ignored and a second is the suggestion in the judgement that the effect of a foreign bankruptcy on creditors lodging claims therein could be analysed by way of the concept of personal bar. A third is the preference shown by the English assignees for the analogy of a bankruptcy transfer to a voluntary transfer over their subsidiary argument based upon the maxim mobilia sequuntur personam and their further argument in favour of the application of 'the law in foro contractus'. It is also notable that the parties argued whether or not the English commission should be allowed to take effect in Scotland as a matter of comity, the arresters suggesting a requirement of reciprocity. These points were taken up in later cases as discussed below.

On closer examination the Aberdeen case too is not as territorial as it appears at first sight. Aberdeen is said to have been a Scotsman, resident in England and was probably trading there. His domicile is not clear. On the basis of an act of bankruptcy in England a commission of bankruptcy was taken out against him in England, with which he co-operated, and assignees were appointed thereunder. Ogilvie, a creditor under an 'English' debt, arrested some of Aberdeen's effects in Scotland and attempted in vain to prove in the English bankruptcy with the benefit of his arrestment. Thereafter the English assignees opposed Ogilvie's forthcoming in Scotland on the basis that under English law, applicable as a result of Aberdeen's residence and the maxim mobilia sequuntur personam, the arrestment fell by reason of the commission. The arrestment was preferred as 'moveables in Scotland could only be attached by diligence issuing out of the courts of Scotland, and that therefore the preference could be judged only by the law of Scotland'.

While there can be little doubt that Scots law, as the lex fori or lex situs was considered to play a major role in the ranking of rights and that retrospective effect was not to be given in Scotland to this English bankruptcy, Aberdeen does
not require no effect at all to be given in Scotland to an English bankruptcy. Given the strong inference that the arrestment occurred prior to the commission, Aberdein may not conflict with later cases allowing an English bankruptcy prospective effect as a transfer of moveables in Scotland, to be ranked with other rights relating to a given item of property situated in Scotland by Scots law. Furthermore, although less convincingly, Aberdein may not even prevent a domiciliary bankruptcy taking full retrospective effect in Scotland. However, despite these possible analyses, the approach taken in Aberdein seems basically territorial.

The purpose of the sequestration sought in the Flammare case was to strike down diligence preferences and thereby equalise creditors' claims. The major issue was jurisdictional competence, the only link with Scotland being the presence of assets in Scotland. The 1772 Bankruptcy Act (12 Geo.III c.72) was given a broad interpretation in relation to jurisdiction but, as indicated above, limited in the interlocutor only to assets in Scotland. Broad jurisdiction coupled to limited territorial effect is not unknown in other systems and on the face of it infers a territorial approach to insolvency.

This does not however eliminate the possibility that jurisdiction based on some other connecting factor, such as trading domicile, could have led to a unified and universal process nor that jurisdiction required to be exercised on the basis of presence of assets or any other basis had an insolvency been commenced elsewhere, as perhaps in a trading domicile. In Flammare an act of bankruptcy had been committed in England, but a commission does not seem to have been taken out. Although the report and the 1772 Act are not clear, this point may have been significant. In any event this particular jurisdictional route to territorial insolvency was blocked by the 1793 Bankruptcy Act (33 Geo.III c.74), interpreted in Ewing's Creditors v Douglas' Attorney 6 February 1802 FC and Keir v Dickey 27 May 1802 FC to exclude Scots jurisdiction to sequestrate Scotsmen trading only abroad.
b) *Ius ad rem* cases. The finding in *Thorold v Forrest & Sinclair* that the English assignees in that case had 'title to compear and compete' relative to Scots property was developed in several later cases to the stage where it may be said that just prior to *Strother v Read* 1 July 1803 FC appropriate foreign bankruptcy assignees were probably considered by the Scots courts to have a personal *Ius ad rem* to certain Scots assets by virtue of a purported transfer thereof under the foreign process in question.

Thus in *Glover v Vasie* 1776 Mor 4562, App. 'Foreign' No.3 assignees under an English commission of bankruptcy against a firm of Leeds merchants were said to 'have a right of action entitling them to recover the bankrupt's effects in Scotland, and to compete for the same'. An English creditor, claiming under an English debt, had arrested some of the bankrupt's effects in Scotland.

The arrester argued that the English commission could 'have no operation in Scotland', partly because of its statutory nature, its Chancery origins and difficulties relative to land' and partly because Scots may otherwise have been encouraged to obtain their bankruptcy in England and thereby prejudice Scots creditors. The English assignees felt such an approach 'would be exceedingly hurtful to the mutual intercourse between the inhabitants of the two countries', considering they had a 'right of action in this country' with regard to moveables 'ex comitate'. While the English assignees made reference to execution of deeds abroad in support of their view, it is probable that this reference was illustrative of conscious commercial comity rather than to a theory of analogy of bankruptcy transfers to voluntary transfers.

The English assignees were preferred to the arrester, as it was found that 'having already drawn a dividend ... under the said commission, [iel is barred from competing with the assignees'. This aspect of *Glover v Vasie* is discussed further in section 5).e) below.

It is interesting that the relative timings of the English assignment and the Scots arrestment do not appear to have been a cause of contention in *Glover v Vasie*. While the order of events may have been rendered irrelevant by the barring of the arrester through his participation in the English process, it is suggested that the lack of such discussion and the nature of the arguments made infers that the English assignees were accorded a personal *Ius ad rem*, which they could endeavour to make real in competition with creditors of the bankrupt. It is further suggested that the English assignees' arguments of commercial comity were upheld to this effect. The facts do not, however, permit the delimitation of this commercial comity to be inferred.

*Scot v Leslie* 1787 Mor 4562 contains similar *Ius ad rem* analysis. In this case an English bankruptcy assignee appointed to the estate of a London merchant obtained decree in Scotland against a Scots debtor of the bankrupt merchant. The debt was then arrested by a creditor of the bankrupt, prior to extract of the English assignee's decree. The English assignee was preferred to the arrester.

The arrester accepted, on the basis of the *Forrest* case, that 'the English assignment gives a *Ius ad rem*, or personal claim to the effect of suing for recovery', that in the absence of Scots creditors 'there can be no harm in allowing the assignee to carry off the effects; nor in any case would an action of repetition lie against him, or against the debtors, were payment to be *bona*
fide made' and that a bankruptcy assignee 'may arrest or adjudge, in order more effectually to compete with Scotch creditors'. The arrester continued to observe that 'if any other competitor steps in while the subjects are in medio, a competition must ensue; the merits of which can only be determined according to the rules of preference which are known and established in the law of Scotland'. The English assignee appeared in broad agreement with this approach, but argued further that 'when the ius ad rem so given ... was by the decree ... in the strongest manner intimated to the debtor, the bankrupt being thereby completely denuded, nothing was left to be attached by the competing party'. Although the judgements are not reported, it would appear that the argument of the English assignee was upheld and that he was considered to have a personal ius ad rem to Scots assets which he could perfect as a real ius in re by taking appropriate action under Scots law.

The theoretical justification for the English assignee's ius ad rem was not clearly elaborated, although analogies were drawn to the equivalent position regarding executries. The English assignee distinguished English letters of administration on the basis that separate confirmation was necessary in Scotland to effect a transfer. While distinctions may be drawn between executries and insolvency processes on whether or not they purport to effect transfers of foreign assets or regarding the effects to be allowed regarding Scots assets to purported foreign transfers thereof under one or the other, it seems probable that at least the English assignee saw the bankruptcy as analogous to a voluntary transfer by the bankrupt. Again, it was not made clear on what basis the bankruptcy transfers of given legal systems would be allowed effect in Scotland.

The rights of English bankruptcy assignees relative to Scots property may also have been analysed as personal iures ad rem in Davidson v Fraser 1798 Mor 4564. In this case attorneys for an English bankrupt obtained decree in an action in Scotland against one of his debtors and adjudged that debtor's Scots heritage. In a ranking and sale of that heritage the validity of the adjudication was challenged, on the ground that the bankrupt had been divested by the English bankruptcy of the debt on which the adjudication had been led.

The adjudication was upheld on appeal, the court observing that 'it is not very long since assignees under an English commission of bankruptcy were allowed to sue or insist in diligence in Scotland at all; and it is still clear law, that the creditors of the bankrupt may obtain a preference over them, by arresting or adjudging, which proves, that in questions occurring here, a radical right is held to remain with the bankrupt'. While some controversy surrounds the concept of a 'radical right' in Scots law, it is probable that in this context the court considered the bankrupt to have remained owner of the debt in question and the English assignees to have obtained a personal ius ad rem, on which they could compete with the bankrupt's creditors relative thereto.

It was argued, quite plausibly, that the debt on which the adjudication had been led was English and, on the basis of the Captain Wilson case discussed in section c) below, that 'every question with regard to its constitution, transmission or extinction, must be determined by the law of England'. These arguments do not appear to have been adequately addressed by either the adjudgers or the court. While it is possible that the court was unwilling to allow the English bankruptcy effect in re relative even to 'English' assets, it is
suggested that the debt in question was considered 'Scots', and thus a debt relative to which the English assignees had obtained merely a personal ius ad rem by virtue of the English bankruptcy. It would seem that the approach of the Scots courts to foreign bankruptcies was becoming clearer through the decisions in Glover v Vasie, Scot v Leslie and Davidson v Fraser, to the stage where appropriate foreign bankruptcy assignees were considered to have a personal ius ad rem to at least Scots moveables, which could be perfected as a ius in re in accordance with Scots law. In The Royal Bank of Scotland v The Assignees of Stein, Smith and Company 20 Jan 1813 FC (at p.79) Lord Meadowbank, who acted as counsel in Scot v Leslie, indicated that prior to Strother v Read court authority could make a foreign bankruptcy assignee's ius ad rem fully effective in Scotland. It is interesting that prior to Strother v Read Scots law may thus have been developing a system analogous to confirmation in executories or the exequatur system developed in several continental European systems, whereby a foreign bankruptcy was 'perfected' by a Scots court in relation to Scots assets. The reasoning underlying all of these developments is not, however, clear, and the criteria by which a given foreign bankruptcy assignee would be accorded a ius ad rem certainly became no clearer through these 'ius ad rem' cases.
c) Captain Wilson. The Captain Wilson case illustrates well the general controversy surrounding universal and territorial insolvency prior to Strother v Read. It was indeed interesting that many of the controversies were quite fully discussed therein prior to many of the cases discussed above being decided.

The Captain Wilson case contains a number of strands of theory and, in particular, some quite strong indications that according broad effect to a foreign insolvency process on the grounds of comity can only take place if reciprocal effect is accorded to Scots processes by that system. Clearly there was much cynicism about the prospects of obtaining effect in England for a Scots cession by adopting too altruistic a stance towards English processes in Scotland!

The facts of the case do not permit very firm conclusions to be drawn. Captain Wilson was a native Scotsman who resided and traded as a banker in London. His personal domicile is not clear. On 15th February 1751 he stopped payment and shortly thereafter a number of arrestments were made in Scotland in the hands of a number of his own debtors. Shortly prior to 15th February 1751 some of the bonds later arrested were assigned in England to the Sun Fire Office, with no formal intimation being made. In November of that year a commission of bankruptcy was issued in England against Captain Wilson which found him to have been bankrupt from the date he stopped payment, and in March 1752 the commissioners executed an assignment of the bankrupt's property under the commission. The property arrested was largely English and Irish bonds, some of which were arrested in the hands of persons having fairly tenuous links with Scotland. Some Scots bonds may also have been arrested, although these are not fully discussed in the reports. The arresters obtained decree in at least one action of forthcoming prior to the commission. They then brought actions of multipleshooting, in which the assignees and the Sun Fire Office compared and claimed preferences.

The major issue in the case was the validity of some of the arrestments themselves under Scots law, standing tenuous jurisdiction therefor against both Captain Wilson and some of the arrestees. While this issue was prior and not strictly relevant to the insolvency issue, as a matter of the general international private law of incorporeal property it is interesting to note that, irrespective of the jurisdictional problems, at least Lord President Craigie was unwilling to accord validity to arrestments in Scotland of English and Irish bonds, considering diligence under English and Irish law more appropriate. The further vexed issues were raised of the effect of an arrestment prior to forthcoming in Scots law and the ranking of such an arrestment with a foreign insolvency process. These issues were not, however, fully resolved and, in particular, the assumption generally seems to have been made that such an arrestment ranked similarly to one in relation to which forthcoming had been obtained. On the assumption that at least some of the arrestments were valid, the effect of the English bankruptcy was considered, giving rise to a useful theoretical discussion of international insolvency. The Inner House appears to have adopted the rather unusual procedure of providing counsel with preliminary opinions when the case was reported to them, prior to a full hearing in presence.

The arguments for and against the application of the maxim mobilia sequuntur personam were fully canvassed at all stages, analogies being drawn to the laws of succession and matrimonial property and difficulties being noted in relation to the changes arising in the creditor's domicile resulting from the transfer of
a debt. Kilkerran reports (p.280) that at the preliminary stage 'the Lords were in their reasoning generally agreed upon the general point, that the arrestments in the hands of Scotsmen residing in Scotland, were preferable to the assignees from the commission under the statute of Bankruptcy, upon this ground, that the laws of the country where res est sita are, without distinction between mobilia and immobilia, the laws by which the right thereto is to be determined; and that the notion that mobilia non habent sequelam was an abstract notion not founded in nature nor agreeable to reason'.

This trenchant rejection of the mobilia maxim may accordingly be considered an equally trenchant affirmation of strict territorial theory, particularly since the Aberdein case was an important influence on this view. The arresters attempted to argue this point®. However, Kilkerran reports (p.281) Lord President Craigie's further comment that 'the legal assignation, by the commission of bankruptcy, was, nevertheless, effective to produce action; and if the arrestments had been posterior to the commission of bankruptcy, he should have doubted their preference', and appears (p.283) to agree with this approach.

The first part of the Lord President's comment is quite consistent with the ius ad rem approach to foreign bankruptcy advocated in the cases discussed in section b) above, but the second appears to accord greater rights to the assignees, apparently from the date of the commission. This view may be supported by his Lordship's rejection, immediately thereafter, of any relation back outwith England of the assignment or commission to the date of the act of bankruptcy•.

The assignees were, however, ultimately preferred to the arresters, at least with regard to the English and Irish bonds. Kilkerran argues forcefully (pp.283-286) that in reaching this conclusion the bench was not only wrong, but had also departed from its earlier views. In so arguing, Kilkerran sets out (pp.284-286) a quite early vested rights argument, based largely on Aberdein and the lex situs. His argument is quite strong, but fails adequately to address the lex situs of the bonds in question, seeming to assume the bonds to be situated in Scotland as they had been arrested there. Monboddo went further and doubted (p.824) that debts had a situs other than any place where jurisdiction lay against a debtor.

While Monboddo's and Kilkerran's contemporary comments® must obviously be of great force, it may be suggested nevertheless that most of their Lordships did not depart materially from their earlier views on the general point noted above, but decided the case on the specific narrower ground that the bonds arrested were English and that the arrestments were therefore either null or® defeated by the relation back of the English bankruptcy, in either event as a result of the application of English law as the lex situs, or what would now perhaps be the proper law, of the bonds in question. The Sun Fire Office, in effect, adopted a similar proper law argument••.

Thus Monboddo reports (pp.822-823) Lord President Craigie as remarking that 'the debts ... being contracted in England, the deeds executed after the English form, by persons then in England, and in favour of a person residing in England, and the place of payment, though not expressed, supposed to be in England, where the debts were contracted ... he considered these debts as English debts, and, particularly, he had laid much weight upon the place of payment, which, he said, gave a situm to the nomen'' and made it be ascribed to that place where it is
payable ...; for which reason, he said, he would consider any diligence or execution upon that debt in the place where it was payable, as preferable to any diligence done upon it in any other place: And, for these reasons, he was of opinion that the statute of bankruptcy gave a preference in this particular case to the assignees', proceeding thereafter to discuss the jurisdictional problems of some of the arrestments under Scots law and concluding that if 'he would have thought the arrestments not void, though he would have still thought the assignation under the commission of bankruptcy preferable to them'. It is of note that the case was unanimously referred to a hearing before the Lord Ordinary on the issue of whether or not the debts arrested were English.

Despite Kilkerran's doubts, the Captain Wilson case would, if anything, appear the more territorial in approach as a result of these remarks by the Lord President, as the effects of diligence and insolvency were in terms referred to the lex situs of the property in medic, at least in the event of competition.

However, Lord Prestongrange and Lord Kames may have adopted a slightly different line of reasoning in relation to the English bankruptcy, while agreeing that the relevant arrestments were void on jurisdictional grounds. Thus Monboddo indicates (p.823) that they 'preferred the English assignees upon this general ground - that the assignation under the commission of bankruptcy was a full and complete assignation, according to the forms of the law of England, vesting the subjects in the assignees from 15th [February] 1751; therefore all arrestments after that date were good for nothing, in the same manner as if there had been a voluntary assignation, of that date, executed according to the forms in England, or a decree of a judge in England adjudging these subjects to the assignees, which [they] thought would be effectual to give execution in Scotland'.

While it could be argued that these remarks apply only to property with an English lex situs, or only allow retrospective effect to an English bankruptcy in relation to such property, the inference remains that their Lordships considered any bankruptcy transfer, or, perhaps, a domiciliary bankruptcy transfer, to take effect in Scotland in accordance with its own law, and with or without retrospective effect, by analogy to a voluntary transfer by the bankrupt. Clearly the English assignees also favoured a broad analogy to consensual transfer by English law or the ius gentium, even if they did add a somewhat disingenuous subsidiary argument that the publication of the English judicial process constituted intimation for the purposes of Scots law. Equally clearly Monboddo objected strongly to their Lordships' general theory, and particularly to its more extreme inferences, commenting (p.824) that 'the commissioners ... derive their power and authority from the act of the law, and not from the deed of the bankrupt'.

At the end of the passage quoted above, Lords Prestongrange and Kames advert to a further theory favouring universal insolvency: recognition of judgements. However, they do not appear to have elaborated upon this theory to indicate which judgements should be recognised, or the precise manner or consequences of such recognition. It is possible that their Lordships merely viewed a judicial assignation as an example of a transfer by the lex loci actus. Monboddo (p.824) in particular noted scathingly that 'in consequence of this decision, the Lords would order execution here upon an English or French decreet, without any trial of the cause'. As obtaining recognition and execution of foreign decrees was generally rather more laborious in the 16th century than now, Monboddo's scepticism seems well founded.
It is difficult to reconcile the reasoning adopted in relation to the Irish bonds with that adopted in relation to the other bonds. The Lord President remained of the opinion that English bankruptcy law could have no retrospective effect outwith English territory. His Lordship accordingly placed his preference for the assignees solely on his view that the arrestments of the Irish bonds were null, as diligence could only take place, or effect a preference, in relation to such bonds under Irish law, as the lex situs. While influenced by the suggestion that Irish law was the lex situs because it was the lex loci solutionis, his Lordship seems to have been swayed largely by the residence of the arrestee, tying in with the main jurisdictional arguments relative to the arrestments.

Lords Coalston, Bankton and Auchinleck considered the Lord President's views on the law applicable to diligence both wrong and internally inconsistent, considering diligence competent where jurisdiction was available in relation to the property concerned. The Lord President's views on the law applicable to diligence are, however, difficult to ascertain from the reports. It would appear that his Lordship considered diligence potentially competent under systems of law other than the lex situs but that the effect of such diligence in a situation of competition would be determined by the lex situs. Thus if the arrestees had made payment of the sums due under the Irish bonds under a forthcoming, in the Lord President's view, Irish law would have determined whether or not the arrestees could have been forced to pay again to the assignees, and perhaps even the arresters' liability to reimburse the sums received to the assignees. As the sums due under the bonds remained unpaid, the competition could easily have been resolved by a reference to Irish law, under which the arrestments were assumed null. A further interesting inference from this line of argument seems to be that some effect in Ireland was accorded by the Lord President to the title to the Irish bonds of the English assignees. Unfortunately, neither the nature of this effect nor the influence of Irish law thereon was elaborated.

Lord Prestongrange and Lord Justice Clerk Erskine thought the arrestment of the Irish bonds valid, but preferred the assignees in relation to the property arrested on the basis of the mobilia maxim, treating these bonds as if they were situated in their creditor's English domicile. Presumably the assignees' preference derived from the retrospective effect of the English statute.

Lords Coalston, Bankton and Auchileck felt this view was contrary to the general view of the court when the case was reported, as it would lead to the defeat of arrestments of Scots bonds. This seems persuasive, unless the previous general view of the court was, as Kilkerran suggests (pp.283-284), abandoned, or originally reflected an insular unilateral choice of law rule favouring local arresters. Regrettably the full opinions of Lords Coalston, Bankton and Auchinleck are not reported and it is therefore difficult to ascertain the precise reasoning according to which a small majority ultimately preferred the English assignees in relation to the Irish bonds.

It is interesting that the analogy of a guardian to a lunatic was also pressed by the arresters as a reason to restrict the assignees' powers to England. This issue was avoided largely because separate reasons existed to favour the English assignees. It remains an important early example of an attempt to analyse this field from the point of view of representation, and it is interesting that in his commentary Kames considered the Chancellor's powers limited in general to the territory of England.
The position of the Sun Fire Office is also interesting. Their claim appears to have related only to the English bonds. They supported the arguments of the English bankruptcy assignees against the arresters, but do not seem to have attempted to argue directly that nothing had been arrested, nor indeed taken by the commission, as the bonds had been assigned to them before the arrestments and act of bankruptcy took place. This may have been because at that time an assignment under English law was not considered fully divestititive of the cedent. The position under Scots law does not appear to have been fully argued.

At the preliminary stage the arresters were preferred to the Sun Fire Office because of the non-divestititive nature of the assignment. This preference was reversed, mainly, it would seem, on the argument of the Sun Fire Office that 'the error in all this is the considering a nomen as having a real lying in Scotland, but there is no such thing; and on the same principle that the law of the country is the rule as to the constitution, and as to the defeasance of a nomen, so it must be the rule as to the assignment'. This appears to be an argument in favour of the application of what is now the proper law of a debt to the constitution and extinction thereof and the transfer of rights therein, by analogy to the lex situs of corporeal property.

This approach is taken one step further by the determination of the ultimate preference of the Sun Fire Office to the English bankruptcy assignees by English law, inferring that not only the constitution, extinction and transfer of rights in English bonds, but also the ranking of such rights, was to be referred to English law. In this context English law could be considered the law of the bankruptcy, but as this is not elaborated and emphasis is placed elsewhere in the case upon the law governing the bonds, ranking would seem to have been referred to English law as the law governing the bonds. This characterisation of ranking as a matter of substantive property rights is important.

The Captain Wilson case is, however, ultimately ambiguous. The mobilia sequuntur personam maxim was largely, but not completely, rejected, as was allowing retrospective effect to foreign insolvency processes in Scotland, and perhaps also in third legal systems. Some support was shown for the voluntary transfer analogy for bankruptcy, for allowing prospective effect to a foreign bankruptcy in Scotland and according such effect in relation to third legal systems, for giving greater effect in Scotland in relation to a bankruptcy declared by the lex situs of given property in relation to that property and for the reference of ranking issues to the lex situs as matters of substantive law.
d) Strother v Read. Strother v Read 1 July 1803 FC was undoubtedly a turning point in the development of the law in this field. It is a case much revered if not always perfectly interpreted in later decisions. In Strother a commission of bankruptcy was taken out in England against an English firm and thereafter the commissioners granted a general assignment thereunder. Prior to the commission a creditor had arrested some of the bankrupt's property in Glasgow and thereafter transferred the benefit thereof to the English assignees. After the assignment an English creditor arrested the same property and took decree in Scotland against the bankrupt. The arrestee raised a multipointing and the 'Court, by a great majority, and proceeding entirely on the general ground, preferred the assignees'.

It would seem that the arrestment prior to the English commission was irrelevant to the decision, and perhaps even null, as it rested on a warrant to imprison as in meditacione fugae without a prior arrestment to found jurisdiction. The 'general ground' would therefore seem to have been the existence of an English commission or the assignment thereunder prior to the arrestment in Scotland, the universal transfer thereby effected by the domiciliary court being allowed to take effect in Scotland from at least its date and at least in relation to moveables.

It was observed by their Lordships that in 'cases of bankrupt, the interests of commerce, as well as the regard which all nations ought to pay to the principles of general law, point out the necessity of adopting one uniform rule; and nothing can be more expedient than that we should follow out the principle already noticed of moveable effects being subject to the disposition of the law which binds the person of their owner. ... It is perfectly fair and equal, that when an English merchant, who happens to have personal effects here, becomes bankrupt, the law of his own country should be allowed to take his whole effects, wherever situated, into its custody, for the purpose of equal distribution among his creditors, according to the rules of English law, while we are permitted, in the case of a Scots bankruptcy, to do exactly the same thing in England. ... [a]ny the commission of bankruptcy and legal assignment, the property of the personal effects becomes changed, and the bankrupt completely divested by a transfer, which in this country we ought to receive as complete, and give it the same effect as we do to our own bankrupt law, or as they give in England to our present law.'

There are a number of important points which emerge from their Lordships' comments. The first is that the domiciliary law does not seem to have been allowed to take effect in Scotland on the basis of the maxim mobilia sequuntur personam, in the sense of deeming moveables to be situated at the domicile of their owner, despite quite strenuous arguments in favour of this reasoning for the English assignees. It is true that the 'principle already noticed' was deference to the forum domicili in intestate succession and legitim, where the mobilia maxim has a slightly more credible history but it is clear from the general level of their Lordships' observations and their failure specifically to endorse the simple mobilia theory that the analogy of beneficial succession was used merely to indicate the appropriateness of the domiciliary system. This point is important as a number of later dicta appear to approve the mobilia maxim on the authority of Strother.

The second point is the permissive manner in which an English domiciliary bankruptcy was 'allowed' to take effect in Scotland. There are two strands to
this point. One is the suggestion of a requirement of reciprocity: that English bankruptcies take effect in Scotland because Scots bankruptcies take effect in England. There are some traces of this reasoning in other cases, but it is probably no longer the law, if it ever was. The other is the idea that a transfer of property which is complete where it takes place may exceptionally be considered or deemed complete by a different lex situs. This concept is probably a development from the analysis in other cases, forcefully debated between counsel in Strother, of a transfer on bankruptcy as an extension of or an analogy to a consensual transfer which should be allowed as much effect as possible.

Related to the second point is the suggestion that 'the same effect' as 'our own bankrupt law' was to be given to the English bankruptcy, perhaps indicating that as the English domiciliary bankruptcy transferred property, the analogous transfer of a Scots sequestration should be deemed to occur, in terms of Scots law and from the date of the commission or assignation, with respect at least to moveable property in Scotland. The English assignees seemed to argue this point, considering 'legal' assignations in England to take effect in Scotland as did Scots 'legal' assignations, with English publicity supplying any residual need for intimation. It may however be rather stretching the point to draw such a conclusion from their Lordships' comments as they proceeded to state as an alternative effect that given in England to a Scots sequestration.

These points are reinforced by their Lordships' reference to the 'enlarged and liberal principle' of recent English cases, to the absence of a 'regular system of bankruptcy' at the time many of the earlier Scots cases had been decided and to s.23 of the 1793 Bankruptcy Act (33 Geo.III c.74), which flexibly stated that the 'Whole Estate and Effects, of whatever Kind, and wherever situated, (in so far as may be consistent with the Laws of other Countries, when the Effects are out of Scotland) shall be deemed and held to be vested in the said Trustee'.

It is further stated by their Lordships that the 'equal distribution' among the bankrupt's creditors was to take place 'according to the rules of English law', perhaps suggesting that the ranking of creditors is governed by the domiciliary system which declares the bankruptcy. This remark must however relate at most only to creditors' rankings inter se as their Lordships' concluding remarks indicated quite clearly that the competition between the arrester and the English assignees must be determined by Scots law, possibly as the lex fori, or perhaps the lex situ, once the transfer under English law had been allowed validity in Scotland. This must in turn have some effect on the ranking of creditors with asset securities.

Strother also seems to reject determination of the general issue of the ranking of an English bankruptcy with an arrestment of property in Scotland on the basis of the law governing the arresting creditor's debt, rejecting the English assignees' arguments, apparently based on the Captain Wilson case and Watson v Renton 21 January 1792 FC, that Scots creditors or creditors claiming under Scots debts were more favoured in relation to the effects claimed by an English bankruptcy in Scotland than English creditors or creditors claiming under English debts. It is not clear to what extent this argument was connected with that of the Bank in Royal Bank of Scotland v The Assignees of Scott, Smith, Stein and Company 20 January 1813 FC described below and linking creditors to separate business establishments.
Strother also rejects the suggestions by the arresters, based on Thorold v Forrest and Sinclair 1762 & 1764 Mor 4561 and Scott v Leslie 1787 Mor 4562, that English assignees in bankruptcy may have a *ius ad rem*, entitling them to collect property or to compete for it, whether by diligence or otherwise, but no completed *ius in re.* It is interesting that their Lordships came to this view by considering the English assignees' title complete *suo genere.* The assignees' arguments that 'the object of the bankrupt law is to equalize the payment of creditors' and that the lack of jurisdiction in the Scots courts at that time to sequestrate English debtors would undermine this object and lead to a race of diligence appear to have persuaded their Lordships to adopt this view, although it is disappointing that discussion of the arresters' logical conclusion that 'there is no reason why the [dispensation with *lex situs* rules] should not likewise apply to heritage' is not reported. This analysis *suo genere* most of all should have led to more fully reasoned development of the law.

One of the assignees' arguments in favour of the effectiveness of the English commission in Scotland was that the arresting creditor would in any event be forced by the English courts, on the basis of Sill v Worswick (1791)1 H.B1. 665, to communicate any preference he obtained in Scotland to the English assignees, and so the Scots courts should short circuit this process. Their Lordships' comments upon this argument are not reported, but given the tenor of the rest of their remarks it is clear that this argument was considered irrelevant.

Similarly the English assignees' brief allusion to the *ius gentium* appears to have been largely ignored by the bench, as was a half hearted attempt by the arresters to maintain absolute territoriality.

Strother is accordingly the first clear affirmation that a foreign domiciliary bankruptcy can take effect *in re* in relation to moveables situated in Scotland, representing a full transition from *ius ad rem* theories and appearing to reject analysis from the individual creditor's point of view. More importantly, this position appears to have been reached from a conscious appraisal of the utility of such a rule rather than from a technical or doctrinal reliance on the *mobilia sequuntur personam* maxim or the consensual transfer analogy.

Although the point is not free from doubt, Strother also appears to have adopted the approach of permitting the transfer of this appropriate personal legal system to take its own effect in Scotland, in so far as consistent with the general principles of Scots law. Similarly, a pragmatic ranking structure appears to have been favoured, ranking the insolvency administrator with other persons by the *lex situs* of property, while supporting a major role for the law governing the insolvency itself in relation to some other ranking issues.

The decision in Strother v Read was reinforced in Maitland v Hoffman 4 March 1807 FC, in which American bankruptcy assignees were preferred to arresters of Scots debts, when the American commission was obtained prior to the relevant arrestments taking place. The most significant aspect of Hoffman is probably the fact that no distinction was drawn between English bankruptcies and bankruptcies originating under systems less closely related to Scotland, like the American bankruptcy in Hoffman. Neither the arrester nor the court thus appear to have objected to the American assignee's view that "the regulations of every civilized country in which the bankrupt law is reduced to a system, are to be received in this country".

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The decision in Struther was accepted, even if reference was made in argument to the analogy of death and the mobilia maxim. As mentioned above, the decision in Struther does not appear to have been based on such theories.

The main arguments in Hoffman concerned the effect of the American commission as a "lien" or assignment and the time at which any assignment took effect. While the judgements are not reported, it would seem that the commission was allowed effect in re from its date. It is possible that retrospective effect to that date was allowed to the formal assignment under the commission. Unfortunately, no judicial comment is reported on the American assignee's argument that a commission of bankruptcy awarded in England or America, must have the same effect in regard to moveables situated in Scotland, that it has in regard to moveables in England or America.
2. Development of general Scots approach from Strother v Read

a) The Stein cases The next major influence on the development of the law was the Stein cases, initially The Royal Bank of Scotland v The Assignees of Stein, Smith and Company (20 January 1815 FC and (1815) 1 Rose 462.) and subsequently Stein's Assignees v Brown and Gibson-Craig ((1829)7 S 686; (1831)5 W&S 47; and (1832)10 S 647). These cases all arose out of the insolvency and prospective insolvency of partnerships involving John, James and Robert Stein, Thomas and Robert Smith and William Scott. These six Scotsmen carried on business as bankers in London as Stein, Smith and Company and in Edinburgh as Scott, Smith, Stein and Company. The three Steins also carried on business as distillers in Canonmills as John Stein and in Kilbagie as Robert Stein and Company. John and Robert Stein resided and were domiciled in Scotland and managed the Scottish banking business, John Stein also being the managing partner of the distillery businesses. William Scott had died before the actions were raised, and seems largely to have been ignored in argument, and the remaining partners resided and were domiciled in England and managed the English business.

On 22nd July 1812 the English banking business stopped payment and the next day four separate commissions of bankruptcy were issued in England against James and Robert Stein and Thomas and Robert Smith. The Scots banking business stopped payment on 25th July and as a result the creditors of the solvent distillery businesses held a meeting pursuant to which, on 6th August, John Stein executed a trust deed in relation to the distillery assets for their benefit. The following day John Stein went to England and committed an act of bankruptcy pursuant to which the four previous commissions were superseded by a joint commission, on 11th August, against each of the three Steins, the two Smiths and Stein, Smith and Company.

On that day the Commissioners under the joint commission executed separate assignations of the English and Scottish property of the bankrupts to a provisional assignee, which were corroborated by an assignation by the bankrupts to the provisional assignee on 22nd August of all of their property in Great Britain and Ireland. On the same day the provisional assignee, the five individual bankrupts and all of the firms granted a power of attorney to one of the trustees under the distillery trust deed in relation to all of the banking and distillery assets in Scotland, which was repeated by the English permanent assignees upon their appointment on 1st September, neither power of attorney mentioning the distillery trust deed.

The provisional assignee executed an English form assignment on 1st September in favour of the permanent assignees and on 7th and 8th September deeds in Scots form in relation to the property of the bankrupts in Scotland. On 16th September the relevant individual bankrupts executed two corroborating dispositions and assignations in relation to all of their property in England and Scotland, the first as partners in the banking businesses and the second, subject to the trust deed, as partners in the distillery businesses. The permanent assignees subsequently became infeft in the heritable property of the bankrupts in Scotland upon individual dispositions thereof.

The Royal Bank of Scotland was a creditor of Scott, Smith, Stein and Company, the Scots banking business, upon a number of discounted, and dishonoured, bills of exchange. It would appear that the bank attempted in vain to obtain the concurrence of John and Robert Stein to a sequestration petition, after which the
bank resorted, on 14th August, to executing letters of horning against the firm and John and Robert Stein, rendering the firm and John and Robert Stein notour bankrupt on 28th August upon the return, unsatisfied, of searches pursuant to the issue of caption.

The next day, three days prior to appointment of the English permanent assignees, the bank presented a petition, in statutory form, for the sequestration of the estates, wherever situated, of Scott, Smith, Stein and Company and John and Robert Stein. It would seem that no attempt was made to sequestrate the individual estates of the remaining partners in Scott, Smith, Stein and Company, and that some attempts were subsequently made to amend the petition to restrict it to the estates of John and Robert Stein, or to the estates in Scotland of Scott, Smith, Stein and Company or John and Robert Stein. The petition was opposed by the English assignees.

Three minor arguments for the bank were summarily dismissed, the first relating to the alleged summary, ministerial nature of sequestration and the consequential right of the bank thereto, subject to recall on full proof of a valid objection thereto, the second relating to evidence of the English commissions and assignments and the third relating to the separate personalities of the two banking businesses. There was a further subsidiary argument concerning the possibility that at least the joint commission was fraudulent and collusive as it derived from an intentional visit to England by John Stein to commit an act of bankruptcy and thereby to choose the law governing his own bankruptcy and thereby also to defraud Scots creditors or the creditors of the Scots business.

Some of their Lordships had some sympathy for this argument thereby inferring that in an appropriate case a bankruptcy which would otherwise be allowed effect in Scotland may be refused such effect for this reason. While further remarks in Stein and later authority suggest firmly that such a bankruptcy should be challenged in the court granting it, the residual inference remains that in extreme circumstances the public policy doctrine, or the related doctrine of fraud à la loi, may exclude an otherwise applicable insolvency law.

However, in Stein itself the Bank had attempted to challenge the commission in England on the ground that it had been fraudulently obtained, but had withdrawn that challenge. This was sufficient for their Lordships to reject this argument in Scotland. Some indeed felt John Stein's actions to have been in the interests of his creditors and therefore laudable. It is interesting that Lord Meadowbank considered the real problem in this regard to have been the requirement then under English law for every partner to commit an act of bankruptcy before a joint commission could be issued in relation to the firm.

The main argument for the English assignees was that sequestration was not possible because the commission preceded the sequestration petition and therefore the estates of the bankrupts were already vested in them. The assignees further argued that a commission and a sequestration could not co-exist in relation to the same estate. These arguments were largely accepted and the petition was refused. The reasoning adopted and the problems raised are however interesting.

In the first place, it would seem that the decision in Stein was based quite firmly on a conscious choice of law and that reciprocity between England and
Scotland relative to the effectiveness of the other’s bankruptcy laws, though noted by some12, was not a critical issue.

Clearly a transfer of property effected by the English 'domiciliary' bankruptcy law was considered to take effect in relation to moveables situated in Scotland13. Lord Meadowbank in particular indicated that Strother was a significant turning point in the law, with a foreign commission providing commissioners prior thereto with merely a title to sue, or ius ad rem, in relation to the bankrupt’s property in Scotland, requiring the interposition of a Scots magistrate’s authority in order to be fully effective14.

It may also be inferred that domicile in this context was considered to mean commercial or trading domicile, rather than the conventional personal connecting factor, although several analogies were drawn in the judgements to succession and the law of matrimonial property. Even the Bank appeared to favour the pre-eminence of the commercial domicile, arguing (FC p.74.) that ‘the law of the debtor’s domicile, where his contracts were made, where they were to receive execution, and where the debtor was obliged to abide by the issue of them, is that by which, in all cases of bankruptcy, his personal property ought to be vested universally in his creditors for distribution.’

The English assignees also appear to have taken this view, if starting from a jurisdictional premise and favouring multiple trading domiciles. Thus they criticised (Rose pp.473-474) 'the Mistake of confounding the Domicile of Succession with that of Jurisdiction', continuing to note that 'In Cases of personal Succession, a person can have but one Domicile ... But he may have various Domiciles of Jurisdiction; and may be so domiciled, wherever he has an Establishment, and carries on Trade ... . In this Case there are two Domiciles.'

Their Lordships clearly accepted that it was possible for a person to have more than one domicile for the purposes of bankruptcy, and decided that a transfer of moveable property effected by the bankruptcy law of one such domicile would prevent a similar later transfer by the bankruptcy law of another such domicile from taking effect in relation to such property, thereby preventing a later effective sequestration relative to such property under the laws of such other domicile. Thus the bank's subsidiary argument in favour of the co-existence of two separate domiciliary bankruptcy processes in relation to the same property was also rejected.

Lord Meadowbank (Rose p.480.) adverted to the 'chief Domicile of the Company', but it does not appear that his Lordship considered this concept significant to the competency or ranking of several domiciliary bankruptcies. His Lordship also noted16 that the great majority of the creditors of the banking business were based in England.

However, Lord Bannatyne suggested (FC pp.81-82.) that 'if a commission ever so formal were taken out, if it appeared to us that the person was domiciled in Scotland, and not in England, I think we would give it no effect, and that we might sequestrate notwithstanding' and that 'If a stranger go to England to commit an act of bankruptcy, and a commission is issued against him, though he is nowise subject to the law of England, I doubt if such a commission can have any effect at all in Scotland'. These suggestions are significant, though obiter, as are his Lordship's doubts16 'with regard to Robert and John Stein as individuals ... how far the commission of bankrupt can extend to Scotland'. Thus
it would appear firstly that only a domiciliary process should, in Lord Bannatyne's view, be given effect in Scotland, or at least that a foreign process should not be given effect in relation to a Scots domiciliary who does not also have some connection with that foreign state, and secondly that competing processes may co-exist, if the Scots court considers a foreign process inappropriate. Later authorities17, while not referring to Lord Bannatyne's remarks, are rather less forthright in their disapproval of non-domiciliary insolvency processes and less willing to countenance several co-existing processes.

Despite the strenuous arguments of the Bank to the contrary, there is a suggestion that a transfer by the domiciliary legal system was considered effective in relation to moveables because they were considered situated at the domicile, on the basis of the *mobilia sequuntur personam* maxim18. It is difficult to reconcile this reasoning with the argument accepted in this first Stein case that a person may have more than one domicile.

It is also slightly odd that Strother v Read was considered authority by certain judges for this proposition. Lord Meadowbank, who was on the bench in Strother, considered (FC pp.77-79) the effect in Scotland of the English bankruptcy 'an emanation ... of the judicial transfer in England which reached the estate in Scotland' and further considered 'uniformity of management' in bankruptcy an 'irresistible necessity ... in point of expediency'. Although his Lordship also referred to transfers arising on marriage, it seems clear that he saw the effect in Scotland of the English bankruptcy as a conscious extension of the ordinary territorial property rules rather than an effect of the *mobilia maxim*. This view is reinforced by his Lordship's reference in this context (Rose p.481.) to 'the increasing Connexion between the two Countries' in justification of his position. Lord Craige, while also rejecting the *mobilia* theory, seemed, however, to doubt the expediency of this extension to Scotland of the English bankruptcy process (FC pp.88-89).

Instead of disputing the domiciliary premise the Bank effectively argued, at one point, in favour of what may be described as a 'South American solution'19. This is one variant on multiple insolvency theory which concentrates more on creditors than assets and favours the ascription of creditors to assets on more economic than strictly legal grounds. Thus the Bank argued20 'Scott, Smith, Stein and Company, had been established in Scotland, had carried on their dealings in Scotland, had raised a credit with Scottish merchants, and had induced those merchants to rely on Scottish law for the recovery of their debts. ... [T]hese are the true grounds on which, in all cases, the moveable estate of a bankrupt is to be considered in his place of domicile, though locally elsewhere, and by which the domicile itself is to be ascertained.' This severence of the single partnership into Scottish and English trading entities and Scottish and English insolvency processes was however rejected, and with it the argument that several insolvency processes could co-exist effectively in relation to the same or different assets and creditors of a single legal entity.

Some of their Lordships advanced the rather narrow explanation that it was only possible under the Scots statute to sequestrate the whole of the bankrupt's estate and that accordingly the Bank were not entitled to the 'partial' sequestration of 'Scots' assets or the assets of the 'Scots business' which they effectively sought, nor even to the sequestration of the 'individual' estates of
Scots domiciled John and Robert Stein. Their Lordships were certainly unwilling to sequestrate the English assets.

Most of their Lordships felt that neither a partial nor a complete Scots sequestration could take place as the English domiciliary process had already vested the bankrupt's moveables in the assignees. It is perhaps understandable that the bank did not attempt to argue that the whole estate of the bankrupts, for the purposes of the Scots sequestration, was that remaining after effect had been given to the English process, as nothing would have remained to sequestrate, unless the transfers of Scots heritage to the English assignees were, as the bank argued (Rose p.468.), in some way invalid or challengeable. Some of their Lordships were clearly of the view that there was nothing to sequestrate.

Lord Meadowbank further considered that 'admitting two incompatible systems of management' and 'opposite and incompatible systems of distribution' would lead to injustice and prevent fair distribution, partly because his Lordship felt it impermissible to prevent English creditors from ranking in a Scots process and vice versa. Lord Meadowbank also observed that 'there are many questions that would puzzle the Court beyond conception ... because there are not the elements to resolve them; there are incompatibilities; the rules of ranking are different; and you cannot splice [several processes] so as to have one management between them.' The English assignees agreed, drawing attention to difficulties which could arise under the 'hotchpotch' rules of several co-existing processes.

Lord Craigie, on the other hand, (FC p.82.) had 'no idea that the commission of the Chancellor does ipso jure prevent a sequestration in Scotland'. As the commission 'did not of itself carry right to the heritage in Scotland' and on the supposition that 'the bankrupts' ... had refused to grant a conveyance of the estates in Scotland' which would therefore 'have been without a management under the bankrupt law' his Lordship 'would have been inclined to sequestrate', adding that 'the effect of the sequestration would have been an after question'. The English assignees appear to have accepted this point, in so far as the Scots heritage was concerned.

The inference from Lord Craigie's dicta appears to be that a Scots sequestration would be possible after a domiciliary bankruptcy had taken place but that it would rank after that domiciliary process in relation to assets considered by the Scots court to have been transferred thereby. Lord Craigie did not see the same difficulties as some of his brethren in the operation of several co-existing insolvency processes, nor indeed in the practical effectiveness of 'partial' sequestrations. His Lordship was however very much in the minority, and seems to have gone rather too far in his criticism of Strother and in his insular attitude towards English bankruptcy law (FC pp.88-89.). So too Lord Robertson seems to have inferred (FC p.87.) that if John Stein had not gone to England and committed an act of bankruptcy a full sequestration in Scotland could have been granted to compete with the four separate English commissions. This view stands oddly with the rest of his Lordship's remarks.

The whole bench did however recognise that serious difficulties could arise in some circumstances from the absence of some insolvency process in Scotland, leading to doubt as to whether or not a Scots sequestration may have been considered exceptionally competent when a prior domiciliary process had
commenced. The principal difficulties concerned heritage in Scotland and the 'individual' estates of John and Robert Stein. Lord Craigie's doubts about the Scots heritage are noted above. Lord Justice-Clerk Boyle entertained similar doubts (FC pp.84–85.) but felt powerless to help, in view of his narrow interpretation of the statute. There appears to be no reported judicial comment upon the bank's further argument that the absence of a Scots insolvency process protected preferences in Scotland which would otherwise fall. This absence of comment is unfortunate.

It is clear that the English assignees considered their commission to extend to the 'individual' estates of John and Robert Stein, and in particular to their interests in the distillery businesses. In the first Stein case the bank argued (FC p.75.) that this was an anomaly which the law of Scotland did not know, and therefore could not tolerate, inferring what would now be termed a public policy exclusion of such a law. It would seem preferable to concentrate in the first instance on choice of law rather than its exclusion.

Lord Bannatyne, as noted above, was unwilling to give effect in Scotland to the English commission insofar as it related to the 'individual' estates of John and Robert Stein and (FC p.82.) was not sure that [he] would not be for sequestrating the individual estates of John and Robert Stein, as neither had an English domicile. However, his Lordship did not favour sequestration because of the terms of the prayer of the petition involved. Lord Justice-Clerk Boyle (FC p.84.) also seems to have considered the commission ineffective in Scotland in relation to the 'separate' estates of John and Robert Stein, but felt prevented by statute from sequestrating those estates.

It is not clear precisely what their Lordships meant by the 'individual' or 'separate' estates of John and Robert Stein. They may have been referring to their non-business assets. It does however seem unlikely that such an alien distinction would have been made by Scots judges, and the 'individual' or 'separate' estates probably included the interests of John and Robert Stein in all of the businesses, though presumably not the interests of the firms in partnership assets. The English assignees probably took the view that commissions in England against John and Robert Stein were necessary so that their interests in the assets of the banking firms could be dealt with, as they doubtless considered the banking firms to have no separate personality from their partners.

This analytical conflict was probably irrelevant in relation to the banking firms as the Scots court considered such firms to have a domicile in England as well as Scotland, and thus gave effect in Scotland to the transfer of the firm's assets effected by the English process. It would however seem that the English assignees considered the assets of the distillery firms also to have vested in them by virtue of the commissions against the partners of those firms (10 S 469.). Unfortunately, this issue does not appear to have been discussed in any detail and no firm conclusion can be drawn therefrom from the Stein cases.

The second Stein case may however infer that the English commission or assignment was effective in Scotland in relation to the 'individual' estates of John and Robert Stein, to the extent that their interests in the distillery businesses may be considered 'individual' estate. As was noted above, the distillery businesses were solvent and appear to have been entirely Scots but for the English domicile of James Stein, the participation of all three partners...
in the banking businesses and the export businesses of the distilleries to England. The English assignees considered that the banking and distillery businesses were the same entity, or at least that the trust deed was void or reducible.

A disagreement accordingly arose between the English assignees and the Scots trustees in relation to a consignment of spirits in Scotland which was destined for the English market, the proceeds of which would have paid the distillery creditors in full and left a surplus for the banking creditors\(^{29}\). This consignment was finally shipped, without prejudice to the respective parties' rights. Shortly thereafter the English assignees advised the Scottish trustees that they now considered the distillery businesses separate from the banking businesses, that the distillery creditors accordingly had a preference in relation to the distillery assets and authorised payment of the distillery debts\(^{30}\). Subsequently the English assignees granted the Scottish trustees a further power of attorney in relation to the distillery assets as the Scottish trustees found distillery debtors unwilling to pay them in view of the English commission. The Scottish trustees proceeded to pay a dividend to the distillery creditors, whereupon the English assignees recalled the power of attorney, entered into a direct composition with the distillery creditors giving a dividend of 15/\(\) in the pound and brought an action for the reduction of the trust deed and an accounting from the Scottish trustees, which was conjoined with the Scottish trustees' action of multiplepounding and exoneration.

Much of the argument in this second Stein case related to the authority of the English assignees to homologate the trust deed as a result of a creditors' resolution which arguably related to the conduct of the bankruptcy in general. This important issue appears to have been referred principally to English law, it being ultimately held by the House of Lords that the English assignees had no authority to homologate the trust deed\(^{31}\). On this issue there was little argument on choice of law and a significant decision by the House of Lords that it was willing to substitute its own position on English law for that proved before the Court of Session. Brougham L.C. then jumped to the unwarranted conclusion that the trust deed was invalid as it required homologation (W&S p.56.). It is quite clear that at this point in the litigation the homologation issue was a subsidiary argument for the Scottish trustees who considered the deed valid, as apparently did the Inner House\(^{32}\).

The trust deed was however reduced when the case returned to the Court of Session, principally on the ground that the distillery partnerships were dissolved by the English commissions issued against two of their partners\(^{33}\) and that John Stein's actions of 'extraordinary administration' in granting the trust deed were therefore ultra vires and null\(^{34}\). It was also suggested from the bench that the trust deed was reducible as a fraudulent preference under the Bankruptcy Act 1696 c.5, but regrettably counsel's attempts to persuade their Lordships to clarify their ratio were in vain.

There appears to be no reported judicial comment on the English assignees' argument that one reason why John Stein could not validly convey the distillery assets to the trustees was that the interests of James and Robert Stein in the distillery businesses were already vested in them nor on the English assignees' subsidiary argument that at the time of the conjoined commission they obtained title to John Stein's interest in the distillery businesses with retrospective
effect to the date of his partners' acts of bankruptcy. This is unfortunate as the trustees argued strongly against both of these points.

The opinion of English counsel had already been obtained on these issues as on that of the homologation of the trust deed (7 S 689-90) but it would be rather rash to draw the conclusion therefrom that all of these issues were considered to be governed solely by English law. Ultimately, the decision in the second Stein case appears to rest largely on the dissolution of the partnerships, which Lord Balgray appears to have viewed as an effect of Scots law set in motion by the English commissions. So Lord Gillies remarked (10 S 651) that 'When a man is made bankrupt in London, he is a bankrupt here', inferring notour bankruptcy under Scots law, both for the dissolution of the partnerships and, perhaps, for the potential application of the 1696 Bankruptcy Act.

It seems implicit, however, in the assignees' title to sue for a reduction and accounting that they had some interest in or to the distillery businesses or the partners' shares therein. Such an interest may have derived from the assignations obtained from the three Steins or from the distillery creditors under their composition with the English assignees. Alternatively, the English assignees may have obtained such an interest directly from the English commission or the assignment thereunder. If the last analysis is correct it is hard to see, standing Strother and the first Stein case, how this interest could be anything less than a lus in re.

The inference therefore remains from the second Stein case that effect may be given in Scotland to a transfer of property situated in Scotland owned by a person domiciled in Scotland and effected by the insolvency law of a legal system to which that person is only connected by virtue of passive participation in a business being carried on in part in the territory of that legal system. Given the propensities of some legal systems to extend insolvency of corporations to their directors, non-executive directors of corporations trading in such legal systems should perhaps beware! On the other hand, John and Robert Stein may quite credibly have been considered to have had such a significant trading connection with England to have been considered to have individual trading domiciles there, allowing their individual bankruptcies to fall within the main ratio of the first Stein case.

The Stein cases are above all a reinforcement of the rule in Strother v Read giving effect in Scotland in re to a transfer of moveables effected by the law of a bankrupt's domicile. Despite some remaining influence of the mobilia sequuntur personam maxim in the Stein cases, Strother's conscious utilitarian choice of the domiciliary system to effect this transfer is further reinforced in the Stein cases, particularly by the articulation of a distinction between traditional theories of single personal domicile and theories of multiple commercial or trading domicile and the favour shown for the application of the latter to insolvency.

This conscious utilitarian approach is also reflected in the rejection in the Stein cases of multiple insolvency processes and the favour shown therein for the first process instituted, while maintaining the theoretical coherence of analysis by way of property transfer. The concern shown for the practical and theoretical problems arising from multiple processes is striking, particularly in relation to issues of ranking.
However, the Stein cases do not stand for rigid unity and universality of insolvency. It was clearly understood that a domiciliary bankruptcy would not be allowed to transfer Scots heritage even if it purported to do so. Furthermore, while stressing the need to challenge a foreign insolvency process in the courts of the legal system from whence it came, the Stein cases clearly infer that no effect will be given in Scotland to a transfer of moveables there purporting to be effected by a legal system other than that of the bankrupt's domicile, or a system with which the bankrupt has other close links. The Stein cases may also suggest that a domiciliary process may not be given such effect in Scotland if it is invoked through fraud or is otherwise contrary to what would now be considered Scots public policy in such matters.

Similarly the possibility was not completely excluded by the Stein cases of commencing a Scots insolvency process after a similar foreign process had been commenced, even if such process were a domiciliary process. This would appear, in particular, to be the case when some of the bankrupt's property has not been effectively transferred by the foreign process in question. The scope of such a Scots process was not fully explored and some doubts must exist on this point in the light of the apparent rejection of 'partial' sequestration.

While the bank's argument for the severence of the estate of a single legal entity into several estates of several business entities were rejected, there was little further discussion in Stein of the ambit of the estate subject to a given insolvency process. In particular, the cases are ambivalent on the issue of the partners' 'individual' estates and do not fully address the consequences of the possibility that the banking firm may have been considered in Scotland to have had separate personality from its partners and not to have been so considered in England. Similar issues appear to have been avoided in relation to the distillery firms. Related issues of ranking were also raised but not fully addressed, as were issues concerning unfair preferences and this is unfortunate. It is however intriguing that a person 'bankrupt' in England was considered 'bankrupt' in Scotland, even if the consequences of this translated status were not fully explored.

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Selkirk v Davis  (1814)2 Rose 97 & 291, 2 Dow 230 is a significant decision of the House of Lords, largely favouring universal insolvency and further reinforcing Strother v Read. At the same time the reported judgement of the Lord Chancellor is regrettably devoid of sustained reasoning. Indeed the most noteworthy feature of the Lord Chancellor's judgement is that his Lordship appears to have considered himself to be sitting in an English court1, and this in itself must diminish the importance of his Lordship's views of the effects of an English insolvency process in Scotland!

The facts surrounding the case were quite complex, although the facts material to the decision itself were quite straightforward. Samuel Garbett was an Englishman who resided from time to time and traded in both England and Scotland. A commission of bankruptcy was taken out against him in England in March 1782, pursuant to which an assignment took place of Garbett's property. At that time he had been resident in England for ten years although almost three quarters of his assets comprised a vitriol business in Prestonpans and his Founders stock in the Carron Company, with the latter of which this case was largely concerned. One month later he was also sequestrated in Scotland, on his own petition and with the concurrence of the English assignees, one of whom was also appointed a trustee under the sequestration. Unfortunately the reports do not disclose the manner in which the English and Scots processes operated relative to each other.

Several years prior to the commission Garbett had purchased a large amount of Carron Company stock from Selkirk's predecessor, along with his son and son-in-law. Garbett's involvement with this transaction was largely as cautioner, but on the default and subsequent sequestration of Garbett's son and son-in-law Selkirk's predecessor arrested Garbett's own substantial holding of Carron Company stock in 1773. Pursuant to negotiations it was agreed, in 1774 and 1777, that this arrestment would be ignored but 'made over' to the trustee on the sequestrated estates of Garbett's son and son-in-law for the purpose of 'extricating' Garbett from a shipping business he carried on with them. Subsequently an inconclusive multiplepoinding took place in relation to this stock.

The agreements of 1774 and 1777 were not fully implemented and Selkirk and his predecessor attempted to prove as creditors under the English commission of 1782, eventually abandoning this attempt. In the meantime the Scots sequestration, which had commenced under the 1772 Bankruptcy Act (12 Geo.III c.72), lapsed in terms of the 1793 Bankruptcy Act (33 Geo.III c.74.), which expressly opened the undivided estate of a bankrupt to the diligence of his creditors. In 1798 Selkirk accordingly arrested to found jurisdiction against Garbett, raised an action against him and thereafter arrested his Carron Company stock on the dependence of that action2.

The Carron Company raised a multiplepoinding in relation to the arrested stock in which the English assignees were preferred to Selkirk. The basis of this preference appears to have been the ineffectiveness of the 1773 arrestment under Scots law and the validity in Scotland of the transfer under English bankruptcy law of the Carron Company stock to the English assignees before the 1798 arrestment took place. Counsels' arguments and the Lord Chancellor's judgement shed some light on a number of points.
Selkirk, as might be expected, argued strongly against the *mobilia maxim* and thereby against the application of English law to the transfer of the Carron Company stock as Garbett's domiciliary system. This argument is interesting for several reasons. Selkirk pointed out that the *mobilia maxim* is 'but an Arrangement of international Convenience or Indifference', observing in relation to its application in succession that 'Iain Executor has no legal title to Moveables in Scotland till he be confirmed an Executor in the Scotch form' and that in any event the classification of the property must be decided 'in foro rei sitae'. Having thus pointed out the basis and limitations of the *mobilia maxim* in a field where its application was more readily accepted he continued 'but is it either convenient or indifferent, that after a man has contracted Debts to a great Amount, in a Country, and Under the Protection and Faith of the Law of that Country, he shall withdraw his Property from the Controul of its Laws and the Reach of his Creditors?'

As far as the English assignees were concerned the answer to Selkirk's last question was yes, provided the bankruptcy was declared under an appropriate legal system. They clearly rejected straightforward application of the law of the personal domicile, and thereby also by implication the *mobilia* theory. Instead the English assignees argued that 'Iain English Commission transfers all the Personal property, be it where it may. The analogous Process in a foreign Country operates upon the Property here. This is not the Result of Domicil: for Bankruptcy, here, may exist without Domicil, but of the Curtesy of international Law - of the Credit which one Country gives to the fair Administration of Justice in another ... Upon the Principle of Convenience, surely the Administration of insolvent Estate, under a Commission or Sequestration, according to their Priorities, [is] less embarrassing than a Competition of conflicting Systems'.

If the unfortunate impression is ignored that the action is being heard in an English court, this argument is quite appealing. It is not tied to the dogma of the *mobilia maxim*, nor even strictly to the domicile for any other reason. There is a direct attempt to address the problems of international insolvency and an appeal to international co-operation, by way of theories of comity, whether with or without its shackles of reciprocity. There is also an unfortunate jurisdictional emphasis in this approach, perhaps reflecting some English views that a transfer should take effect in England if effected by a legal system having an acceptable claim to jurisdiction over the bankrupt, such as the Jurisdiction claimed by the English courts! The English assignees cited Strother and the first Stein case in support of their reasoning. Neither, however, would appear to support it in full.

While Eldon LC considered (Rose p.315.) 'that an English Commission passes, as with Respect to the Bankrupt and his Creditors in England*, the personal Property he has in Scotland or in any foreign Country', his Lordship did not directly address the reasoning of the English assignees, except to agree (Dow pp.239-240.) that domicile was not essential to English bankruptcy jurisdiction. Neither did his Lordship comment upon the Court of Session interlocutor's 'finding that the assignment (the Common debtor being domiciled in England) was preferable to the arrestment of 1798'.

Instead, the Lord Chancellor spent much of his opinion discussing the relevant issues of the validity in Scots law of the 1773 and 1798 arrestments in the light of the agreements of 1774 and 1777 and the Scots Bankruptcy Acts and
discussing the irrelevant issue of dicta in the first Stein case upon the obligations of a bankrupt under English law to convey his Scots heritage to his English assignees. Although his Lordship adverted to the analogy of voluntary transfer proposed by Selkirk, he appears to have preferred the English assignees on the basis that the assignment to them under English bankruptcy law was a special type of assignment not requiring intimation in Scotland, while hedging his bets by finding that intimation had taken place.

Thus the Lord Chancellor (Rose p.316.) could not 'help thinking there is a great Difference between the Assignment of a particular Debt by a particular Individual, and the Assignation of all a Man's Property for the Benefit of all of his Creditors'. His Lordship proceeded to note the impracticality of requiring intimation and to rely upon the analogy of assignation by marriage mentioned in the first Stein case by Lord Meadowbank, noting that neither such an assignation nor that deriving from an adjudication required intimation in Scots law.

The extent to which internal Scots law was relevant to the decision of the House of Lords is not clear from these remarks. The reference to adjudication seems to indicate the importance of the existence in internal Scots law of exceptions to the requirement of intimation. The reference to the law of matrimonial property may be to similar effect. Scots law may therefore have been considered to have a veto over the effectiveness in Scotland of the 'universal' transfer of English bankruptcy law, which veto was not exercised in relation to a transfer analogous to those occurring on marriage and adjudication. It is, on the other hand, slightly odd that no reference was made to the intimation requirements of the obvious Scots analogy: sequestration! This may infer the irrelevance of Scots internal law to the effectiveness in Scotland of the 'universal' transfer of English bankruptcy law, this being determined entirely by the law under which such a transfer is alleged to have taken place. The ambiguous reference to matrimonial property law may support this reasoning.

However, neither analysis sets out the criteria by which to select the legal system competent to effect a 'universal' transfer which takes effect in Scotland, and the Lord Chancellor does not provide any assistance. Standing the distinguishable facts of the case and the authority of the first Stein case, to which much reference was made, Selkirk does not appear to be authority for the jurisdictional argument of the English assignees.

Neither does the Lord Chancellor's judgement support the English assignees' inference (Dow p.240.), principally from Still v Worwick (1791)1 H.Bl. 665, that the transfer should take effect in Scotland as a matter of what may now be termed customary public international law, from which Scots law would be presumed not to derogate. It is not clear whether this possible derogation was viewed by the English assignees as a matter of initial choice of law or as a reference to the lex situs subsequent thereto to ascertain whether or not the law initially chosen would be allowed to take effect.

Selkirk's main argument was that Strother and Stein were wrongly decided and should be reversed. He argued secondly that Strother was distinguishable, as there the bankrupt traded only in England and the competing creditor was English and claiming in respect of an English debt (Rose pp.303-304.). The first argument is relatively credible in the light of earlier authority, but, as discussed above, Strother was in itself a significant turning point in the law.
The second argument is more complex and contains elements of the severance of a single legal entity into several trading entities with separate trading domiciles, as rejected in the first Stein case, of the domicile of a creditor and the law governing his claim, as rejected in Strother itself, and of the location of the assets of such entities, as rejected in both the first Stein case and Strother. These elements were not clearly distinguished by either Selkirk or the Lord Chancellor, but were rejected *en masse* with the first argument.

Selkirk is perhaps more interesting for its facts and its *obiter* remarks than its *ratio*. Thus two separate insolvency processes co-existed for some time in relation to Garbett's estate, and the integration of such processes was countenanced by the Lord Chancellor. The co-existence of the two processes does not appear to have been contentious and the Scots sequestration appears to have been set up with the principal purpose of facilitating the administration of Garbett's property in Scotland. The sequestration appears to have been considered necessary when it was obtained, and it is of interest that only the personal estate in Scotland was sequestrated.

The Lord Chancellor noted the difficulties arising from the ineffectiveness of an English bankruptcy in relation to Scots heritage and further problems arising from differences between Scots and English insolvency law. His Lordship also drew attention to the potential difficulties arising from the co-existence of two processes (Rose pp.314-315.), concluding that 'If, my Lords, you attempt to obviate these Inconveniences by a co-existing Sequestration and Commission, the Difficulty is tenfold greater, unless the one should be used merely as the Means of assisting the Distribution of the Funds under the other.' This appears to exclude several competing insolvency processes but not several co-operative insolvency processes.

The Lord Chancellor did not, however, expressly consider the Scots sequestration invalid, and it may be arguable from Selkirk that, as far as a Scots court is concerned, such a Scots sequestration is effective once awarded, notwithstanding an otherwise effective existing foreign process, and, perhaps further, that the effect in Scotland of such a foreign process is superseded or suspended while the sequestration is in force. Both Selkirk and the English assignees appear to have envisaged this approach (Rose pp.301, 304 & 307.), if for different reasons, and even the Lord Chancellor (Rose pp.309 & 317.) appears to have countenanced this argument, while suggesting (Dow p.244.) that the commission was 'paramount' to the sequestration. As a matter of property theory this first argument is open to considerable criticism, particularly in relation to the vesting and divesting of rights. It is not, however, completely unknown in Scots insolvency law.

Another interesting point is the acceptance, in effect if not in theory, by the Lord Chancellor of the English assignees' argument that Selkirk's abortive participation in the English bankruptcy process barred him from denying the effectiveness of the commission in Scotland. It is notable that his Lordship appears to have taken the passive view that rights could be withheld in the English process if the benefit of foreign property were not transferred to that process rather than favouring the active requirement to transfer such benefit. If his Lordship was considering a Scots court's approach to an existing English insolvency process his opinion appears contrary to that implicit in Strother and if his Lordship was considering the approach of an English court to a foreign process, as seems more likely, his comments were irrelevant to the case but a
useful obiter indicator of one approach the Scots courts were later to adopt in relation to foreign claims and processes.

In sum, Selkirk would seem to be the final victory, in the House of Lords, of Strother over vestiges of strict territorial theory. It would also seem further to reinforce conscious reasoned choice of law aimed specifically at the problems of international insolvency, emphasised by the Lord Chancellor's pleas for specific statutory reforms (Rose pp.312-313.), rather than inadequate dogma such as the mobilia maxim or the voluntary transfer analogy. Selkirk did not, however, significantly clarify the ambit of the reasoned rules to be adopted.

As in the Stein cases, the conscious approach of Selkirk to the problems of international insolvency appears to have recognised the advantages of flexible approaches to multiple insolvency processes, both in the suggestion that several co-operative processes may co-exist and in the passive approach suggested relative to preferences obtained abroad by creditors.
c) The Falconer cases  The development of the Scots approach to international insolvency continued in the Falconer cases, with two decisions in 1814 and a third decision in 1817 clarifying a number of matters.

Duncan Hunter was a partner in two firms, Hunters Rainey and Company, which traded in London, and Hunters Rainey and Morton, which traded in Glasgow. The partners in these firms were the same, except that the Glasgow firm had one further partner. Hunter was a Scotsman with substantial individual assets in Scotland, but appears to have been domiciled in England. The reports disclose little about his partners or the business of the firms. After attempts had been made to come to an extra-judicial arrangement, a commission of bankruptcy was issued against Hunter in England on 11th July 1811 and six days later the Scots firm and all of its partners, including Hunter, were sequestrated in Scotland. Scots and English creditors appear to have participated in both processes. The reports do not disclose at whose instance the commission and sequestration were awarded, and do not directly examine issues relative to the partnerships or Hunter's partners.

By arrangement with the creditors, Hunter was entrusted with the management of his English estate and that of the English firm, under the supervision of the English assignees; one of the trustees under the Scots sequestration managed the estate of the Glasgow firm; and Falconer, another of the Scots trustees, managed the individual estates of the partners of the Glasgow firm, including that of Hunter. This arrangement proceeded uninterruptedly for over 16 months, during which time Falconer became infeft in Hunter's own Scots heritage and then attempted to sell it by roup. Several weeks prior to the roup Hunter disposed of his Scots heritage to his English assignees, who thereupon became infeft therein. This, needless to say, was seen to impede the roup and Falconer raised an action to reduce the disposition to the English assignees.

In the meantime a dispute had arisen between Falconer and the English assignees in relation to Hunter's shares in Cranstonhill Waterworks, a statutory corporation, the shares in which appear to have been considered moveable property governed by Scots law. The Waterworks raised a multiplepounding in which the English assignees were preferred to Falconer.

In the Waterworks case Falconer initially made a half-hearted and incomprehensible attempt to distinguish Strother v Read and Selkirk v Davis on the spurious bases of the laws governing the claims or the domicile of the competitors in those latter cases, alternatively basing his case on a distinction between the management and ultimate disposal or distribution of the estate and finally arguing that the sequestration had to be given its statutory effect in Scotland as it had been awarded, had been neither recalled nor reduced and had already involved both English and Scots creditors. The second argument was addressed more fully in the other Falconer cases, but implicitly rejected in this case in relation to moveables. Ironically it was raised by the English assignees in the other Falconer cases!

As indicated above, the third argument probably remained available after Selkirk, to the effect that a Scots sequestration may be considered by a Scots court to supersede even a foreign domiciliary bankruptcy, at least in relation to property in Scotland. Certainly, in the other Falconer cases, the Second Division took the view, as indicated below, that if a sequestration is not opposed or recalled under the statute that statute should be given its full statutory effect. The
Second Division's reasoning is not reported in the Waterworks case. It would however seem, from the other Falconer cases, that the Scots sequestration was not considered null, nor even null in relation to moveables, but that there were no moveables to sequestrate as they had all passed to the English assignees. This was clearly the view of the English assignees, who argued from inter alia Selkirk and the first Stein case that the English commission had divested Hunter of his moveables in Scotland and that 'It is therefore needless to reduce the sequestration, which clearly never could be attended with any legal effect'. It would therefore seem that a Scots court will not allow a Scots sequestration to supersede a prior foreign process, at least in relation to moveables and at least if that process originates in the bankrupt's domicile.

The other two Falconer cases related to the Scots heritage, the first to the reduction of the disposition by Hunter to the English assignees and the second to the distribution of the proceeds of sale of that property. In the first case Falconer argued (1814 FC pp.33-34.) that the English commission could not of itself transfer heritage in Scotland, that the sequestration had not been opposed and the infelment pursuant thereto was therefore valid and that the title of the English assignees was therefore reducible on the 1696 Act (c.5) or as invalid at common law. He distinguished the first Stein case on the ground of the respective timings of the voluntary transfers by the bankrupt to the English assignees.

The English assignees (1814 FC p.34.) did not attempt to argue that they owned the bankrupt's heritage by virtue of the commission, not least because they considered English law did not assert such a claim. They also agreed with Falconer that the sequestration had been a useful means by which to prevent preferences arising for individual creditors in relation to the Scots heritage, although they felt it should go little further. Instead they asserted that the English commission had vested them with a personal right to the heritage in Scotland and elsewhere, which required to be completed in accordance with the lex rei sitae. They further argued that the 'beneficial' right to the heritage and its proceeds had been vested first in them and as the trustees under the sequestration would be obliged, as posterior trustees, to denude in their favour it would be expensive, inexpedient and troublesome to reduce their own title.

It may be wondered firstly whether the English assignees felt this 'beneficial' right was of greater force than the personal right they otherwise claimed and secondly why they considered it to be vested in them rather than the bankrupt's creditors. The first point was not further discussed, although Lord Meadowbank supported Eldon LC's view in Selkirk that English assignees did not even have a personal right to heritage in Scotland under English bankruptcy law. The second may be answered by the English assignees' later assertion (1814 FC p.34.) that the commission vested the rights of all creditors in them and that they should be treated as the representatives of such creditors, claiming as a single block beneficiary of the sequestration, to whom the bare trustees under the sequestration should denude.

While representation in international insolvency had prior thereto largely taken the form of representation of the bankrupt, the ius ad rem cases discussed in section 1),b) above may also suggest that foreign insolvency administrators may act as representatives of the bankrupt's creditors in the execution of diligence. There was no support for this approach from the bench in the first Falconer heritage case, except, perhaps, obliquely from Lord Meadowbank (1814 FC p.37.).
Its application as a general rule is certainly inconsistent with the decision in the second Falconer heritage case.

Both the Lord Ordinary, Lord Fitmilly, and the Second Division postponed the main issues, the Lord Ordinary by refusing to reduce the disposition on condition of consignment of the sale price and the English assignees' offer to be party to the disposition by Falconer to the purchaser, and the Second Division by reducing the disposition while reserving all questions for application to the proceeds of sale. A separate bill of suspension of the sale had similarly been refused by the Second Division, while reserving any rights of the English assignees to the price. The difference of approach between the Lord Ordinary and the Second Division is, however, of some importance.

The majority in the Second Division favoured reduction of the disposition to the English assignees on the simple ground that it was null, as Falconer rather than Hunter was infeft at the time it was granted. It is not clear whether or not the English assignees would have been preferred had they been infeft before Falconer and it does not appear to have been argued that either process had deprived Hunter of the capacity to grant a disposition of the Scots heritage to the English assignees.

Clearly the English commission and assignment were not given or allowed direct effect in relation to Hunter's Scots heritage and the sequestration was considered valid, at least as regards the Scots heritage. It would seem that the English process was not even considered to give the English assignees a personal ius ad rem to the Scots heritage. It is not clear whether this approach would have been taken had the English process arrogated such a right to, or even a ius in re in, Scots heritage. The tenor of the judgements certainly infers that no effect in re would have been given in Scotland to the English process had it arrogated such a right in re.

It is, however, unfortunate that their Lordships did not discuss the issues of partial sequestration so anxiously explored by largely the same bench in the first Stein case. It may have appeared obvious that there was no partial sequestration as the English process had reduced Hunter's whole estate to the Scots heritage.

Lord Justice-Clerk Boyle also suggested (1814 FC p.39.) that if the sequestration had been opposed it would not have been awarded. This obiter suggestion goes a step beyond the first Stein case, as in Falconer the bankrupt had not disposed his Scots heritage to the English assignees prior to the sequestration petition, and there was therefore estate to sequestrate. As noted below, his Lordship appears to have changed his view, for this reason, by the time of the second Falconer heritage case.

It is unfortunate that their Lordships did not comment upon the reason why the sequestration had not been opposed, as the prevention of preferences is, to modern eyes, a major reason to allow multiple insolvency processes. The Lord Justice-Clerk stressed that the sequestration should run at least some of its statutory course as it had not been stopped at the outset by opposing the petition or recalling the process within the statutory time limit.

Lord Meadowbank opposed the reduction of the disposition, principally on the ground that, unreduced, it would entitle the English assignees to the bankrupt's
reversionary right to the Scots heritage. The reversionary right his Lordship was considering was that arising upon satisfaction of heritable securities rather than that arising upon completion of the sequestration. The disposition to the English assignees was therefore treated by Lord Meadowbank almost as if it were a heritable security, postponed to other heritable securities and held by the English assignees for the creditors claiming under the English process.

Lord Meadowbank therefore considered Falconer entitled to realise the Scots heritage and pay the heritable creditors but bound to transmit the free proceeds of sale to the English assignees with neither a detailed accounting nor detailed consideration of the individual claims of the creditors, whereby channelling claims to the English process. In his Lordship's view this would avoid inextricable ranking problems and be consistent with the view, noted above, of the Lord Chancellor in Selkirk that one insolvency process could be used for the purpose of distribution under another. His Lordship did not indicate why he felt the English process should be pre-eminent, and was unfortunately unable to elaborate his views in the second Falconer heritage case as he died in the interim 16.

Although Lord Justice-Clerk Boyle supported Lord Meadowbank's approach as a matter of policy, neither he nor the remaining judges considered the disposition to have the suggested effect and they expressly postponed consideration of the disposal of the free proceeds of sale. Lord Banmatyne, in particular, was unable to accept that the sequestration could transfer the heritage only to the extent to which it was subject to heritable securities (1814 FC p.37.). The bench was, however, unanimously of the view 14 that Falconer was entitled to dispose of Hunter's Scots heritage and settle the claims of the heritable creditors, thereby rejecting the argument that Falconer should immediately denude to the English assignees prior to selling the property or prior to satisfying the heritable creditors. Some degree of multiple administration and ranking was thereby admitted by all.

In the second Falconer heritage case the Second Division preferred the claims of Falconer to the proceeds of sale of the heritage to those of the English assignees. The English assignees argued (1817 FC pp.442-443.) that Strother, Stein and Selkirk were 'founded on the inexpediency of allowing two processes of administration and ranking to be going on at the same time of the same person's estate', that their claim merely gave these decisions full effect, that the hardship to Scots creditors was no greater in relation to heritage than moveables distributed under a foreign process and 15 that justice could as easily be done to creditors in England as Scotland. They felt a distinction between moveables and heritage existed in the vesting of ownership but should not exist in relation to the ultimate distribution of the estate. Accordingly they argued that the Scottish trustee's title had prevailed in the previous action solely to provide a purchaser with good title to the heritage, that his appointment had been a temporary vesting expedient and that he should therefore transmit the sale proceeds 16 to be distributed under a single English process. The Lord Ordinary, Lord Pitmilly, upheld this argument, but made the further suggestion, roundly criticised by the Second Division 17, that the proceeds of the heritage were moveable and therefore carried by the English commission.

Falconer, on the other hand (1817 FC pp.443-444.), distinguished Strother and Stein on the ground that he had already been appointed trustee under statute, irrespective of any distinction which may have been drawn from the cases.
between heritage and moveables, and argued that the statute determined the disposal of the sale proceeds. He also disputed the relevancy of the English assignees' distinction between vesting and distribution, arguing further that he should have been compelled to denude as soon as the heritage had vested in him had his role been merely that of a subordinate vesting conduit. Falconer's argument on the statute was upheld.

Lord Robertson was very firmly of the view that the statute had to be given its full effect, as the sequestration had been awarded, and that the only effect of the English commission had been to attach the bankrupt's moveables and so prevent them falling under the sequestration. His Lordship was also of the view that the pernicious consequences of a double administration were overstated and pointed out that the English assignees had abandoned their claim to the full sale proceeds, thus accepting a double administration in relation to at least the heritable creditors.

Lord Justice-Clerk Boyle also felt the statute should be given its full effect, as sequestration had been awarded and not recalled. His Lordship also appears to have considered the original award of sequestration justified, on the grounds that, unlike in Stein, there was something to sequestrate, and to have considered the trustee's adjudication entitled to the same protection as that undoubtedly enjoyed by an adjudication by an individual creditor.

Lord Craigie was also of the view that once sequestration had been awarded the property attached required to be distributed by the trustee in sequestration in accordance with Scots law, and was unwilling to distinguish between distribution to heritable and other creditors. Indeed his Lordship only grudgingly accepted the decisions in Strother and Stein, which he considered the execution of foreign decrees on doubtful grounds of expediency.

Lord Glenlee adopted a different line of reasoning, giving clear, though obiter, support to the full *mobilia sequuntur personam* maxim. His Lordship argued that bankruptcy should be considered a civil death and assimilated to death in this context. Accordingly, it was argued, moveables should be deemed to be situated in the bankrupt's domicile as it would have been possible for him to bring them there. As it was not possible for the bankrupt to bring moveables to his domicile after they had been arrested the *mobilia* fiction was inapplicable in that situation and as it was never possible for the bankrupt to take heritage to a foreign domicile this fiction could never apply to heritage. There was therefore no analogy to Strother and the English assignees' argument in favour of a single insolvency process was implicitly rejected. Indeed his Lordship considered the Scots sequestration to be expedient, as otherwise the bankrupt's heritage would have been adjudged by other creditors.

However Lord Glenlee appears to have suggested that Falconer could, in an appropriate case, have been compelled to distribute at least some of the funds in his possession in accordance with English law, although he could not be compelled to transmit those funds to the English assignees for this or any other purpose. The point was not argued and his Lordship in any event had his doubts in relation to the need to apply the statute, the ranking of heritable creditors, the ranking of partnership and personal creditors and the presence of Scots creditors. The last appears to have derived from the idea expressed by the

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Royal Bank of Scotland and rejected by the court in Stein\(^2\) that local creditors rely on a local fund of credit.

One point quite firmly established by the Falconer cases is that a foreign insolvency process will not be given effect in re in Scotland in relation to land in Scotland, even, it would seem, if the given process claims such effect for itself. In making this point, it is also clear that the effect claimed by a given foreign process in relation to property in Scotland was considered important, an issue approached more clearly in the later case Goetze v Aders (1874) 2 R 150 discussed below. The Falconer cases may therefore infer that a foreign insolvency process may be allowed to give rise to a personal *ius ad rem* in relation to Scots heritage, if it arrogates at least such a right, analogously to the *ius ad rem* allowed in relation to Scots moveables in the cases discussed in section 1) b) above\(^2\).

The English assignees had conceded the significance of the role of the *lex situs* in land in this field, but nevertheless pressed the value of a single insolvency process, arguing quite intelligibly from the reasoned choice of law in Strother and Stein. Although they also pressed analysis via the representation of creditors and Lord Glenlee favoured the *mobilia* theory, coupled with a new status theory of civil death, the Falconer cases cannot be seen as a retreat from the reasoned choice of law in relation to moveables made in Strother and Stein, as there were reasons to depart therefrom in relation to land.

The Falconer cases do, however, represent a softening of judicial attitude towards multiple insolvency processes, indicating that the inexpediency and the inextricable problems previously perceived were not so grave as previously thought. The advantage of a second process in the avoidance of preferences was also noted.

However the problems arising from multiple processes were not, in these cases, inextricable and the integration of several processes was not fully addressed. While the validity and ranking of securities over Scots land was clearly considered to be governed by Scots law and to be carried out under the Scots sequestration, doubts were expressed as to whether Scots or English law should be applied by the trustee under the Scots sequestration to other ranking issues. The cases also appear to depart, to some extent, from Eldon LC’s view in Selkirk, noted above, that a second insolvency process may be used only for the purposes of carrying out distribution under another, main, process.

Neither was it clearly established when a second insolvency process may be instituted in Scotland, as much stress was laid on the fact that the sequestration in the Falconer cases had been neither opposed nor had any attempt been made to recall it. The bankruptcy statute was then considered mandatory. The inference may be taken that sequestration may be refused or recalled at the outset in circumstances when it cannot be stopped later.

Flexibility in granting or recalling an insolvency process can be very useful in an international context\(^2\), but some broad guidelines are equally useful. The Falconer cases seem to infer that sequestration in Scotland is possible when there are some assets which the Scots court does not consider to have been transferred by a competent foreign process. The Falconer cases do not decide whether such assets require to be situated in Scotland or whether this approach
should be taken if a foreign process does not transfer assets yet purports to administer them.

It is also significant to a co-operative international insolvency structure that the Falconer cases did not allow the Scots sequestration to supersede the English commission in relation to moveables, although it is unfortunate, in the light of *dicta* in *Stein and Goetze v Aders*, that the issue of partial sequestration was not more fully discussed, as contradictions and difficulties occurring relative to the ambit of a given bankrupt estate may thereby have been resolved.
d) Geddes v Howat. In Maitland v Hoffman 4 Mar 1807 FC assignees under an American commission of bankruptcy were preferred to creditors arresting a Scots debt, on the dependence of a Scots court action against the bankrupt, after the commission but prior to the assignment thereunder. As discussed in section 1), d) above, it would seem that effect was allowed in re to the American process in relation to Scots assets from the date of the commission. It is, however, difficult to ascertain the ratio of Hoffman from its rather brief report and the varying arguments therein. The position in Hoffman was clarified in Geddes v Howat (1824)2 Shaw 230. In this case the House of Lords clarified the relative procedural points in a foreign bankruptcy and a Scots sequestration at which transfers under each process would be considered, in a Scots court, to take effect.

Geddes was a native of Orkney who had traded in partnership in Liverpool for some time, eventually becoming insolvent, settling with his creditors by composition and returning to Orkney. Some time after his return to Orkney Geddes took over his father's banking business which he ran to similar effect. In November 1819 he secretly conveyed his estate to two of his brothers-in-law and went to London where, on 4th January 1820, he committed an act of bankruptcy. A defective commission was issued against him in England on 18th January, swiftly followed on 26th January by a petition for a Scots sequestration, the first deliverance in which was issued the following day. A second commission was issued in England on 15th March, pursuant to which assignees were appointed in April. Sequestration was finally awarded on 16th August 1820.

The English assignees petitioned for the recall of the Scots sequestration arguing firstly that the award of sequestration was incompetent as the commission had transferred Geddes' property to them prior to its award and secondly that in any event the commission had retrospective effect to the act of bankruptcy, prior to the petition for sequestration. The House of Lords' reasoning is not reported on either issue.

The second argument was rejected without a great deal of reported discussion. The analogy was noted (at 233.) by the Inner House between the relation back of an English bankruptcy to the first act of bankruptcy and Scots rules against diligence and transactions prior to sequestration and the suggestion made that these rules were not intended to strike at foreign insolvency processes. It seems unlikely that the inference from this analogy is that retrospective transfers would have been allowed greater effect in Scotland if they were not so analogous or if they purported to defeat foreign insolvency processes. This is reinforced by the other case law discussed in section 4) below.

Addressing the first argument, the Inner House (at 232-233.) refused to recall the sequestration because 'the date of the issuing of the commission had hitherto regulated all questions of this kind, and justly so, because it was the first sentence of the foreign Court which could have the effect of operating as an assignment; that creditors in a different country, where the bankrupt might have had a domicile of trade, could know nothing of the date of an act of bankruptcy; and that a sequestration, therefore, applied for, and the first deliverance recorded, before the application for a commission, must form a mid-impediment to the effect of preventing the issuing of the commission itself, or at least prevent it from striking against the sequestration.'
The emphasis on the probable knowledge of third parties is notable. This issue rightly continues to cause much anxiety. It is also notable that some retrospective effect in Scotland to the date of the first foreign decree was potentially allowed to a foreign process, presumably only if it claimed such effect. The Scots process would seem to have been given its full retrospective effect by the Scots court as the first court order therein preceded the first court order in the foreign process. The potential application of this theory to assets situated abroad was not explored.

The Scots petitioners further argued that the English commission could not have been preferable to the sequestration even if it had been issued prior to the first deliverance on the Scots petition, firstly because Geddes had gone to England with the fraudulent intention of obtaining a secret discharge under English law and secondly because Geddes' property had to be distributed by Scots law because he was domiciled and carried on business in Scotland. The second argument was based expressly on the strict *mobilia sequuntur personam* maxim.

These arguments do not appear to have been addressed by the court, except perhaps in an obscure reference by the Inner House (at 233.) to deciding the case on priority of first court orders 'had it been a case in which otherwise there were grounds for supporting the title of the English assignees'. The inference therefore remains that a commission issued in England against Geddes may have been given effect in Scotland despite Geddes' tenuous links with England. Little else may otherwise be drawn from these arguments.
Goetze v Aders. Goetze v Aders (1874) 2 R 150 is a further significant case in the development of the Scots international private law of insolvency, if, perhaps, more subtle than its headnote, which baldly states that 'sequestration .. in a foreign country renders a subsequent award of sequestration in Scotland incompetent'.

F. Goetze and Sohn, a Saxon firm of spinners, and its sole partner were made the subject of concourse proceedings by a Saxon court on 2nd January 1874, and a 'trustee' was appointed relative thereto the following day. Goetze appears to have been domiciled in Saxony and, although his firm traded abroad through correspondents, Goetze and his firm appear to have had their own place of business only in Saxony and to have traded largely there. Funds, and perhaps also goods, belonging to Goetze or his firm were held in Glasgow and these were arrested by English creditors on 6th December 1873 to found jurisdiction against Goetze or the firm and again on 13th January 1874 on the dependence of the action raised. On 4th February 1874 Goetze, his firm and the Saxon 'trustee', with the concurrence of a creditor, petitioned, apparently after arresting to found jurisdiction, for the sequestration of the whole estates of Goetze and his firm, with the object, clearly recognised by Lord President Inglis (at 154.), of cutting down these arrestments, and in particular that prior to the concourse. The petition was refused and some comments were made in relation to the separate issue of the effectiveness of the arrestments1.

The Lord Ordinary refused the petition on the ground that the Scots courts did not have jurisdiction to sequestrate Goetze or his firm, irrespective of the Saxon process, arrestment to found such jurisdiction in particular being ineffective for this purpose. This issue was not addressed by the First Division, except obliquely by Lord President Inglis' observation (at 154.) that the bankrupts had almost no connection with Scotland. This is unfortunate as an opportunity was thereby missed to clarify the manner in which the Scots courts were prepared to facilitate unified and universal insolvency processes by declining jurisdiction and channelling jurisdiction to an appropriate legal system in the manner discussed in section 5) below. An opportunity was also missed to re-examine jurisdiction to sequestrate the estates of persons having little connection with Scotland other than the presence of assets there.

Instead the First Division refused the petition because of the existence and nature of the extant Saxon process. Lord President Inglis and Lord Deas2 were firmly of the view that the Saxon concourse transferred ownership of the bankrupt's moveable property in Scotland to the Saxon 'trustee', thereby preventing a second sequestration.

Their Lordships' views differed as to why Saxon law had such effect. Lord President Inglis and Lord Ardmillan3 favoured the full mobilia sequuntur personam theory, considering moveables notionally situated in their owner's domicile, and so transferred by a transfer of the domiciliary system. It is odd that Strother v Read 1 July 1803 FC, the Stein cases4 and Selkirk v Davis (1814) 2 Rose 97 & 291 were referred to as authority for this proposition. As mentioned above, they do not support it. Lord Deas (at 155.) may, on the other hand, have taken the view that the first sequestration prevailed, irrespective of where it took place, as too, if rather inconsistently, may Lord Ardmillan (at 156.). As there can be little doubt that it was appropriate on any theory of universal insolvency for the Saxon concourse to be given effect in Scotland, excessive reliance should not be placed on these comments.

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It is more significant that the First Division6 found it impossible to decide without knowing what (the parties') rights were under the Saxon sequestration. The mere existence of the Saxon process was thus not in itself sufficient to preclude a Scots sequestration.

The questions put to Professor Endemann to ascertain the nature and extent of the parties' rights under the Saxon process are also significant, as are his answers thereto (at 151-152.). He was asked firstly whether or not the Saxon concourse gave 'a preferable or first exclusive right over the whole estate of the bankrupts ... situated beyond, as well as within, the realm of Saxony', to which he replied that it did, explaining that the 'right is in itself exclusive, because it appertains to the representative of the entire body of the creditors appearing in the concourse, who alone have a right to satisfaction, and that out of the whole of the property'.

Professor Endemann secondly confirmed that this right was no weaker in relation to property situated outwith the German Empire than it was in relation to property situated in Saxony or elsewhere in that Empire and thirdly stated that the right relative to property outwith Saxony was not dependent in any case upon 'completion' by a supplementary sequestration or similar process before the Courts of the country in which such estate is situated'.

The questions asked appear to infer that a pragmatic co-operative structure might have been adopted by the Scots court if the answers had been that property outwith Saxony did not fall within the concourse, or that the rights of the 'trustee' relative thereto were lesser under Saxon insolvency law outwith than within Saxony or that some 'completion' process by the courts or law of the situs was considered necessary under Saxon insolvency law.

Lord President Inglis' dicta may however undermine such hopes. Thus his Lordship stated emphatically (at 153) that 'If it was ever supposed that there might be a partial sequestration, the sooner such a notion is put to an end the better', continuing to note that 'to grant the prayer of this petition would be to sequestrate over again the estates which have been already sequestrated in Saxony, and to create a title which would compete with the title of the trustee, who has been appointed in these bankruptcy proceedings'.

It may be wondered whether or not his Lordship would have been prepared to sequestrate only property situated in Scotland if the concourse had encompassed only property situated in Saxony, or whether in such a situation sequestration would have been refused, leaving property in Scotland subject to unfettered diligence, or whether sequestration would have been granted relative to all property and thus perhaps give rise to competing titles to property situated in Saxony, or whether sequestration would have been granted relative to all property outwith Saxony. It may also be wondered why his Lordship did not adopt the persuasive argument mooted in the first Stein case, and apparently accepted in the Falconer Waterworks case7, that there was no property to sequestrate, as he appeared to analyse the Saxon concourse as a transfer of property to the Saxon 'trustee'. It would then have been open to his Lordship, in an appropriate case, to sequestrate only property in Scotland as it would have been the whole estate of the bankrupt.

It may also be wondered whether Lord President Inglis would have been prepared to provide some sort of exequatur type confirmation9 of the Saxon process in

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Scotland, had it been necessary under Saxon law for such a process to take place to render the Saxon process effective outwith Saxony. His Lordship's reference (at 153) to the confirmation of foreign executors in Scotland is ambiguous on this point.

The questions put to Professor Endemann are also interesting for their level of abstraction. It is not clear that the Saxon concourse had the effect under Saxon law of transferring ownership of the bankrupts' property to the 'trustee', rather than placing exclusive powers of administration in the hands of the 'trustee' of property remaining in the ownership of the bankrupts. Neither is it clear that the Saxon concourse was not considered by Saxon law to extend to foreign land. The first question put to Professor Endemann was however sufficiently abstract to enable the court to consider the functional and technical analogies between the Scots and Saxon insolvency systems without becoming bogged down in technical detail.

Having made this point, there is some ambiguity in their Lordships' integration of the rights of the Saxon 'trustee' with Scots law. Thus Lord Deas (at 155) considered it 'very satisfactory to find the law ... to be in accordance with our own' and Lord President Inglis considered (at 152.) the title of the Saxon 'trustee' 'the same as that of a trustee in a Scottish sequestration or an assignee in an English bankruptcy', further observing that the Saxon concourse gave 'a universal title so far as moveable estate is concerned'.

Professor Endemann's opinion does not seem to indicate a technical identity between Scots and Saxon insolvency law. It is accordingly arguable from their Lordships' remarks that a foreign insolvency system analogous to a Scots system will be given effect in Scotland, as regards moveable property, in terms of the analogous Scots insolvency system rather than in strict terms of that foreign system. Alternatively, close analogy to the Scots system may have been considered a prerequisite to allowing it its own effect in Scotland. As indicated in section 1) (d) above, Strother v Read may favour allowing a foreign process its own effect in Scotland.

Difficulties undoubtedly arise from either of these views in relation to foreign insolvency processes which do not have a relatively close analogy in Scots law and Goetzte may infer that no effect can be given in Scotland to such an insolvency process. Goetzte is understandably ambiguous upon whether or not the consequence of the potential ineffectiveness of such a foreign system in Scotland could be the competence of a Scots sequestration, whether competing with or ancillary to the foreign system in question. Lord Ardmillan appears to have minimised the possibility of such a situation arising by stressing (at 156.) equivalence rather than similarity of a foreign process. Lord Ardmillan may also have facilitated the integration of foreign processes with Scots law by using (at 156.), whether deliberately or not, the vague concept of 'attachment' rather than the more precise Scots concept of ownership transfer when considering the effect of the Saxon concourse.

It is however possible that their Lordships found it proved that Saxon law transferred ownership of the bankrupts' property to the Saxon 'trustee' and did not fully address the irrelevant issue of immoveable property. This view certainly appears implicit in Lord President Inglis' remark (at 154.) that 'it is only as operating a conveyance of moveable estate that the foreign bankruptcy proceedings receive effect'. The consequence of this view would appear to be
that a foreign process which does not transfer ownership of the insolvent person's property to an insolvency administrator will have no effect in Scotland. On the other hand, the Lord President also expressed (at 153.) the view that 'the title of [the Saxon 'trustee'] will receive effect from its date, and entitle him to ingather that part of the bankrupt's estate situated in Scotland', perhaps inferring that the *ius ad rem* approach of some of the earlier Scots cases could be applicable to foreign titles other than ownership.

In either case the separate issue would then arise of the competence of a Scots sequestration while such a foreign process was pending. It may be argued from the views noted above of Lord President Inglis on the incompetence of co-existing 'sequestrations' and of Lord Ardmillan on the requirement to refuse a second 'sequestration' in the presence of a complete foreign 'attachment' that neither a competing nor ancillary Scots sequestration could be awarded in such a situation. The court may not, on the other hand, have fully addressed this issue®.

**Goetze v Aders** is most significant for its examination of a foreign insolvency process at a relatively abstract level, in the context of its own legal system. The conclusions to be drawn from Goetze in respect of such an examination are, however, thoroughly ambiguous. The consequence of the examination could be to refuse such a process all effect in Scotland except as a transfer of ownership of moveables, and that only if the process in question purports to have such effect according to its own legal system. A further consequence could also be that no Scots insolvency process is possible when there is an extant foreign process, irrespective of whether or not that process purports to transfer ownership of moveables in Scotland. Alternatively, Goetze may allow for the subtle and coherent integration of several legal systems and insolvency processes. In the light of other authority, the conclusions which should be drawn from Goetze probably lie somewhere between these two extremes.
f) General position: Phosphate Sewage and other principles. Phosphate Sewage Company v Lawson & Sons' Trustee' is a slightly peculiar case, significant in this context largely for an attempt by Lord President Inglis to set down a short and coherent set of principles to govern major issues of international insolvency law. Lord Shand expressed the view (at 1146.) that 'the opinion which [the Lord President] has now given will be accepted as a valuable and authoritative exposition of the law in future cases'. Lord Shand has been proved correct to a certain extent, if only because of the concise manner in which the Lord President set out his views. It will be seen that Lord President Inglis' principles, though useful, are not the end of the matter.

The defender was the trustee on the sequestrated estates of a partnership which traded in both Scotland and England and which had been instrumental in setting up the pursuer to exploit what turned out to be a worthless guano concession. The pursuer lodged a claim in the Scots sequestration in relation to alleged fraud in its promotion, withdrew this claim and lodged a second, almost identical, claim. The second claim was ultimately rejected by the House of Lords, but, in the meantime, the pursuer obtained an English Chancery judgement in its favour, confirmed by the English Court of Appeal, in a suit in very similar terms to the claim rejected by the House of Lords. This judgement 'ordered that the plaintiff company be at liberty to prove ... under the sequestrated estates of Peter Lawson & Sons' and the pursuer lodged a third claim in the sequestration upon this judgement. The third claim was rejected by the First Division for two reasons, firstly on the obvious ground of res judicata and secondly because the English court was considered to have no jurisdiction to pronounce the judgement upon which the claim was based. The second reason is discussed further in section 5) below.

In the course of his judgement Lord President Inglis outlined (at 1138.) his general principles of international insolvency law as follows:

'First, the great principle that moveables follow the law of the owner's domicile is not more firmly settled in the case of intestate succession than it is in the case of bankruptcy. Hence, whenever the Court of the domicile has by proceedings in bankruptcy vested the moveable estate of the bankrupt in a trustee or assignee for the purpose of equal distribution among his creditors, no part of the moveable estate, wheresoever situated, can be touched or affected except through the bankruptcy proceedings and by the orders of the Court of that country in which those proceedings take place. The jurisdiction of that Court is exclusive.' His Lordship referred to Strother v Read 1 July 1803 FC, Maitland v Hoffman 4 March 1807 FC and Goetze v Aders in support of these propositions.

The Lord President continued to observe, under reference to the first Stein case and Selkirk v Davis (1814)2 Rose 97 & 291, that 'Secondly, When the bankrupt is a trading company having two trading domiciles, as in the present case, the same principle is still applicable. The process of distribution of the effects may be instituted in either domicile, but where it has been instituted in one of the domiciles, and the estate has been vested in a trustee or assignee, no claim can be made effective against the estate, and no part of the estate can be touched or affected except through those bankruptcy proceedings, and the jurisdiction of the Bankruptcy Court of that domicile is exclusive even of the courts of the other domicile'.

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Thirdly, These principles of international law do not apply to the real estate of the bankrupt situated beyond the country of the domicile, but in questions between different parts of Her Majesty's dominions the Imperial Parliament has wisely provided that the bankruptcy, or rather the completion of the trustee's or assignees' title to the bankrupt estate shall have the effect of transferring to and vesting in them all real estate in any part of Her Majesty's dominions.

Fourthly, The trustee in a Scotch sequestration ... or the assignee in an English bankruptcy ... in whose character of trustee and assignees respectively ...

can be subject to the jurisdiction of no Court except the Courts of the country within which the bankruptcy proceedings have been instituted, and the concursus creditorum has been established. The bankrupt ...

may be subject to the jurisdiction of Courts beyond the country of his domicile and of the bankruptcy proceedings ... . If the object of the creditor suing be merely to constitute his debt there will be no objection to the jurisdiction, for the constitution of the debt is sometimes a useful and even necessary proceeding for the purpose of preserving or securing recourse against co-obligants or co-cautors.

At least the first three of Lord President Inglis' principles were obiter, and, while agreeing with the Lord President's general views, Lord Deas (at 1142.) appears to have considered no issue of international private law to have arisen in the case at all.

Apart from the apparent assumption that his principles were applied uniformly throughout the world, Lord President Inglis' principles are interesting for a number of further reasons. They first of all reflect an emphasis on jurisdiction rather than choice of law and in particular emphasise the channelling of jurisdiction discussed in section 5) below as a method by which to establish unified and universal insolvency processes. It may however be questionable whether or not this jurisdictional emphasis was justifiable on the authorities to which reference was made and whether or not this emphasis is helpful in the resolution of the problems of international insolvency.

Strother, Hoffman and Goetze were all quite firmly based upon choice of law rather than jurisdiction, as indeed were Stein and Selkirk. In these cases the rights of the various foreign assignees in and to the relevant items of property in Scotland were based substantially upon effect being allowed in Scotland to transfers under the law of the relevant foreign legal system. While it is implicit that the foreign courts involved were considered by the Scots courts to have jurisdiction to effect or sanction the constitution of such rights, this appears to have been a secondary issue.

Furthermore, despite Lord President Inglis' remarks, it is not a logical consequence of allowing a foreign domiciliary bankruptcy transfer to take effect in Scotland that exclusive jurisdiction lies in the foreign domiciliary court relative to the estate falling within that bankruptcy. On the other hand, it is relatively simple to argue that the judgement of a foreign court of exclusive jurisdiction should take effect in Scotland. It would seem that his Lordship inferred exclusive jurisdiction from choice of law and then deduced that same choice of law from the exclusive jurisdiction inferred therefrom. Leaving aside the Lord President's reasoning from the authorities, it is possible, on this jurisdictional analysis, that excessive power could be ascribed to a court accorded exclusive jurisdiction, removing the practical flexibility of multiple jurisdiction for various purposes. It is also clear that a jurisdictional
approach is inadequate in relation to insolvency processes which do not involve a court or similar institution.

Secondly, Lord President Inglis' references to the bankrupt's domicile appear inconsistent and not wholly justified. His Lordship's first principle appears to invoke the *mobilia sequuntur personam* fiction to justify the effectiveness within Scotland of a foreign domiciliary bankruptcy transfer, by analogy to the rules in intestate succession, whereas the second principle refers to trading domicile and the possible existence of multiple domiciles for the purpose of bankruptcy. It is clear that an individual may only have one domicile for the purposes of succession, that trade is only one element in establishing this domicile and that a partnership in itself cannot have a domicile for the purposes of succession. Furthermore, the authorities discussed above and referred to by his Lordship appear, on balance, to favour a connecting factor of trading domicile to the connecting factor of general personal domicile for the purposes of a bankruptcy transfer. Neither do these authorities, other than perhaps Goetze v Aders, support the full *mobilia* theory.

In addition, the precision of the analogy between succession and bankruptcy was, as usual, not fully examined and significant differences in title were ignored, such as the requirement for a foreign executor but not a foreign bankruptcy trustee to obtain some form of confirmation from the Scottish courts before intromitting with property in Scotland. It would therefore seem preferable to view his Lordship's references to succession and domicile in the first principle as broad analogies by which appropriate choice of law rules for bankruptcy have been established in terms of the second principle.

The Lord President's third principle seems uncontroversial in the light of the Falconer cases and his Lordship's fourth principle is discussed further in section 5 below.

It may be useful to paraphrase his Lordship's principles thus: jurisdiction to commence an insolvency process should be channelled to any trading domicile of a bankrupt, and after commencement of such a process exclusively to that trading domicile in relation to most issues concerning that process. The first transfer of moveables effected by an insolvency process of a trading domicile of a bankrupt should then take effect in Scotland. It is doubtful whether further reliance can be placed on the Lord President's principles.

It is also doubtful whether many further reliable general principles of the Scots international private law of insolvency may be stated. Despite *dicta* in several cases, it is clear from the cases discussed above and in the following sections that appropriate foreign insolvency processes have effects in Scotland additional to the transfer of moveables. It would also appear that the Scots courts will countenance multiple insolvency processes, particularly if assets are not transferred by one or more of them, and will endeavour to assess the effects claimed by a given foreign process in its own terms. It is suggested that the general approach of the Scots courts, while relatively undeveloped, provides a degree of useful flexibility in approach to the problems of international insolvency. The Scots approach to some of these problems is discussed in the following sections.
3) Vesting of property and the lex situs.

In sections 1) and 2) above it was argued that Scots law permits appropriate foreign insolvency processes to have certain effects within Scotland. The principal effect permitted has been the transfer of Scots assets under such a foreign process. Scots law, as the lex situs or the law otherwise governing the relevant assets, appears to have a residual function in this regard, including the limitation of such asset transfers. The Scots courts would also appear to accord such residual functions to a foreign lex situs or other such law. These residual functions are evident as regards 'radical rights' held by bankrupts and as regards various types of property, such as future property and trust funds. They are particularly evident as regards land.

a) Radical rights. The doctrine that a bankrupt holds a radical right in property transferred on his bankruptcy is controversial in internal Scots law'. Simply stated, such a radical right is supposed to entitle a bankrupt to deal, after his discharge, with property transferred by his sequestration as owner thereof, without any form of reconveyance. In Gracie v Gracie's Trs. (1909)2 SLT 89 it was argued that a person who had been bankrupted in New Zealand could not claim legitim in a Scots executry, despite his discharge in New Zealand, as he had not been reinvested with his estate. Lord Johnston rejected this argument as his Lordship was (at 91) 'not prepared to accept the proposition that a foreign sequestration ... does more than carry, as does a Scots sequestration, the bankrupt's moveable estate to the trustee or assignee for the purposes of the sequestration, leaving always a radical right in the bankrupt'. This radical right was clearly considered a matter of Scots rather than New Zealand law.

Dicta in Davidson v Fraser 1787 Mor 4562 also indicate that foreign bankrupts are considered to have a radical right to assets in Scotland. However, as the administrators of foreign insolvency processes may, as discussed in section 1),b) above, at that time only have been considered to have a ius ad rem to property of bankrupts in Scotland, the radical right mentioned may have been conventional ownership!

Similarly the radical right doctrine was referred to in Salman v Earl of Rosslyn's Trs. (1900)3 F 298 in which a Scots trust was superseded by an English bankruptcy. While it was assumed throughout without argument that the English bankruptcy should take effect as if it were a Scots sequestration, and therefore supersede the type of trust in question, it is difficult to conclude that Scots law was not considered relevant in this context in any event.

b) Scots heritage. It is common to analyse separately the international effects of insolvency on moveables from effects on immoveables. It is suggested that in Scots international private law the distinction between the two categories of property is not so great as it appears on first sight, the difference lying largely in the degree to which a foreign insolvency process is permitted to take effect within Scotland. The control exercised by the Scots lex situs is greater as regards immovable than moveables and it was accordingly held in the Stein and Falconer cases that an English bankruptcy could not transfer Scots heritage even if it purported to do so.

It may be argued from Falconer that a foreign process may be allowed to give rise to a personal ius ad rem to Scots heritage in the administrator thereof if it purports to do so, entitling him to deal with, and presumably make up title
to, that Scots heritage in terms of Scots law. As discussed in section 5) below, court authority was obtained in Araya v Coghill 1921 SC 462 for the disposal of Scots heritage by a Chilean receiver. It is also suggested in section 5) below that such authority may not have been necessary. In any event the conditions imposed by the court in Araya show the powers retained by the Scots court in respect of the exercise of the powers of the Chilean receiver as regards Scots heritable and other property.

The position regarding Scots heritage has been relaxed from time to time by statute as regards certain foreign processes. Thus in Rattray v White (1842)4 D 880 a vesting order under the English Judgments Act 1838 (1 & 2 Vict. c.110) was made against a debtor, prior to adjudications being led in Scotland of an adjudication previously led by that debtor. Shortly thereafter the English vesting order and a subsequent order appointing an assignee under the English process were recorded in Scotland in the General Register of Sasines. The adjudications were thereupon dismissed pursuant to the opinions of the Whole Court of the Court of Session as the subject thereof had vested in the English assignee.

Section 37 of the 1838 Judgments Act provided for the vesting in a provisional assignee of 'all the real and personal estate ... within this realm and abroad' of the debtor. Section 45 of the Act then provided for property vested in the provisional assignee to be vested in a more permanent assignee and s.46 for registration of both vesting orders in any place in Scotland to have the effect of registration of a conveyance in such place, as regards property requiring such a conveyance. Section 46 then protected bona fide purchasers registering their titles prior to registration of the vesting orders, provided the vesting orders were not registered within two months of their dates.

Much of the argument in Rattray v White related to whether or not s.37 of the 1838 Act was intended to include Scots heritage. Lord Moncreiff was of the view (at 889) that s.37 provided the English assignees with title to recover Scots heritage, but that the effect of that title in competition should be determined by the Scots lex situs. His Lordship also felt there were technical problems in applying s.46 for this purpose, as at that time sasines and other such instruments rather than conveyances of land were registered in the Register of Sasines.

Lord President Boyle and the other consulted judges were of the view that s.37 was clearly intended to apply to Scots heritage, by analogy to the development of the law regarding moveables and after considering other statutes to similar effect. The existence of the s.46 procedure was felt to support this view.

It is not so clear what role their Lordships felt was played by s.46 in the constitution of the rights of the English assignee, particularly as regards their effects in re. As actions of adjudication have only limited effect in Scots law from the date they are commenced, the date at which the English assignee was considered to have acquired a right in re in relation to the subjects thereof was probably not considered critical4. It is nevertheless unfortunate that this point was not clarified, particularly in view of the retrospective implications of swift registration under the proviso to s.46.

The consulted judges did note (at 887) in relation to the previous English Bankruptcy Act of 1825 (6 Geo.4 c.16 ss.12 & 64) and the Scots 1839 Bankruptcy
Act that 'the transference of real property is thus completed by its actual vesting in the assignees in England, and trustee in Scotland, by virtue of the act and declaration of the law'. The English Bankruptcy Act of 1825 contained no provisions relative to Scots law equivalent to s.46 of the English Judgments Act of 1838, suggesting a willingness on the part of the court to give an English bankruptcy effect in relation to Scots heritage without any registration procedure. Section 30 of the Scots Bankruptcy Act of 1839 did, however, contain a registration provision referring to English law concerning the effects of a Scots sequestration in relation to English land. The consulted judges further felt (at 888) that s.46 of the 1838 English judgments Act was 'an express recognition of the necessity of following out the system of registration applicable .. to real .. property under the Act'. It seems likely that the consulted judges considered the English bankruptcy to take effect in re by virtue of registration under s.46 of the 1838 Act. It is less clear that this registration was considered to have retrospective effect.

It is suggested that the approach of the consulted judges was not in fact very dissimilar to that of Lord Moncreiff, except that the consulted judges adopted a more robust approach to the niceties of Scots conveyancing of land than did Lord Moncreiff, allowing sequestration to arise from the recording of a foreign court order. In any event there was some attempt to integrate the English process with Scots law, in terms of Scots law6.

The dictum quoted above in relation to the English Bankruptcy Act of 1825 shows some willingness on the part of the Scots courts to give foreign insolvency processes effects in Scotland in relation to heritage without any specific procedure to integrate such a process with the Scots land conveyancing system. Such an approach was more clearly taken in Murphy's Tr. v Aitken 1983 SLT 78, although the lex situs still retained a significant role in this latter case.

In Aitken inhibitions had been registered in Scotland against a person later bankrupted in England. Lord Allanbridge held that title to Scots heritage was acquired by the English trustee in bankruptcy, subject to the inhibitions registered in Scotland. The issues in this case related largely to the ranking of the claims of the inhibitors relative to the Scots heritage and it is therefore discussed further in section 6.5 below. It is interesting in this context largely for the analysis by Lord Allanbridge of the effect in Scotland of a statutory transfer of Scots heritage by an English bankruptcy in terms of a voluntary transfer thereof under Scots law by the bankrupt. This approach was based upon that taken in Calbraith v Grimshaw (1910) AC 508 relative to diligence executed prior to bankruptcy7 and in Salaman v Tod 1911 SC 1214, discussed below.

It may be argued that the analogy of voluntary transfer is an anachronism deriving from early theories of international insolvency8. It is nevertheless significant that the English process was integrated with Scots law in terms of the Scots lex situs.

Although both a personal ius ad rem and a real ius in re would have been postponed to the inhibition in Aitken, it appears to have been assumed by both parties and Lord Allanbridge that a real ius in re in the heritage in question had vested in the English trustee by virtue of the equivalent provisions in the English Bankruptcy Act of 19149 to s.37 of the English Judgments Act of 1838, without any additional Scots registration requirements equivalent to s.46 of that
latter Act. As in *Rattray v White*, this was no doubt the effect of the 'imperial' aspect of the statute.

**c) Future and contingent property.** Scots law also retains a role in relation to future and contingent property otherwise governed by Scots law which is argued has been transferred by a foreign insolvency process. It was argued in *Obres v Paton's Trs.* (1897) 24 R 719 that a claim to *legitim* from a Scots estate had vested in a French syndic under French law and that the bankrupt could not therefore have discharged that claim, as he had purported to do prior to his father's death.

After a proof Lord Kyllachy, the Lord Ordinary, held that under French law succession rights did not vest in the syndic until the death of the relevant person, in the same manner as under the equivalent Scots rules. Had Lord Kyllachy considered it irrelevant to argue that the French process had greater effect than an equivalent Scots process in relation to future property it is arguable that a proof of French law would have been unnecessary on this point. However his Lordship appears (at 723) to have taken a restrictive approach to foreign processes, considering the only effect thereof recognised in Scotland to be divestiture of moveables as effectually as under an equivalent Scots process. The French rules established at the proof would accordingly appear to have been considered effective in Scotland to the extent they did not go beyond the equivalent rules of Scots law.

Given the outcome of the proof on this point it was not directly addressed on appeal. While the approach of the First Division to the French process in general was undoubtedly more co-operative than that of the Lord Ordinary, there is no reason to suppose that there was any disapproval of the restrictive approach apparently taken by Lord Kyllachy to the transfer of the Scots *legitim* claim. Indeed the analysis by the First Division of the syndic's title to reduce the discharge thereof as a gratuitous alienation in terms of equivalent Scots trustees tends to support an analysis of property transfer in similar terms of equivalence.

A different approach was adopted in *Salaman v Tod* 1911 SC 1214, where an English trustee in bankruptcy claimed a non-vested contingent interest of the bankrupt in a Scots executry estate. This *spes successionis* would not at that time have vested in a Scots trustee in sequestration but was held on interpretation of the English statute to have vested in the English trustee. The 'imperial' nature of the English statute was obviously central to the decision reached. The integration of English and Scots law was not, however, completely ignored in its interpretation relative to Scots property, despite assertions that no question of international law was involved.

Lord Kinnear considered (at 1221) the English statute to transfer to the English trustee all property which the bankrupt could have so transferred, continuing to observe that 'the question which we have to consider in this action is whether, according to the law of Scotland, the right which the trustee seeks to vindicate is so assignable or not'. The First Division then concluded, from an analysis of Scots law that this *spes successionis* was so assignable and had therefore vested in the English trustee. The First Division interpreted the English statute for itself and it is not clear what view would have been taken had the statute purported to transfer property which was not assignable under Scots law. It is
possible that such an 'imperial' statute would have been given full effect in Scotland.

As mentioned above, the voluntary transfer analogy in Salaman v Tod was applied in Murphy's Tr. v Aitken. While reliance upon a statutory requirement to give effect to an English transfer of transferable property was not explicitly set out in the Aitken case and the more general analogy to voluntary transfers drawn in Galbraith v Grimsbaw (1910) AC 508 was referred to in both Salaman v Tod and the Aitken case, it is suggested that a voluntary transfer analogy should not be applied as a general rule. The reason for this is the inappropriateness of applying an outmoded general theory to specific current issues.

At first instance in Salaman v Tod, Lord Skerrington favoured a comparison of the effects of the English process with its Scots equivalent, as he felt less constrained by the 'imperial' nature of the English statute than did the First Division. This approach appears inconsistent with that taken by the First Division on appeal, but is similar to that apparently taken by Lord Kyllachy in Obers.

A similar approach to that of Lords Skerrington and Kyllachy may also have been taken by Lord Fleming in Arthur's Trs. v Salaman 1930 SW 58, where it was noted that under both Scots and English bankruptcy statutes the excess over alimentary needs of alimentary funds vested in the relevant trustee from the date of appointment. The appropriate Scots proportion of Scots alimentary interests were accordingly held to have vested in an English trustee in bankruptcy on his appointment. However the report is rather brief and such a ratio would be inconsistent with that of the First Division in Salaman v Tod, given the similar statutory provisions involved.

d) Scots trusts and executries. The Scots courts have also placed some reliance upon Scots law as regards claims by foreign insolvency administrators upon Scots trust funds and executory estates. Thus in Salaman v Earl of Rosslyn's Trs. (1900)3 F 298 an English bankruptcy was considered to supersede a Scots administrative trust as if it were a Scots sequestration. It was not argued that the English bankruptcy did not purport to have that effect, nor that the English statute had to be given effect in Scotland irrespective of the provisions of Scots law, the case being argued as if the English process were a Scots sequestration. It is however difficult to conclude that the special nature of the trust in question was not considered to be governed by Scots law and that had such trusts not been superseded by Scots sequestrations the trust in question would not have been superseded by the English bankruptcy.

In Salaman v Sinclair's Tr. 1916 SC 698 an English trustee in bankruptcy argued that a Scots executry estate, and in particular some Scots deposit receipts, had been transferred to him by the English bankruptcy of the executor, subject to any preference available to claimants on the executory estate. Procedural difficulties prevented this issue from being decided explicitly by the First Division. Lord Skerrington at least appears to have held the obiter view (at 707) that the issue of ownership of the deposit receipts at the time of the English bankruptcy was governed by Scots law. If they were to have been considered beneficially owned by the executor under Scots law, subject to executory claims, presumably the effect of the English process thereon may then have been considered.
The case had not reached that stage as the executry estate had been sequestrated in Scotland after the English bankruptcy of the executor, and the First Division merely decided that claims should be determined in the course of the Scots sequestration. While the Scots sequestration may have been considered pre-eminent by the Scots court, it is arguable that Scots law was in any event considered to play a delimiting role in relation to the English bankruptcy inssofar as it purported to affect Scots property.

e) Foreign assets. It will be clear from the above discussion that Scots law is considered by Scots courts to play some role in relation to Scots property even when a foreign insolvency process is allowed effect in Scotland as a transfer of assets. In addition Scots courts appear to a certain degree to accord a similar role to foreign laws as regards foreign property otherwise considered by the Scots courts as falling within Scots or other insolvency processes.

Thus it would appear that in the Captain Wilson case an English bankruptcy may have been considered by the Scots court to have retrospective effect in relation to English debts where it would not be allowed such effect in relation to Scots debts. Similarly in Peters, Bogle & Marshall v Dunlop's Trs. 1770 Mor App Bankrupt No.1 the law of Virginia was considered (without much evidence!) firstly to allow full effect to a Scots trust deed for creditors as regards property in Virginia and then to pay no regard to the reduction of the trust deed in Scotland as a preference under the 1696 Bankruptcy Act. The trustees under the trust deed were therefore preferred to non-acciending creditors who arrested property coming to Scotland from Virginia.

The role of a foreign lex situs in relation to land was conceded by Lord Hunter in Wilsons (Glasgow and Trinidad) Ltd. v Dresdner Bank (1913)2 SLT 437 at 438. Although his Lordship took the view that the adjudication of heritage provided by a Scots winding up in s.213(2) of the 1908 Companies (Consolidation) Act applied to land wherever situated, he nevertheless felt a foreign court could consider the provisions of the statute ultra vires. However, Lord Hunter felt that the courts of Trinidad could not take that view as the statute was 'imperial'.

The law otherwise governing property acquired after a Scots sequestration was also considered relevant in Mein v Turner and Andrew (1855)17 D 435 although a contrary argument may be constructed from Richardson v the Countess-Dowager of Hadinton (1824)2 Sh App 406. In Mein v Turner and Andrew the Second Division refused to declare that acquirenda of a Scots bankrupt which was situated in England had vested in the Scots trustee in sequestration, largely because it was felt that a later English bankruptcy should first be challenged in England. It was also clearly accepted that English law would determine finally the effectiveness of the Scots sequestration relative to the English acquirenda.

The view taken in Richardson v Hadinton is not so clear. The case related principally to the effect of Russian prescription upon the debts owed by a person who had been sequestrated in Scotland. The bankrupt had later moved to Russia and acquired a great deal of property there prior to his death. Some of this property had apparently been sent to his daughter in Scotland. It was argued (at 419-420) that the Russian property was 'charged with' Russian debts, and in particular debts due to the Emperor of Russia which prevented the Russian property being affected by creditors and (at 407) that in any event it was
subject to Russian law as an executry estate. Very little comment was made by the court upon the property in Russia, the power of the Russian law apparently being accepted relative thereto. The suggestion (at 432) that a 'more decided opinion' be obtained 'on the effect of a Scots sequestration upon property sued for in the Courts of Russia' may infer that Russian law was considered to play some role relative thereto.

It was, however, suggested that property coming to Scotland could be applied in settlement of the bankrupt's debts, if they had not prescribed. No reference was made to a distinction between property subject to and not subject to the Russian Imperial embargo in this regard. Unlike the account taken of the law of Virginia in Dunlop's Trustees, the House of Lords in Richardson v Hadinton may have considered that no account should be taken of the law of Russia as regards property subsequently brought to Scotland.

The nature under Russian law of the Russian Imperial embargo and of the 'charging' of the Russian property with debts was not elaborated. It is accordingly possible that property leaving Russia or the property received by the bankrupt's daughter, and being considered most clearly by the court, was not affected by the embargo or charge to the exclusion of the attachment thereof in Scotland. Such property could therefore have been the subject of the supplemental sequestration referred to (at 426-427) by the court as appropriate to give the Scots trustee title thereto, without ignoring the Russian law.

While the arguments were not clearly focussed on property issues in Richardson v Hadinton the dicta are expressed in general terms. This may suggest that the effects of Russian law on assets in Russia may only have been accepted because the court could do nothing about it. It is suggested that such a broad view of these dicta is inconsistent with the request noted above for further opinions upon the effect of the Scots sequestration in Russia and with much of the other authority discussed above.

f) Conclusions. The general approach of the Scots courts to detailed issues in asset transfers on international insolvency may be best summarised by three statutory provisions: s.23 of the 1793 Bankruptcy Act and ss.72 and 426(2) of the 1986 Insolvency Act. Section 23 of the 1793 Act declared that the 'whole Estate and Effects, of whatever Kind, and wherever situated, (in so far as may be consistent with the Laws of other Countries, when the Effects are out of Scotland,) shall be deemed and held to be vested in the said Trustee' and s.72(1) of the 1986 Act provides that '[a] receiver appointed under the law of either part of Great Britain ... may exercise his powers in the other part of Great Britain so far as their exercise is not inconsistent with the law applicable therein' (italics added). In addition, s.426(2) of the 1986 Act restricts the requirement under s.426(1) to enforce insolvency court orders obtained in one part of the United Kingdom in another part 'in relation to property situated in that part'. The residual powers of the lex situs are thus recognised.

The judgements at first instance of Lord Kyllachy in Obers v Paton's Trs. and of Lord Skerrington in Salaman v Tod and the judgement of Lord Fleming in Arthur's Trs. v Salaman tend to support a general approach whereby the effects claimed by a foreign insolvency process in Scotland are limited by the effects of an equivalent Scots process. Strict comparison of the effects of Scots and foreign insolvency processes is, however, needlessly restrictive of the foreign process.
in question. It introduces a requirement to satisfy two legal systems, along the lines of the supposed 'double delict' rule in Phillips v Eyre (1870)LR 6 QB 1.

It is suggested that such a doctrine should not be developed from these judgements and that instead a foreign insolvency process be allowed its own effect in Scotland, to the extent that such effect is not contrary to basic rules of Scots property law, and that the effect claimed for such a process be integrated with other rules of Scots property law in terms of Scots law. It is also suggested that the First Division in Salaman v Tod adopted this latter approach, despite the 'imperial' nature of the English statute, and that the analogy of voluntary transfer was used only because the English vesting provisions operated on that analogy. It is further suggested that many of the cases discussed above involved basic principles of Scots property law which were either unaffected by the foreign law in question, practically necessary for the integration of the respective property systems or too important in the view of the Scots court to be superseded by a foreign law. Further basic principles of Scots property law, such as the inalienability of types of property and the general protection of trust property from a trustee's own creditors, may also be expected to restrict the effects claimed in Scotland for a foreign insolvency process.

Section 426(3) of the 1986 Insolvency Act provides that 'the Secretary of State may by order make provision for securing that a trustee or assignee under the insolvency law of any part of the United Kingdom has, with such modifications as may be specified in the order, the same rights in relation to any property situated in another part of the United Kingdom as he would have in the corresponding circumstances if he were a trustee or assignee under the insolvency law of that other part'. This power has not yet been exercised. It is suggested that this power be exercised to extend or clarify rather than restrict the rights in Scotland of relevant United Kingdom trustees and assignees. It is further suggested that s.426(3) should not be allowed to restrict the effects allowed at common law to foreign insolvency processes in relation to Scots assets.
4) Retrospective effects of insolvency: the 'suspect period'.

a) Introduction. In Section B.3) above it was indicated that the suspect period gives rise to some of the most intractable problems faced by international insolvency. 'Suspect period' is a broad generic term which may be used to describe the scope of operation of a number of legal devices which prevent or nullify transactions or other actions which take place prior to some form of formal insolvency, when such transactions or other actions prejudice creditors of the insolvent person. Such formal insolvency thus appears to have some retrospective effect, to a time when it is felt, with the benefit of hindsight, that actions of and relative to a person should have been restrained, in the interests of his creditors, when that person was becoming insolvent. It should be added that there are analogous devices which need not be linked to a formal insolvency process, an example being Scots equalisation of diligence on apparent insolvency', and, as illustrated below by Obers v Paton's Trs. (1897)24 R 719 in relation to acquirenda, further devices which are not strictly retrospective from the commencement of such a process.

As also indicated in Section B.3), such legal devices are commonplace and reflect similar policies in different legal systems, although the devices themselves vary considerably in technical detail. In an internal context the retrospective nature of such devices gives rise to a clear conflict between the interests of a third party dealing with an apparently solvent person and the creditors of that person, and indeed between the interests of both of these groups and that of the person later becoming insolvent. Individual legal systems arrive at a particular balance of these interests, of which persons operating under that legal system should be aware. Creditors taking securities or using diligence should accordingly be aware of the risk that their securities or diligence may be undermined "retrospectively" by the future insolvency of their debtor.

In an international context the assessment of such risks by all parties is particularly difficult, partly because of difficulties in choice of law. The balance of interests achieved by individual legal systems derives from the integration of apparently distinct legal issues, to which distinct choice of law criteria apply. Thus a person may purchase property in one state and the seller may later become formally insolvent in another state. The law of the first state may require a purchaser to have some reason to suspect the impending insolvency of the seller before the sale may be annulled and the law of the second may not. Choice of law criteria relative to the sale, such as third party certainty, suggest that the purchaser should have regard to the suspect period rules of the first legal system and criteria relative to the insolvency process, such as doctrines of unity and universality of insolvency, suggest that an insolvency administrator should be entitled to invoke the suspect period rules of the second legal system.

This is a simple example, but it serves to illustrate the difficulties inherent in the integration of the different balances of interests reached relative to the suspect period by different legal systems. These difficulties are such that it would almost be true to say that suspect period rules generally only have effect within the territory of a given insolvency process. It may therefore be said that those wishing to defraud their creditors should do so in a state in which they are unlikely to be the subject of a formal insolvency process.
Regrettably the resolution of this unfortunate state of affairs in the United Kingdom at common law has been largely stultified by the English House of Lords case Galbraith v Grimshaw [1910] AC 508, discussed below, which held that neither the retrospective laws of Scotland nor England were applicable to strike down execution levied in England prior to a Scots sequestration, when each law would have been applicable to strike it down in an internal context. Similarly pragmatic approaches to the problem have been largely unsuccessful, as, for example, in the dogmatic refusal of the court in Goetze v Aders (1874) 2 R 150 to strike down diligence executed in Scotland by sequestrating in Scotland a person who had already been bankrupted abroad. There has been little express statutory assistance of much effectiveness. As mentioned below, the position may be alleviated by the more pragmatic approaches taken in Re Paramount Airways Ltd. (No.2) [1992] BCC 416 by the English Court of Appeal and potentially available under s.426(5) of the 1986 Insolvency Act.

Detailed authority is mixed and it is necessary to distinguish several types of issue. One set of issues relates to the target of the device involved. Thus the approach of the Scots courts to diligence executed prior to insolvency seems to differ from their approach to the preference of favoured creditors, and both may differ from the approach taken to gratuitous disposal of assets. A second set of issues relates to the technical operation of the device involved. Thus the approach taken to overtly retrospective vesting and divesting of rights differs from the approach to devices undermining a transaction ex post facto on the ground that its effect was to prejudice creditors. Other technical issues, such as a requirement that the commencement of a suspect period be determined by a court, may give rise to further variation. A third set of issues relates to the source of the device invoked, the court in which it is invoked, the person invoking it and the assets to which the action relates. Thus a Scots court may be more willing to give effect to a Scots device in relation to foreign assets than it would be to give effect to a foreign device in relation to Scots assets and a Scots device may or may not be made available to the administrator of a foreign insolvency process or to an individual foreign creditor in relation to Scots assets by a Scots court.

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b) Diligence. The approach generally taken by Scots international private law to diligence executed during the suspect period has been influenced significantly by the main line of authority which established the prospective international effects of insolvency processes. One reason for this is the fact that very many of these main cases concerned competitions between diligence executed under one legal system and insolvency processes deriving from another. A more important reason is perhaps the technical manner in which internal English law dealt with such issues at the relevant times by initially giving strictly retrospective effect to a bankruptcy assignment to the date of the first act of bankruptcy. There would seem to be, in short, a distinctly xenophobic and restrictive territorial approach to anti-diligence devices, allowing creditors to evade such devices by executing their diligence in favourable jurisdictions.

As discussed in section 2) above, appropriate foreign processes are generally given effect in Scotland as a transfer of property in Scotland from the commencement of the formal process. Accordingly, as discussed in section 2),d) above, in Geddes v Mowat (1824)2 Shaw 230 the vesting of Scots property in English assignees would have been related back to the date of the petition in the English court for a commission of bankruptcy. It may then, perhaps, have been difficult to address the separate issues of the suspect period as these were also dealt with in internal English law by the doctrine of relation back. The exceptions to strict relation back, which arose in English law largely to protect innocent third parties from secret acts of bankruptcy, seem then to have developed in such a manner that the Scots courts would have found it difficult to develop sympathetic choice of law rules, even if the appropriate sympathy had been present.

In Dunlop's Creditors v Brown and Craw 1759 Mor 4559 an act of bankruptcy took place on 14th July 1755, a petition for a commission of bankruptcy was presented in England on 2nd August 1755 and an assignment took place relative to the commission on 23rd August 1755. Some debts due to the bankrupts were arrested in Scotland between the date of the act of bankruptcy and the date of the petition for the commission and 'the Lords preferred the arrestments in the hands of the company's debtors resident in Scotland, preceding the date of the petition for the commission, to the legal assignees'.

There is no further reported comment from the bench and the parties' arguments largely concerned the general effectiveness in Scotland of the English process. The narrower issues of the suspect period were only addressed obliquely in the assertion of the arrester that 'the effect given to commissions of bankruptcy in England, by positive statute, can have no effect beyond the jurisdiction of their law, no more than the retrospect established in Scotland by the act 1696 can be effectual in England or Holland, or than the retrospects established by ordinances in France can be effectual here or in England'. The possibility of applying Scots law to deal with the arrestments was not discussed, which is not surprising given the lack of an appropriate remedy in Scots law at that time.

The Captain Wilson case was much referred to in Brown & Craw. The general nature of the arguments and judgements is discussed in section 1),c) above. Again the narrower issues of the suspect period do not appear to have been particularly addressed, although it is suggested that the Scots court may have been prepared to give full effect to the relation back of the English process as regards English bonds, and perhaps even Irish bonds, arrested in Scotland. There was in the Captain Wilson case at least a negative territorial approach to
the general idea of allowing retrospective effect in Scotland to foreign insolvency processes, in that English relation back was excluded as regards Scots bonds. However the Captain Wilson case by no means established a lex situs choice of law rule for the suspect period in general or in particular as regards diligence executed during such a period.

Hunter v Palmer (1825)3 S 586 is the leading Scots case relative to diligence executed during the suspect period. As indicated below, it has also had more general influence.

In Hunter Scottish merchants arrested debts owed by a Glasgow trader to Foster, a merchant from Berwick, initially to found jurisdiction and then on the dependence of admiralty actions to constitute their claims against Foster. They obtained decree in their actions several weeks later, on the same day that a commission of bankruptcy was obtained in England against Foster, which was followed several weeks later by an assignment thereunder. Several acts of bankruptcy, under English law, were alleged to have take place prior to the arrestments.

The English assignees argued that as it had been established that an English commission of bankruptcy took effect in Scotland in relation to moveables, that effect should include all of the provisions of the English law, including those concerning relation back. They also argued that any preference of the arresters should in any event be determined in the English process®. The arresters felt the Scots court should determine the issue and (at 588) that 'the Courts of Scotland had gone as far as international comity required, in giving effect to an English commission of bankruptcy from the period of its date, but that it would be going greatly too far to allow it to have a retrospective effect, so as to cut down diligences executed under the sanction of the law of Scotland, and which would not have been interfered with by a Scotch sequestration in similar circumstances'.

The Judge-Admiral preferred the English assignees, but was reversed by the Court of Session on advocation. However the Court appears to have been very much influenced by the form and possible effects of the English law in question and could have considered English law applicable in principle but inapplicable upon interpretation, as the lex causae, to Scots diligence. Alternatively, the applicable English law may have been excluded for reasons of lack of 'comity', on what would now be considered the 'public policy' exclusion of foreign law. It is thus not completely clear that the arresters' more general argument regarding the irrelevance of English law was upheld. Neither does the reference of the arresters to equivalent Scots rules appear to have been fully discussed nor taken up by the English assignees. It seems doubtful that the arresters were inviting the court to invoke the Scots rules in favour of the English assignees in order to strike their diligence down!

Lord Glenlee noted (at 590) that 'English law says, all diligences are voided by a prior act of bankruptcy. This rule, however, is restricted by [Romilly's Act]® as to English diligences, if not executed within two months of the commission. But Scotland is excluded by this act, so that English creditors would be on a more favourable footing than Scotch creditors; and consequently to give effect to this would not be international justice. Besides, it would appear that it was the understanding of the Legislature, that the retrospective effects of a commission of bankruptcy could not operate in Scotland, and that it was in

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consequence of this understanding that the above statute was declared not to apply to Scotland, as being unnecessary there.'

Despite its ambiguity, Hunter has been interpreted as a rejection of the argument that the retrospective rules of foreign insolvency laws should be allowed effect in relation to diligence executed in Scotland. It does not determine whether or not the equivalent Scots rules are available to an appropriate foreign insolvency administrator as a matter of choice of law.

Inshaw Seamless Iron and Steel Tubes Limited v Smith, Roberts & Co. Limited (1911)28 Sh Ct Rep 171 suggests that foreign insolvency processes may have some retrospective effect in Scotland, although it may not be wholly in point in this context. A Scots creditor of an English company arrested debts due to the English company by Glasgow Corporation prior to the presentation in England of a winding up petition in relation to the English company. The Scots creditor then received payment of the sums arrested, pursuant to a multiplepoinding, prior to a winding up order being made in England relative to the English company.

The liquidator argued that the arrestment was void under s.211 of the Companies (Consolidation) Act 1908 as an attachment put into force after the commencement of the winding up, which was deemed under s.139 of the Act to commence on presentation of the petition. The substance of the case was the interpretation of s.211, an English section in a United Kingdom statute. While the speciality of the United Kingdom statute is potentially significant, as is the declared (at 175) absence of Scots authority, the approach taken by Sheriff Craigie is interesting.

The Sheriff analysed (at 175) the operation of the section in English law in relation to garnishment with a view to assessing (at 174) whether the proceedings taken by the (arresters) are, 'in the sense of sec 211 of the Act of 1908, according to the law of Scotland an "attachment, distress, or execution".' Sheriff Craigie concluded that an arrestment fell within the relevant category prior to forthcoming and was accordingly unaffected by s.211 as the significant step preceded the liquidation petition. This interpretation of English law in its context suggests that English law was considered the lex causae. However, the retrospective provision involved was probably more akin to those backdating assignments to commissions of bankruptcy, as in Geddes v Howat, than to traditional anti-diligence devices, and Inshaw may be distinguishable on this further ground.

Inshaw is also notable for its dicta (at 174) rejecting the application of the Scots s.213 of the 1908 Act to strike down the arrestment in question. Section 213 was a conventional provision striking down diligence within 60 days of the commencement of winding up of Scots registered companies. It was therefore conceded to be inapplicable on interpretation. Its relevance as a matter of choice of law was not discussed.

A similar point was more forcefully expressed in Scottish Union and National Insurance Company v James (1886)13 R 928, even if the First Division did appear unwilling to discuss the issues fully. In Scottish Union Insurance a holder of a security over a livery of land in Ayrshire raised an action of poinding of the ground several weeks prior to the owner of the relevant poindings moveables being adjudged bankrupt in England. It appears to have been assumed that the bankruptcy was, in general, effective in Scotland.
The English trustee argued (at 930) that s.3 of the Conveyancing Act 1874 Amendment Act 1879 restricted the preference of the poinding to the current half-year’s interest and one year’s arrears of interest as ‘the restriction imposed by statute upon creditors in a competition with a trustee in bankruptcy was as applicable in the case of an English as of a Scottish bankruptcy. The trustee in England, by the universal operation of the sequestration there, had acquired right to all the moveables wherever situated, and should have the same rights in competition with other creditors as if he had been appointed in Scotland.’ The trustee further argued that the mutual assistance provisions in s.118 of the English Bankruptcy Act 1883 led to a similar result. He does not appear to have attempted to invoke any equivalent English provisions.

The First Division were so unimpressed they did not even call upon the poinder to address them, Lord President Inglis being of the view (at 931) that the point ‘hardly deserves attention’. His Lordship continued to note that ‘(t)he right of the poinding creditor is secured by the common law, and the only way in which the statute interferes with that is in the case of the trustee in sequestration. No such person is competing here.’ The Lord Ordinary (Trayner) at least had the good manners to consider (at 930) there to be no authority in support of the English trustee’s proposition.

It is odd that the First Division was considerably more willing eleven years later in Obers v Paton’s Tr. (1897)24 R 719 to allow a French syndic to invoke Scots rules relating to gratuitous alienations. However, as in many of the other cases, it may be fairer to blame the unsatisfactory outcome of this case on the inadequacy of the lex causae rather than the choice of law rule, which it was unnecessary to elaborate.

Opinions were reserved in Lindsay v Paterson (1840)2 D 1373 regarding the effectiveness in a Scots sequestration of attachments used within the City of London, within 60 days of the sequestration, of a debt due to the bankrupt. Interdict was granted to ensure that the issue was determined in the course of the Scots process, but regretfully the suspect period issue does not seem to have come before the court.

The attaching creditors argued that the relevant provision of Scots law was applicable neither as a matter of choice of law nor interpretation. Lord Gillies expressed the obiter view (at 1376) that this plea was ‘totally unfounded. [Attachment] is an English, and farrestment] is a Scotch term; but the thing designated is equally struck at by the statute, whether it is attempted in England or Scotland.’

Galbraith v Grimshaw, which is discussed next, suggests that the English courts might have taken a different view of this issue. It would also be rather insular if, in the light of Hunter, Scots courts were to refuse to allow foreign rules effect in Scotland while unilaterally arrogating effect abroad for the equivalent Scots rules.

Galbraith v Grimshaw [1910] AC 508, an English House of Lords case, illustrates well the bizarre consequences of some of the reasoning described above. While Grimshaw relates strictly to the effects of insolvency on prior execution, it contains dicta to more general effect. While these dicta may not completely reflect the broader Scots position, the authority of the House of Lords has made them influential.

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In Grimshaw decree was obtained in Scotland against Merrens & Sons and extended under the Judgments Extension Act 1883 to England. Certain debts due in England to Merrens & Sons were then made the subject of a garnishee order nisi in respect of the extended judgment, shortly prior to the sequestration of Merrens & Sons in Scotland. Interpleader proceedings were raised in England in which the garnishing creditors were preferred. The Judgements are distinctly general, restrictive and territorial in outlook.

All agreed that attachment after the date of the sequestration would not have prevailed over the rights of the trustee under the sequestration. Lord MacNaghten further observed (at 511) that 'if the bankruptcy had been an English bankruptcy, the attachment ... would not have prevailed' and '[i]f ... the process in Scotland that corresponds ... with attachment, had been pending there, the claim of the ... trustee ... must have succeeded'. Loreburn L.C. agreed (at 510) that 'the trustee may find himself (as in this case) falling between two stools'12.

Both of their Lordships took the view that effect would be given in England to a foreign bankruptcy as a prospective transfer of assets, subject in this case to the garnishment. Indeed Loreburn L.C. expressly (at 510-511) based his judgement on the analogy of a foreign bankruptcy to a voluntary transfer of assets by the bankrupt. English law, as, presumably, the lex situs, appears to have been considered the law appropriate to relation back and, as Loreburn L.C. observed (at 510), 'the English law as to relation back [applied] only to cases of English bankruptcy'. The real problem in Grimshaw may therefore have lain in a restrictive interpretation of English law, as illustrated by Lord MacNaghten's comment (at 512) that the 'Bankruptcy Act 1883 does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date'. Neither, however, did it expressly provide for a prospective transfer of assets in the event that a foreign process claimed such effect, and it may be said that their Lordships failed to address fully the appropriate choice of law issues when interpreting the relevant legislation.

Lord Dunedin cannot be accused of this last omission. His Lordship noted (at 512-513) that relation back was a very natural development of bankruptcy principles, but that it 'will always be an arbitrary period determined by positive enactment', continuing to observe that 'if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution'.

However his Lordship saw 'great difficulties' in extending this doctrine to relation back, principally, it would seem, in integrating the different legal systems which could be involved. Thus Lord Dunedin noted (at 513) that 'if you take the law of the country of the bankruptcy, then the execution or security in question may be and often is of a kind which is quite foreign to the system of law which you are administering in the Bankruptcy Court. If on the other hand you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal'13. These are, however, commonplace problems of international private law and it is regrettable that Lord Dunedin did not explain more fully why he felt they could not be overcome in this context. His Lordship, along with the other judges, felt these problems could be overcome within the United Kingdom by statute, but that the then existing co-operation provisions14 did not
have the necessary effect. As mentioned in section e) below, it is arguable that
the present co-operation provisions may be more effective in this regard.

Loreburn L.C. and Lord Dunedin drew support for their views from undisclosed
dicta of Lord President Inglis in Goetze v Aders (1874)2 R 150. While the Lord
President expressed the view (at 153 under reference to inter alia Hunter v
Palmer) that the only effect in Scotland of a foreign bankruptcy was a
prospective title in the foreign assignee, this view was strictly obiter and
opinion was reserved in relation to the validity of the prior arrestments which
had been served in that case.

The purpose of the sequestration petition in Goetze was, of course, to strike
down diligence executed during the relevant suspect period under Scots law. As
noted in section 2),e) above, the petition was refused on more general grounds.
The use of a Scots sequestration as a device to strike down prior Scots
diligence under Scots law had previously been rejected in Keir v Dickey 27 May
1802 FC, on the basis of lack of jurisdiction, and was later so rejected in
Vylie, Ptnr. 1928 SLT 665. The readiness of the Scots courts to assume
jurisdiction under the earlier legislation in Cole v Flammare 1772 Nor 4820 to
strike down prior diligence would seem to be sadly missed in the light of the
interpretation placed on Hunter, the unhelpful interpretations of Scots law in
Inshaw and Scottish Union Insurance and the implications for Scots law of
Grimshaw.

A partial remedy to this diligence problem is now set out in s.185(4) of the
Insolvency Act 1986. Section 185(1) applies the retrospective anti-diligence
devices of s.37 of the Bankruptcy (Scotland) Act in the winding up of a company
registered in Scotland, similarly to s.213 of the Companies (Consolidation) Act
1908, as restrictively interpreted in Inshaw. Section 185(4) provides that
'this section, so far as relating to any estate or effects of the company
situated in Scotland, applies in the case of a company registered in England and
Wales as in the case of one registered in Scotland'.

It may be wondered why this benefit was not expressly extended to the creditors
of companies registered outwith Great Britain15. It is also difficult to assess
the status of this sub-section, in a Great Britain statute, as a special choice of
law rule or as a rule of internal law under Scots law or both Scots and English
law. It would appear at least to continue the tradition of providing an
inadequate lex causae were, for example, a German insolvency administrator to
argue successfully that Scots law should apply, as a matter of choice of law, to
the striking down for the benefit of a German insolvency process relative to a
German corporation of diligence executed in Scotland15.

It is furthermore slightly bizarre that s.183(5) of the 1986 Act states
unhelpfully that the equivalent 'English' provision, s.183, 'does not apply in the
case of a winding up in Scotland'. It might be wondered if it would apply to
the winding up abroad of a Scots registered company! It would appear that the
facts of Grimshaw have survived the onslaught of the 1986 Act, even if its
inverse17 has not15.

The more general provisions of s.37 of the Bankruptcy (Scotland) Act 1985 seem
firmly linked to the presence of a Scots sequestration. It 'extends' by virtue of
a traditional provision in s.78(5) to 'Scotland only', presumably constituting
(See Dicey & Morris pp.15-26.) a provision of Scots internal law and allowing

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the grafting of sensible choice of law rules thereto. The cases discussed above do not suggest that it will be given extensive extra-territorial effect nor that a foreign process will be allowed to trigger it in Scotland.\(^\text{13}\)

Despite the *dicta* in *Lindsay v Paterson* and the doubts expressed above in relation to the *ratio* of *Hunter*, it is difficult to resist the conclusion that in Scots international private law the *lex situs* is basically applicable to strike down diligence executed during the suspect period and that the *lex situs*, Scots or otherwise, is often blissfully unaware of and largely inadequate to perform this function.

The central case in this respect is *Whistle v Bridger* (1843) 9 & 10 Will 324, which came before the Whole Court of the Court of Session. Bridger, Thurstans, European and Company were London merchants who obtained consignments of goods in Great Britain for a firm in Calcutta, much more the exporters of such goods and exchanged themselves in respect of such goods from the sale proceeds of such goods, which were remitted to them in London. Still, Bridge and Company, Bridger Thurstans, obtained consignments in Scotland for the London and Calcutta firms.

The Glasgow firm was instructed in Scotland on 3rd December 1840. In September 1849 it incurred a debt to the London firm by failing to remit the proceeds of a bill of exchange it had discounted for the London firm. In November 1849, being pressed for payment, the Glasgow firm endorsed in favour of the London firm an acceptance of a Liverpool firm and a bill of lading in respect of a consignment of grey jute which the Glasgow firm had obtained in Scotland and had decided to ship to Calcutta to resolve its problems. The Glasgow firm also drew a bill of exchange on the London firm in respect of part of the value of the consignment. The London firm discounted the Liverpool firm's acceptance, accepted and discounted the Glasgow firm's bill and credited the Glasgow firm with the proceeds and the net value of the consignment.

The English firm in succession raised an action to reduce the various transfers and for an accounting in respect of the proceeds of the property transferred. Several grounds of refutation were put forward by the English firm, including the reduction of the transfers as fraudulent purposes. The main arguments concerned the application of the 1819 Act in an international context.

The English firm argued that the 1819 Act was 1835 Act and would not apply to a transaction completed or carried out outside England, or other contexts. The court, however, relying on *Hunter* and *Whistle v Bridger*, held that the 1819 Act applied because the goods were situated in Scotland and were under property of that area, were delivered out of Scotland and were subject to Scottish court and jurisdiction. Therefore, the English firm was entitled to recover the balance.
c) Unfair preferences. The position regarding unfair preferences is significantly less certain than that regarding diligence, although the balance of authority seems to favour the application of the *lex loci actus* at the time of the preference or the personal law of the bankrupt. It is also possible that the personal law of the bankrupt could now, perhaps, be assimilated to the law under which the relevant insolvency process has been instituted.

Broadly, an unfair preference is a voluntary grant by a person later becoming formally insolvent of a security or other right in favour of a creditor, to the effect that that creditor obtains an advantage over other creditors in a later insolvency process. In Scots law the traditional counter measure to such preferences has been their reduction under the Bankruptcy Act 1696 (c.5). Analysis in the Scots courts of choice of law in respect of such preferences has therefore taken place largely in the form of determining the scope of application of the 1696 Act.

The central case in this respect is *White v Briggs* (1843) 5 D 1148, which came before the Whole Court of the Court of Session. Briggs, Thurburn, Acraman and Company were London merchants who obtained consignments of goods in Great Britain for a firm in Calcutta, made loans to the shippers of such goods and reimbursed themselves in respect of such loans from the sale proceeds of such goods, which were remitted to them in London. Bell, Bogle and Company, Glasgow merchants, obtained consignments in Scotland for the London and Calcutta firms.

The Glasgow firm was sequestrated in Scotland on 3rd December 1840. In September 1840 it incurred a debt to the London firm by failing to remit the proceeds of a bill of exchange it had discounted for the London firm. In November 1840, being pressed for payment, the Glasgow firm endorsed in favour of the London firm an acceptance of a Liverpool firm and a bill of lading in respect of a consignment of grey jaconets which the Glasgow firm had obtained in Scotland and had decided to ship to Calcutta to resolve its problem. The Glasgow firm also drew a bill of exchange on the London firm in respect of part of the value of the jaconets. The London firm discounted the Liverpool firm's acceptance, accepted and discounted the Glasgow firm's bill and credited the Glasgow firm with the proceeds and the net value of the jaconets.

The Scots trustee in sequestration raised an action to reduce the various transfers and for an accounting in respect of the proceeds of the property transferred. Several grounds of reduction were put forward by the trustee, including the reduction of the transfers as fraudulent preferences at Scots common law. The main arguments concerned the application of the 1696 Act in an international context.

The English firm argued (at 1150) that the 1696 Act 'could not apply to a transaction completed or carried into execution in England, or other foreign country', explaining that the bills had been received and acknowledged in England, pursuant to an English contract. The trustee appeared to accept this *lex loci actus* or transactional approach at least in part, arguing that the deeds challenged were granted in Scotland. However, the trustee also argued that the 1696 Act applied because the bills and goods were situated in Scotland immediately prior to their transfer to the English firm, because the owners of such property at that time were domiciled in Scotland and because the Scots court had jurisdiction². Accordingly the *lex loci actus*, the *lex situs*, the law
governing the transaction in question, the domiciliary law of the granter of a preference and the lex fori were all canvassed.

The 1696 Act was considered applicable by a majority of the court, on the basis of several lines of reasoning, not all of which had been argued by the parties. Lord-Justice Clerk Hope considered the 1696 Act to be binding on the court and that no issue of international private law arose in the case, Lord Mackenzie (with whom Lord President Boyle and Lords Cockburn and Wood concurred) considered Scots law applicable as the domiciliary law of the bankrupts, Lord Cuninghame, while ostensibly agreeing with Lord Mackenzie, seems to have favoured the application of Scots law as the lex loci actus and Lord Fullarton dissented (along with Lords Jeffrey, Ivory and Moncreiff), considering that the 1696 Act could have no operation extra territorium, preferring to apply, in different circumstances, the lex situs or the personal law of the recipient of a preference. Rather oddly, Lord Meadowbank concurred with both the Lord Justice-Clerk and Lord Mackenzie and Lords Murray and Medwyn both concurred with both Lord Cuninghame and Lord Mackenzie! The formal ratio decidendi is therefore difficult to determine. Each of the main lines of reasoning contains useful and interesting analysis.

Lord-Justice Clerk Hope (at 1179) found 'in this case no question of international law at all', considering that the court was 'not asked to give effect to any rule or principle of the law of England' but 'to deny effect to the law of Scotland, and to a Scotch statute ... in respect of the simple fact that the defender lives in England, and draw there the benefit of the preference which he obtained in Scotland'. His Lordship added (at 1179, emphasis in report) that the preference was 'manifestly against the terms of the statute, which we must enforce whenever we can', considering himself 'very far, then, from holding, that it is not a most essential point that the question is tried in the Scotch courts'.

This approach was, in fact, probably more pragmatic than xenophobic, as his Lordship had previously stated (at 1178) that '[i]n giving effect to the laws of other countries, while there are many general principles which entitle one to go very far to avoid collision, and to secure uniformity and equality in the distribution of bankrupt estates, there are limits which the difference of jurisdictions renders insurmountable; and there are many cases in which, in our country, effect must be denied to the statutory rules of another country', referring to Hunter v Palmer as an example. Thus Lord-Justice Clerk Hope was 'not prepared to say, that if an action had been raised in England, founded upon [the 1696 Act], ... the English courts were bound to give the same effect to our Scotch statute that we are'.

His Lordship accordingly refused (at 1177), as a matter of statutory interpretation, to draw a distinction between the prospective and retrospective operation of the 1696 Act, while conceding that a foreign court may do so. His Lordship also refused (at 1176-1178) to draw distinctions upon the jurisdictional basis of the reduction action, considering arrestment to found jurisdiction adequate to found an action under the 1696 Act and issues of the residence of the defender and his non-participation in the Scots sequestration irrelevant. The defender's residence at the time of the preference also appears (at 1176) to have been considered irrelevant as a matter of choice of law.

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It is difficult to assess how resolutely Lord Justice-Clerk Hope would have adhered to these positions had the facts of the case been different, as his Lordship did consider questions of international private law in passing and noted (at 1176) that 'it must be very material first to settle whether the transaction was completed in Scotland, or not'. While the latter statement was made in the context of minimising the possibility that the 1696 Act may be inapplicable, it does reinforce the disfavour shown (at 1179-1180) by his Lordship for 'the creditor of Scotchmen [carrying] away from Scotland the bill and goods, which were part of the assets in Scotland'.

Strands of various theories can be seen in these remarks, and elsewhere in his Lordship's judgement, but emphasis was clearly laid (at e.g. 1175) on the fact that the bankrupts had carried out in Scotland all of the actions which they required to carry out to effect the preference. Indeed his Lordship appeared to reject the lex situ, noting that the point in issue 'cannot be affected by the property being situated out of Scotland, or having been sent out of Scotland'. The lex loci actus of the bankrupt at the time of the preference would thus appear to have been favoured, had the court not been bound in any event, in his Lordship's view, to apply the 1696 Act.

Strands of various theories can also be seen in Lord Mackenzie's judgement. His Lordship's emphasis was, however, firmly on the personal law of the bankrupts, either their nationality, their domicile or, perhaps, their commercial domicile. The basis of this emphasis is not clear, as reference was made to Struther v Read 1 July 1803 FC, the mobilia sequuntur personam maxim, the capacity of the bankrupts and the essential validity of a transfer constituting a preference.

Thus Lord Mackenzie stated in several places that the 1696 Act is applicable to 'the acts of Scotch bankrupts' and (at 1155) that 'it is fixed by ... Strothers ... that the bankrupt statutes of one state may wholly divest any of its own subjects of his moveable property, wherever situated in fact, so as to affect the people of all other states attempting to acquire rights on that property. It would seem to follow, that similar statutes in any state might divest or disable the subjects of that state in relation to their moveable property partially, or to certain effects, or contingently, so as in like manner to affect the people of all other states attempting to acquire rights on that property, provided only these last statutes shall not be so absurd or so unjust, that they are unworthy of the comitas gentium. Both seem to rest on the same principles, the power of every state over its own subjects, the legal maxim, that mobilia non habent situm, but are held sequi personam, and that ... every one wishing to acquire right, by acquisition from another, is bound to enquire what the right of that other is, by the law under which he lives, and makes the conveyance.'

This analysis does not in itself completely exclude the lex loci actus, nor perhaps even the laws governing the transaction or conveyance in issue. His Lordship was at pains to point out (at 1154) that the 1696 Act 'neither says nor implies, that those grants must be completed before the nullity shall attach to them; that they shall be valid conveyances, not struck at by the statute, down to the moment of delivery and acceptance, so that, if delivery and acceptance can be contrived to be in England, the whole conveyance is valid. On the contrary ... all done by the bankrupt in creating such preferences in favour of one creditor should be null.' Nevertheless Lord Mackenzie proceeded to state that the preference in question was completed in Scotland, as all actions necessary to
effect it were carried out in Scotland. However, in the final reckoning, his Lordship clearly favoured the application of the bankrupt’s personal law, whatever the precise basis for its application may have been, and appeared to reject (at 1154) the application of either the lex situs or the lex loci actus as a matter of principle.

Lord Mackenzie made a couple of other interesting points. Unlike Lord Justice-Clerk Hope, Lord Mackenzie felt that his decision should be made on a similar basis to the decision an English court would reach and felt that the 1696 Act should be given effect in such a case in foreign courts (See 1152 & 1156). In doing so his Lordship drew a distinction7 between the annulment of voluntary preferences and diligence occurring prior to formal insolvency.

Lord Cuninghame appeared to consider the 1696 Act to be applicable as the lex loci actus. His Lordship referred (at 1168) to ‘similar disqualifications attached to the transactions of merchants on the eve of bankruptcy in some of the other commercial states of Europe and America’ noting that ‘In these countries, if any such voluntary preference, as that now under challenge, were given by a resident trader, it would be the duty of every court of justice to which the preferred creditors are amenable, to make them responsible for preferences, taken and retained, in defiance of the statutory law of the country where the transactions took place’. His Lordship had no doubt8 that the Scots courts should accordingly allow American assignees to sue Scots traders for restitution of preferences obtained by them in America on the basis of a contravention of an analogous American law.

It is, however, inferred in both passages that traders grant such preferences at their own place of business, suggesting that the lex loci actus coincides as a matter of course with that person’s personal law, and indeed the law under which a relevant insolvency process may later commence in respect of such person. It is also suggested that the law governing the relevant property also coincides with the lex loci actus. Thus Lord Cuninghame justified his position by stating (at 1167) that ‘When parties in any part of the world come to transact with a trader settled in another country, they are bound either to know the law by which the debtor holds his property and rights, or, at least, to be aware, that neither he nor they can resist with impunity the law of the state in which he lives and carries on trade’, continuing to note that such a person ‘has the ... means of being informed, that every alienation or assignment given by the bankrupt, in security of a prior debt during the sixty days preceding bankruptcy, is null and void, and must be transferred or accounted for to the trustee for the creditors at large’, analogously to knowledge of prospective divestment on bankruptcy. His Lordship also adverted (at 1168), if obliquely, to the relevance of the mobilis sequuntur personam maxim and made reference (at 1167) to the ‘disabilities’ arising under such laws and their creation of ‘prohibited acts’.

Despite this array of alternative arguments, Lord Cuninghame’s judgement seems ultimately quite firmly in favour of the application of the lex loci actus.

Lord Fullarton’s dissenting judgement is partly territorial in outlook, reasoning quite clearly from a distinction between the prospective and retrospective effects of insolvency and by analogy to Hunter v Palmer. His Lordship drew (at 1159 & 1161) a sharp distinction between the prospective and retrospective effects of the 1696 Act, the first, in his Lordship’s view, giving rise to nullity of future transactions entered into by a bankrupt on the basis of his
disability relative thereto and the second rendering otherwise valid transactions challengeable at a later date for narrow statutory reasons.

Lord Fullarton accordingly reasoned (at 1161-1164) quite directly from Hunter v Palmer and, apparently, Strother v Read as regards the international operation of the Act and rejected (at 1160-1161) the distinction between the effects of bankruptcy on prior diligence and voluntary transactions apparently favoured by some of the other judges. His Lordship supported (at 1161) the arrester's argument in Hunter that 'there is no inconsistency in sustaining diligence used prior to the commission, and refusing effect to diligence used subsequent to it; for in the one case the diligence is free from any legal objection according to the law of Scotland, and in the other case, it is plainly inept by our law, being done against a bankrupt already divested'. In Lord Fullarton's view (at 1162-1163) 'the statutory retrospective nullity created by the Act 1696 is no more entitled to effect extra territorium statuentis, than the statutory divestment of the bankrupt, by the law of England, from the date of the act of bankruptcy. For I am unable, in a question of this kind, to discover any distinction between legal diligence and the voluntary act of the bankrupt. In both cases the same question arises - Was the absolute right in the bankrupt when the diligence was used or the conveyance taken? And in both cases the answer will depend on the effect of the foreign law, in annulling or qualifying the right by its retrospective operation'.

Clearly (see 1163-1164) his Lordship was not convinced by the 'conditional nullity' argument relative to the retrospective effects of the 1696 Act which was favoured by Lord Mackenzie. It would however appear that Lord Fullarton would have given effect to the 1696 Act, or indeed an analogous foreign law, had his Lordship considered its internal effect to have been to 'qualify' the rights of the prospective bankrupt and rights received therefrom in real time.

Rather than qualifying rights created by making their validity conditional on the absence of future bankruptcy, Lord Fullarton considered (at 1160) the 1696 Act directed in this context 'not against the granter of the deed, but solely against the receiver' and to impose 'purely and exclusively an obligation on the receiver to restore; an obligation which, although perfectly effectual against those subject to the statute, is not entitled to any effect against rights vested in parties who are beyond its reach, both at the time when they received the grant, and at the time when it is sought to be annulled'. His Lordship had previously (at 1159) distinguished the effects of the two parts of the 1696 Act 'as against persons domiciled beyond the territory of Scotland'. It is unlikely that these points were purely jurisdictional or a matter of unilateral or ad hoc choice of law, as his Lordship had premised his analysis (at 1158) on the view an English court should take of the case.

His Lordship would therefore seem to have considered the personal law of the recipient of a preference, whether at the time of the preference, bankruptcy or reduction, or at all or any of such times, to have been applicable to its reduction ex post facto, as a matter of choice of law. Lord Jeffrey, who generally concurred with Lord Fullarton, certainly took (at 1165) the view that the recipient's personal law was applicable. There seems to have been no plea as to the application of the analogous English law'.

The analogous English law may of course have been considered neither to qualify rights created under other choice of law rules nor to have been directed against
the recipients of such rights, but to fall into a further category, as perhaps a purely retrospective transfer. On Lord Fullarton's view, such a law would probably have been entitled to no effect extra territorium, such effect being allowed only prospectively, suggesting in turn the applicability of the lex situs\textsuperscript{12} to such a category of laws.

Lord Fullarton's judgement also contains a few further points of interest. His Lordship appeared\textsuperscript{13} to consider notour bankruptcy rather than sequestration the critical borderline between the prospective and retrospective effects of the 1696 Act, both internally and internationally. While such an international distinction is consistent with his Lordship's analysis of the prospective effects of the Act in terms of disability, it does not appear consistent with the general line of authority from Strother, which appears to rest upon international effect being allowed to transfers of property on bankruptcy from the date such a transfer has been sanctioned by a court\textsuperscript{14}. Notour bankruptcy usually pre-dated any such sanction\textsuperscript{15}.

Lord Fullarton, while formally reserving his opinion, also suggested (at 1157) that had the defenders been 'claimants in a Scots sequestration, insisting for a share of the bankrupt's estate, in addition to the benefit which they have received from the transaction under reduction ... it might have been difficult, perhaps, for the defenders to evade their liability to the operation of the Act 1696'. This suggests either that the law governing the insolvency process is generally applicable to the reduction of preferences, subject to certain territorial restrictions, or that the relevant choice of law structure may be more complex, in that in certain circumstances either the law governing the insolvency process or the personal law of the recipient of a preference may be applicable.

His Lordship was also careful to distinguish reduction on the basis of fraud or collusion (at 1157 & 1163) from reduction under the 1696 Act. It may therefore be possible to argue that different choice of law criteria apply to the reduction of preferences at common law or on the basis of other statutes or foreign laws.

Lord Moncreiff's position was similar to that of Lord Fullarton, except that his Lordship's emphasis lay more upon the lex situs than other systems\textsuperscript{16}. His Lordship clearly viewed (at 1170-1171) the application of a trader's domiciliary system to matters relating to his property after bankruptcy a limited exception to the application of the lex situs relative to such matters. His Lordship was therefore unwilling to undermine, retrospectively, otherwise valid rights of foreign traders in property outwith the bankrupt's domicile on the basis of constructive fraud under the bankrupt's domiciliary system. The 1696 Act was thus considered basically to have no retrospective extraterritorial effect. His Lordship did not however fully address the basis upon which another law could be applicable, and in particular (at 1169) did not consider English law necessarily applicable as the current lex situs.

Lord Moncreiff did suggest (at 1169) that 'Scotch estate or funds ... would be within the Act 1696'. Given the facts of the case it would seem likely that his Lordship had in mind the lex situs at the time of the action, perhaps also requiring the same lex situs at the time of the preference. However the judgement is not clear and it is arguable (see 1170) that coincidence of lex situs and recipient's personal law was considered necessary, or even that these were alternative bases for application of the 1696 Act. His Lordship was,
however, more firmly of the opinion (at 1169) than Lord Fullarton that participation in a Scots insolvency process by a recipient of a preference could in itself render the 1696 Act applicable.

It will be clear that White v Briggs may be considered authority for almost any proposition in this field, even if, on balance, the lex loci actus and the bankrupt's personal law appear to predominate. Unfortunately previous and later cases shed little further light on what should be taken from this distinctly confusing leading case.

Thus in Sym v Thomson 6 July 1758 FC a merchant from Dalkeith assigned English debts in England to a favoured creditor shortly prior to becoming notour bankrupt under Scots law. This assignation was reduced by the Scots court under Scots law. The trustee for the Scots merchant's other creditors argued firstly that the assignment was a fraud at common law and secondly that the preference fell within the 1696 Act.

The basis for the application of Scots law is not however clear. Neither the personal law of the favoured creditor nor the law governing the debts was apparently relevant to exclude Scots law. Although the case was not so argued, Scots law may have been applied as the personal law of the bankrupt, under which he became bankrupt. On the other hand, the brazen manner in which the cedent travelled to England, along with the preferred creditor, to effect the preference may have persuaded the court to apply the Scots law thus avoided, perhaps giving an early example of what may have become a public policy rule against evasion of laws: fraud à la loi! The trustee certainly argued (at p.212.) that if the 1696 Act were not applicable 'it would open a door for infinite frauds to the bankrupts of [England and Scotland]; who would have nothing to do but to step over the border, [and] grant their fraudulent preferences, as they pleased'. The relevance of the lex loci actus may not therefore have been fully excluded.

The Scots court in any event did not appear inhibited by possible territorial restrictions and may have been swayed most of all by the trustee's arguments on the lack of a distinction of places of alienation in the 1696 Act. Sym may thus support the lex fori argument of Lord Justice-Clerk Hope in Briggs. However, all that can reliably be drawn from Sym is its rejection of a strict territorial limitation upon the 1696 Act, and perhaps a similar rejection relative to the Scots common law rules. There is no reported indication that the equivalent English rules either would or would not have been given effect within Scots territory.

In Peters, Bogle & Marshall v Dunlop's Trs. 1770 Mor App Bankrupt No.1 a rather different view seems to have been taken, the judges being 'all of opinion that the enactments of the statute 1696 could have no regard paid to them in a foreign country', thus preferring the trustees under a trust deed for creditors, which had already been reduced in Scotland under the 1696 Act relative to a Scots arrestment, to non-acceding creditors who had later arrested tobacco and staves shipped to the trustees in Fort Glasgow from Virginia by the bankrupt. Presumably no regard would equally have been paid in Scotland to a foreign equivalent to the 1696 Act, at least as regards property situated in Scotland at the time of operation of such equivalent law, given the inference that the lex situs was the applicable law.
However, the case may not be so simple. In the first place, although Dunlop became notour bankrupt in Scotland under Scots law, 'the greatest part' of Dunlop's effects were situated in Virginia, with the possible consequence that his domicile, or trading domicile, may have been Virginia. Although the point does not appear to have been argued, the territorial restriction of the 1696 Act may have resulted from this point. Two laws, of different territorial scope, may thus have been potentially applicable; the first being the territorially limited lex situs at the time of reduction and the second being the extraterritorial personal law. This argument is, however, speculative.

Less speculative is the refusal of the court in this case to allow the lex loci actus extraterritorial effect, despite the arresters' emphasis on the determination of the validity and invalidity of the trust deed by the law of its place of execution or the lex loci contractus. The arresters' emphasis was, however, on initial invalidity of the trust deed rather than reduction ex post facto under the 1696 Act. This analysis of the mode of operation of the 1696 Act may have allowed the trustees to avoid addressing issues of reduction ex post facto of the trust deed by allowing them to distinguish the form and essential validity of the original transfer of the Virginia property, argue that the law of Virginia was applicable to issues of the essential validity of the transfer, assume that the law of Virginia allowed the transfer under the formally valid trust deed to take place and argue that the 1696 Act related to essential validity and was accordingly irrelevant, irrespective of whether or not the 1696 Act arrogated extraterritorial effect. Thus any effect of the 1696 Act to avoid valid transfers ex post facto may not have been properly considered. It is however difficult, on the whole, to ignore the favour shown for the lex situs in this case.

The second Stein case may be a reinforcement of the territorial approach of Bogle, if on a more co-operative basis. The Stein cases are discussed at some length in section 2(a) above. Briefly, a partner of a Scots distillery firm granted a trust deed in Scotland in respect of the firm's assets in favour of the firm's creditors shortly after commissions of bankruptcy were issued in England against the other two partners in the firm, only one of whom was clearly domiciled in England. A commission was issued in England shortly thereafter in respect of the partner granting the trust deed, who was probably domiciled in Scotland. The commissions were issued as a result of the bankrupts' status as partners, along with others, in a separate banking firm trading both in Scotland and England.

The trust deed was reduced by the Scots court, but regrettably the bench was unwilling to accede to counsel's request that they clarify their ratio (10 S 652.). The principal ground of reduction appears to have been the 'nullity' of the trust deed as it was granted ultra vires the granting partner after the dissolution of the partnership by the English commissions previously issued in respect of the other partners.

The English assignees argued in addition (10 S 650.) that the 1696 Act applied to set aside the trust deed because the granting partner had been rendered notour bankrupt by diligence shortly thereafter and because of the English commissions against the various partners both prior to and after the trust deed. They further argued that the English commissions had transferred the property of the partners concerned from the dates of the relevant acts of bankruptcy. The retrospective aspect of such transfer was probably material only in relation to
the partner granting the trust deed. The Scots trustees accordingly argued (10 S 650-651.) that the distillery firm, as such, had been neither rendered notour bankrupt nor affected by the English commissions. Additionally, they argued that 'as it was found in [Hunter v Palmer] that arrestments used prior to the English commission of bankruptcy, but within the 60 days, were effectual, so must a voluntary onerous conveyance be so'. They would appear to have considered neither the retrospective provisions of English nor Scots law to have been applicable, rather as was found in England in Galbraith v Grimshaw, as discussed above, in relation to execution.

The court made no comment upon the arguments concerning the application of English rules on relation back. However, at least Lord Balgray seems (at 651.) to suggest that the 1696 Act was applicable. Accordingly, when Lord Gillies' comment (at 651.) that 'when a man is made bankrupt in London, he is a bankrupt here' is taken into account, the second Stein case would at least seem to indicate that Scots rules may be invoked in some circumstances in aid of foreign insolvency processes.

This should not perhaps be surprising, as the 1696 Act was not necessarily linked to a Scots sequestration, sequestration merely being one mode of constituting notour bankruptcy for the purposes of the Act. Similarly the reduction of fraudulent preferences at Scots common law is not linked directly to specific, nor indeed any, insolvency processes. Any foreign process may perhaps trigger receptive Scots rules against unfair preferences.

In this second Stein case Scots law was, however, the lex situs, the lex loci actus and a personal law of most of the granters and recipients of the preference and so the limitations of the application of the Scots rules are difficult to draw from it. In any event Scots law was not excluded by English law being a personal law of the some or all of the bankrupts and the law governing the bankruptcy process.

In the first Stein case the apparently unsatisfactory position regarding preferences was used as an argument in favour of awarding sequestration in Scotland in the face of an existing English bankruptcy. It was argued that English rules against preferences should not be allowed effect in Scotland because the recipients thereof would have no means by which to assess their position on receipt of a potential preference. It was also argued that Scots rules could not apply if an English commission excluded a Scots sequestration. The first argument seems to favour a lex situs or lex loci actus rule. The second seems hard to justify as the 1696 Act was not linked solely to sequestration.

It was further argued (Rose p.468.) that preferences would inevitably arise in relation to Scots heritage, as the English bankruptcy process could not extend to such property. A Scots sequestration was seen by the petitioners as the answer to this problem, as they viewed the conveyances of heritage made to the English assignees in that case as challengeable preferences. The lex situs may have been favoured here, although it may also be inferred that heritage was considered a special case.

The court did not comment directly upon any of these arguments, nor upon the slightly odd argument (Rose p.470) that going abroad to obtain an award of bankruptcy was itself a preference under the 1696 Act. Implicit approval of the
conveyances of heritage to the English assignees may however infer that the court considered them struck at as preferences by neither Scots nor English law.

This last point relative to the first Stein case should perhaps be qualified by dicta thereon in Weston v Falconer 17 Dec 1817 FC, wherein Lord Craigie suggested (at p.448.) that the conveyances of heritage in the first Stein case should have been considered challengeable under Scots law. As discussed in section 2) above, Lord Craigie's judgements in the first Stein case and the Falconer cases did not concur with those of the majorities in several respects and this dictum should therefore be treated with caution. The first Stein case, like most others, is ultimately ambiguous on these issues.

The 1696 Act was more clearly in point in the Falconer cases than the first Stein case. In Falconer v Weston 18 Nov 1814 FC conveyances of Scots heritage to English bankruptcy assignees were reduced. The Scots trustee in sequestration seeking the reduction was, however, infact in the relevant property prior to the infeftment of the English assignees pursuant to the conveyances in question. The reduction appears to have taken place on that simple basis rather than because of any retrospective application of the 1696 Act. It is, however, notable that one of the main reasons for the later Scots sequestration in these cases was the prevention of preferences in relation to Scots heritage. The territorial emphasis is clear.

Cowan v Dixon (1828)5 Fac 137 & 7 S 132 contains some interesting discussion of the international effects of the 1696 Act. The facts were simple. Constable and Company were Edinburgh booksellers who deposited long dated bills with London bankers Dixon and Company, who thereupon accepted bills drawn upon them by Constable and satisfied such acceptances on maturity by receiving cash from Constable or discounting some of the long dated bills deposited with them. In January 1826 Constable sent Dixon a sight bill for £750 drawn by the Royal Bank of Scotland on the Bank of England with specific instructions to satisfy a bill payable to Sir Walter Scott with the proceeds thereof. Instead of doing this Dixon applied the proceeds to Constable's general account, as they were at that time overexposed to Constable. Constable were sequestrated on 10th February 1826 and the trustee in sequestration sought repetition of the £750 on the basis of the 1696 Act.

The Lord Ordinary, Lord Newton, was of the view (at 141-142.) that 'the Act does not reach the case. The bill in question was an English bill, the petitioners, to whom it was transmitted, resided and carried on business in London; and the particular business which they did for Constable and Company was all transacted there. The bill was sent to them in London to be used there; and, though indorsed in Scotland, the assigment was not effectual, or completed, until it was received by them. ... The retrospective bankruptcy of the Scotch statute cannot operate against an English creditor acquiring a preference in England, any more30 than the English retrospective bankruptcy can have the effect to void the diligence of creditors used in Scotland, to attach the property of an English debtor. ... The validity of the preference falls, therefore, to be determined by the law of England.' English counsel was of the view that Dixon and Company were entitled, as against the trustee, in English law to set the proceeds of the bill off against Constable's general account.

His Lordship also refused to apply s.51 of the 1814 Bankruptcy Act (54 Geo.III c.137) to oblige the communication of this foreign preference to the sequestrated
estate before allowing a dividend therefrom to Dixon and Company\(^31\). His Lordship quite credibly interpreted this section to compel the communication of only post first deliverance preferences, leaving the door open as regards provisions not so expressly restricted. However, the 1696 Act was not allowed extra effect outwith s.51 just because Dixon and Company were claiming in the sequestration.

The Inner House took the view that the 1696 Act did not apply to this transaction as it was either a cash payment or a remittance in the ordinary course of trade under Scots law, while carefully refusing formally to decide the choice of law issue. In so refusing this issue was stated (at 145.) to relate to the extension of the operation of the 1696 Act to 'preferences granted in a foreign country', noting that the 1696 Act was inapplicable even if the transaction in question 'had taken place in Scotland'. Lord Glenlee also felt (at 146.) that Hunter v Palmer 'may probably afford some indication how the Court would decide such a case' and that Sym v Thomson 'would require some consideration'. Lord Alloway went further, feeling (at 146.) that 'Dixon ... have explained the principles which would rule the question of international law ... very properly'.

Dixon had argued on appeal (at 144-145.) that Struther v Read gave prospective attachment of moveables wherever situated from the date of first deliverance in a sequestration on the basis of the *mobila sequuntur personam* maxim\(^32\) and that accordingly before that date 'the law of the foreign country cannot recognise a state of bankruptcy arising out of acts committed in another country, nor allow a retrospective effect, which is introduced by a statute which can have no effect *extra territorium*'. They referred to Hunter v Palmer on this point and, rather oddly, to the express provision in English law in Romilly's Act\(^33\) preventing its extension to Scotland. They also felt the question to be one of English law 'because the whole transaction ... took place in England'.

Constable had distinguished Hunter v Palmer as relating to diligence and had argued (at 143.) that 'The bankrupts were Scotch; and the estate is under a Scotch sequestration, in which [Dixon] are themselves claimants' and\(^34\) that 'the remittance was the act of a party domiciled in Scotland'. These arguments were not really addressed by the Inner House. Neither, and more importantly, was their argument, under reference to Sym v Thomson, that if a different rule from theirs prevailed it 'would enable every debtor to evade the operation, both of the English and Scotch retrospective bankruptcy, by granting securities, or making fraudulent transfers of property, on the eve of insolvency, in the adjoining kingdom.'

While there are traces of many theories in these arguments and *dicta*, the greatest emphasis appears to have been upon the *lex loci actus* and the *lex situs*\(^35\), both of which were almost certainly English law, given the facts. Criticism of Cowan v Dixon in White v Briggs\(^36\) and the other theories adverted to in Cowan make its continued influence on the law less clear.

Ord v Barton (1847)9 D 541 appears to be the first reported case after Briggs relating to this matter. The choice of law issue does not, however, appear to have been fully addressed, with much emphasis being placed upon more general jurisdictional issues. A Liverpool cotton broker lodged a claim in a Scots sequestration, which the trustee proposed to reject until such time as the Liverpool broker accounted to the sequestrated estate for the proceeds of certain
shares in a ship which were alleged to have been transferred by way of illegal preference. The trustee thereafter raised an action to reduce the preference.

The main arguments concerned the availability of jurisdiction against the Liverpool broker on the basis of reconvention. The court had little difficulty in accepting such jurisdiction, while observing that enforcing a Scots decree in England may be difficult in this context, if such enforcement were necessary to recover any balance of the preference in excess of the dividend retained. Lord Moncreiff was further of the view (at 544.) that 'a claimant in a Scotch sequestration ... must ... take from us the whole law of bankruptcy which may bear upon his claim'. While the implication of these remarks and those of Lord Justice-Clerk Hope appears to be the 'enforce it when you can' approach earlier adopted in Briggs by Lord Justice-Clerk Hope, as the personal law of the broker was apparently the only English connecting factor various other theories remain open. Indeed, as discussed above, Lord Moncreiff did not agree in Briggs with these views as expressed by the Lord Justice-Clerk.

Stewart v Auld (1851)13 D 1337, while not exactly in point, is factually quite similar to Ord v Barton and contains some relevant dicta. Graham & Company traded as commission agents in both New South Wales and Glasgow. They were bankrupted in New South Wales and then shortly thereafter sequestrated in Scotland. Stewart obtained a dividend in New South Wales and then attempted to rank in the sequestration for the full amount of his debt. The Sheriff Substitute, and then the First Division, upheld the Scots trustee's decision to declare an equalising dividend to other creditors.

The Sheriff Substitute (at 1340.) considered Stewart's position to be similar to that of a creditor who had 'obtained payment under some diligence abroad, not perhaps reducible in this country, and who afterwards claimed in a sequestration here'. Lord Cunningham felt (at 1344.) on the other hand that 'where it necessary, a strong plea might be urged against the appellant on our own statute of 1696. The present is a Scots sequestration; and the appellant [has to] draw a part of the sequestrated Company's funds in Australia'. While a distinction should probably be drawn between the dividend issue in Stewart v Auld and issues concerning the effects of insolvency on prior diligence and preferences, the Sheriff Substitute clearly did not favour extra-territorial reductions while Lord Cunningham, despite his comments in Briggs, favoured the law governing the insolvency process, the lex fori or the domiciliary system. Few clear conclusions can, however, be drawn from these stray dicta37.

The most recent reported Scots case closely in point in this context is Wilsons (Glasgow and Trinidad) Ltd. v Dresdner Bank (1913)2 SLT 437 in which the 1696 Act was not considered so obviously irrelevant to securities granted over land in Trinidad just prior to a Scots liquidation as to be dismissed without a proof being heard. There was also, however, a dispute as to the initial validity of such securities under the law of Trinidad at the time of their grant and Lord Hunter may have felt it more convenient to postpone determining the relevancy of the 1696 Act to the case until after a proof relative to the more general point had taken place. The major issues in the case related to jurisdiction and it was presumably more convenient to determine both remaining substantive issues together after a proof relative to both had taken place. It would, however, have been simple for his Lordship to reject the application of the 1696 Act outright had the lex situs been considered exclusively applicable to the striking down of

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unfair preferences, and this point may perhaps be drawn from the case. This is particularly so as the property in question was land.

It is not surprising to note, in the light of the preceding discussions, that the present Scots statutory provisions relating to unfair preferences are singularly unhelpful as regards their international application. Section 243(9) of the Insolvency Act 1986 states that s.243, the general Scots unfair preference provision, 'applies to Scotland only'. The more general provisions in s.36 of the Bankruptcy (Scotland) Act 1985 are similarly expressed30, and s.440(2)(a) of the Insolvency Act provides that ss.239 to 241 thereof, the main equivalent English provisions, 'do not extend to Scotland'. The most intelligible interpretation of these provisions must be that the relevant sections are the internal provisions of Scots and English law respectively, leaving, as stated above in relation to diligence, the possibility of grafting sensible choice of law rules thereto. However s.243(4) of the Insolvency Act33 and s.36(1) of the Bankruptcy (Scotland) Act also suggest that a Scots insolvency process is necessary in order to invoke such sections, restricting their utility in an international context.

Section 244 of the Insolvency Act40 relating to extortionate credit transactions and s.245 of the Insolvency Act relating specifically to the challenge of prior floating charges41 are equally unhelpful as regards their international effects. These provisions should probably be applied similarly to those relating to traditional unfair preferences42.

It must be said that the Scots international private law of unfair preferences has developed in a state of complete confusion. Almost all of the many theories canvassed in Briggs appear to have been favoured in various cases prior thereto if, perhaps, a co-operative application of the lex situs may have been gaining ascendancy under the influence of Hunter v Palmer over the initial willingness in Sym v Thomson to countenance clearly extra-territorial effects for the 1696 Act. If it did nothing else, Briggs certainly reversed the territorial trend, while leaving continuing uncertainty between the two main remaining contenders: the lex loci actus at the time of the preference and the personal law of the bankrupt43. Later developments have not clarified that continuing uncertainty significantly.

Most recently, the decision of the English Court of Appeal in Re Paramount Airways Ltd. (No.2) [1992] BCC 416 may have increased that uncertainty. This case concerned the application of English provisions directed against transactions at an under-value and is thus discussed in section d) below. Nicholls V-C did, however, analyse various preference and other provisions in a similar manner. As discussed below, Paramount may be seen to favour applying the suspect period provisions of the law under which an insolvency process has been instituted and limiting the international effects thereof through the exercise of discretion by the courts of the legal system under which that process has been instituted. It is suggested that the Paramount decision at least facilitates the development of Briggs in the direction of the personal law, and hence the law under which an insolvency process has been instituted. Views may differ as to the appropriateness of such a development44.
d) Gratuitous alienations. If Scots authority relating to unfair preferences is obscure and confusing, at least there is some. Scots authority on the international effects of rules relating to gratuitous alienations is very sparse indeed.

Gratuitous alienations are similar in many ways to unfair preferences, except that the prejudice to the creditors of the person later becoming formally insolvent is usually caused by the grant of a right to a person other than another creditor. A typical gratuitous alienation is a gift of property to a close relative shortly prior to the donor's bankruptcy. The traditional Scots counter measure has been the 1621 Bankruptcy Act (c.18)¹. As noted above, there is little direct Scots case law relating to the international effects of the 1621 Act or other international aspects of gratuitous alienations.

Obers v Paton's Trs. (1897)24 R 719 may not strictly relate to the traditional retrospective concept of the suspect period. It is of significance thereto nevertheless. Paton was a domiciled Scot who traded extensively in France and was bankrupted there, a syndic definitif being appointed by the Tribunal of Commerce at Lille to administer his affairs. While so bankrupted Paton discharged his right to legitim in respect of his father's estate, a matter of weeks before his father's death. Both the Lord Ordinary, Lord Kyllachy, and the First Division clearly considered this a brazen attempt to defeat his creditors.

This case is significant in this context for the discussion of gratuitous alienations which it contains, particularly as the alienation in question preceded the time at which control of the legitim claim in question could have vested in the syndic or a Scots trustee in sequestration under either system. The discharge was reduced as a gratuitous alienation, both at Scots common law and under the 1621 Act.

The First Division did not really consider choice of law issues relative to gratuitous alienations. It is nevertheless clear that the First Division considered the syndic to be entitled to invoke the Scots rules in this regard². The Lord Ordinary came to the conclusion³ that 'Paton, being at the date of this discharge a domiciled Scotchman, the French law has no application, and ... remedy must be found not under the law of France, but under the law of Scotland'⁴. This view appears, rather oddly, to have been based upon Hunter v Palmer and the view⁵ that a foreign bankruptcy takes effect in Scotland only as a conveyance of moveables. This last point is probably inconsistent with the broader approach to foreign bankruptcies favoured by the First Division⁶.

It is difficult to draw firm conclusions from Obers, except the obvious one that a person administering an appropriate foreign insolvency process may be permitted to exercise the powers available to his Scots equivalent under Scots law in Scotland relative to the reduction of gratuitous alienations carried out in Scotland in relation to Scots property and (presumably) in favour of Scots domiciliaries. This is, nevertheless, a significant conclusion as the alienation was not allowed to escape between the two legal systems. The Lord Ordinary clearly felt French law to be irrelevant here, if his Lordship would appear to have given several possibly inconsistent reasons for this view. The First Division did not express a view on this point and neither the First Division nor the Lord Ordinary speculated upon the possible application of the Scots rules in relation to gratuitous alienations having more substantial foreign connecting factors.
Bolden v Ferguson (1863) 1 M 522 suggests a similar approach to gratuitous alienations to that later adopted in Obers, although there would appear to have been no discussion of its international aspect. In Bolden an assignee appointed in England under the Judgements Extention Act 1838 was allowed to invoke the 1621 Act in relation to a preceding disposition of heritable property in Largo. However, as in Obers, it is difficult to discern any clear choice of law, as the various probable connecting factors were either with Scots law or are not clear from the report. There was no attempt to invoke English law.

The present statutory provisions contained in ss.36 and 78(5) of the Bankruptcy (Scotland) Act and ss.238, 242 and 440(2)(a) of the Insolvency Act 1986 are almost identical in scope to those relating to unfair preferences, 'extending', 'applying' and 'not extending' 'to Scotland'. Again they may best be considered solely as provisions of internal law, rather than incorporating choice of law rules. However, as with the present statutory rules against unfair preferences discussed above, these statutory gratuitous alienation provisions appear linked to specific insolvency processes, thereby potentially limiting their availability to foreign insolvency administrators even if they might otherwise appear to be so available as a matter of choice of law.

The English Court of Appeal decision in Re Paramount Airways Ltd. (No.2) [1992] BCC 416 may support this view of the availability of statutory Scots gratuitous alienation provisions as limited to Scots insolvency processes, while suggesting they may be applied broadly, once available. Paramount concerned, principally, the interpretation of the words 'any person' in s.238(2) of the 1986 Insolvency Act, an English provision directed against under-value transactions, and English procedural issues. It must nevertheless be of some persuasive authority in Scotland, particularly regarding analogous Scots provisions of the Insolvency Act.

In this case administrators appointed to an English company were given leave to serve a summons on a Jersey bank under s.238 of the Insolvency Act, to have sums paid to it by the company's London solicitors repaid. Nicholls V-C indicated in the first place (at 421) that 'the company must be in the course of being wound up in England or subject to an administration order' for the provisions to take effect. Although obiter, this dictum clearly precludes the approach in Obers and Bolden whereby Scots provisions were made available to foreign insolvency administrators.

'Any person' with whom an under-value transaction had been entered into was then construed literally, leaving the court a broad discretion firstly in giving leave to serve a s.238 summons out of the jurisdiction and secondly in giving the orders 'thought fit' for the purposes of s.238(3). Nicholls V-C proceeded to list (at 425) a series of possible criteria a court may use to determine the exercise of its discretion 'including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved ... whether the defendant acted in good faith, and whether under any relevant foreign law the defendant acquired an unimpeachable title free from any claims even if the insolvent had been adjudged bankrupt or wound up locally'.

While certain of these criteria are reflected in the development of the Scots position regarding preferences discussed in section c) above, the jurisdictional
and discretionary approach of the English Court of Appeal is not. The closest analogies are probably, in the first place, the domiciliary analysis of choice of law in this context, assimilated to analysis in terms of the law under which an insolvency process has been instituted, and, in the second, the view discussed in section c) above of Lord Justice-Clerk Hope in White v Briggs that Scots unfair preference provisions should be enforced when the court has power to do so, tempered by a discretion not to exercise such power. The approach of Nicholls V-C in Paramount does not, therefore, accord with the general development of the Scots approach to the suspect period, even if it may have attractions to some as a matter of policy.

The lack of Scots authority and uncertainties regarding the authority of Paramount make it difficult to draw firm conclusions regarding the Scots international private law relating to gratuitous alienations. While Obers and Bolden suggest the development of a co-operative territorial approach similar to that which may have been developing in relation to unfair preferences prior to Briggs, they certainly do not exclude extra-territorial application of Scots rules against gratuitous alienations, as suggested in Paramount. It is difficult not to speculate that the rules developed in relation to unfair preferences would also be applied to gratuitous alienations, given the parallel development of the rules in internal Scots law and their present statutory form. One consequence of that reasoning could of course be the reinstatement in the rules relating to unfair preferences of some additional co-operative application of Scots law for the benefit of foreign insolvency administrators, under the influence of Obers.
e) Conclusions. As stated above, several general types of issue require to be isolated before the law in this field can be properly considered. This in itself suggests that the suspect period is not considered to comprise a single general category of issues. It does, however, seem preferable as a matter of policy that it should be so considered.

There is also further fragmentation of approach in relation to more detailed issues. It is thus possible that different approaches may be taken to different types of property, as perhaps in the emphasis upon the lex situs in Veston v Falconer\(^1\) in relation to unfair preferences granted over land.

It is also possible that several provisions may operate concurrently, with a limited local law being made available to a foreign process, as in Obers v Paton's Tr, while the personal law of the bankrupt\(^2\) or the lex loci actus is given more general effect, on the basis suggested in White v Briggs. It is similarly possible that several provisions may operate concurrently in situations, such as many corporate insolvencies, in which there are several concurrent insolvency processes\(^3\).

The further suggestion may be made that s.426(5) of the Insolvency Act 1986 could be applied to allow the administrators of foreign insolvency processes to invoke Scots suspect period rules or their own corresponding rules in the Scots courts. Under s.426(5), on request by a court of certain designated legal systems\(^4\) a Scots court may 'apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters'. Section 426(5) proceeds to require the court to 'have regard ... to the rules of private international law'. While the function of this last provision is not clear, it should at least eliminate procedural problems in this context\(^5\). Section 426(5) does not yet appear to have been invoked to apply Scots or foreign suspect period rules for the benefit of a foreign insolvency process.

It is, however, difficult to conclude that there is substantial coherence in the law. Its most striking features seem to be the general absence of application within Scotland of the rules of foreign systems and the apparent inadequacy of the internal Scots rules, and in particular the statutory rules, when they appear prima facie applicable as a matter of choice of law.

It may nevertheless be suggested that the lex situs\(^6\) is applicable to rules having direct effect upon real rights, whether by qualifying rights in real time on vesting or by altering them in a strictly retrospective manner. It may also be suggested that the lex loci actus or the personal law of a person becoming insolvent\(^7\) is applicable to rules operating ex post facto to restore a previous position, the effect of such rules as regards real rights in the property involved being referred to the lex situs\(^8\).

The further suggestion may then be made that the apparent dichotomy between rules relating to diligence and rules relating to unfair preferences and gratuitous alienations is based upon the mode of operation of the specific rules invoked in the cases rather than reflecting a true division between the targets of suspect period devices.

However, distinctions according to the technical operation of suspect period devices are themselves unfortunate given that the purpose of all such devices is
substantially the same. Concerns about according retrospective effects to foreign laws make the resolution of such technical problems difficult outwith treaties. As policies against acts carried out during suspect periods are also substantially uniform it may be preferable to allow several legal systems to operate at once than to allow such acts to escape, as in *Galbraith v Grimshaw*, between several systems.

The co-operative approach in *Obers v Paton's Tr* should therefore be developed, perhaps also through s.426(5) of the Insolvency Act, along with clarification of the approach in *White v Briggs*. The approach in *Briggs* may then be further developed consciously to accord effect within Scotland to strictly retrospective rules of appropriate foreign systems, rather than took place in *Strother v Read* as regards prospective bankruptcy transfers. Despite the inferences which may be drawn from the *Paramount Airways* case, it is suggested that the *lex loci actus*, rather than the law governing an appropriate insolvency process, is the most suitable law to apply in this context, as its suspect period rules should be clearest in the mind of the person later affected thereby. It cannot be said that Scots law has yet come to any of these conclusions.
5) Methods used to establish unity and universality of insolvency.

a) Introduction. A number of methods are used by various legal systems in order to establish practical unity and universality of international insolvency processes, with varying degrees of success. There are two broad approaches: unilateral and multi-lateral. These approaches are largely inconsistent with each other, the unilateral tending to strive directly for unified and universal insolvency processes and the multi-lateral tending to facilitate unified and universal effects while acknowledging the limits of a strictly unified and universal process. Scots law uses both unilateral and multi-lateral approaches in endeavouring to establish insolvency processes which are effectively unified and universal.

Jurisdiction is central to many of the methods used to establish effective unified and universal processes. Thus a given legal system may arrogate broad jurisdiction to initiate insolvency processes and temper this with discretionary powers to decline jurisdiction in favour of a more appropriate legal system. A legal system may, on the other hand, provide narrow grounds of jurisdiction with a view to requiring proceedings to be brought under an appropriate legal system. There are particular difficulties with the former approach when other legal systems consider the jurisdiction of the first inappropriate, and with the latter when another legal system, considered inappropriate by the first, arrogates jurisdiction or when a process is not commenced at all.

Jurisdiction is also sometimes channelled to existing insolvency processes, whether by the courts of the legal system under which such a process has been initiated, or by the courts of other legal systems considering such a foreign forum appropriate to determine the given issues raised. Channelling jurisdiction to a legal system's own insolvency processes is often of limited international effectiveness, as it may be regarded as excessively extra-territorial by other legal systems. Measures to this latter effect are thus often limited, for practical purposes, to the withholding of benefits under a domestic insolvency process until practical co-operation can be achieved.

Co-operation is indeed sometimes evident among several co-existing insolvency processes. While their very co-existence appears to deny principles of unified and universal insolvency, such multiple co-operative processes may arguably achieve a greater degree of practical unity and universality of insolvency than may be achieved when a single process is accorded theoretical universal and unified effect.
b) Initial jurisdiction. It may be suggested that broad flexible jurisdiction to institute insolvency processes tends to facilitate more satisfactory international processes than does such jurisdiction when narrow and strictly applied. Scots jurisdiction tends to have been invoked quite strictly in this context, particularly as regards sequestration under Bankruptcy Acts prior to the Bankruptcy (Scotland) Act 1985. The basis of Scots sequestration jurisdiction has also tended to be relatively broad and, prior to the 1985 Act, to a degree inappropriately focussed on personal jurisdiction rather than business operation and presence of assets. Given the relatively unco-operative approach of Scots sequestrations to foreign processes discussed below, some scope would accordingly appear to remain for inappropriate internationally ineffective Scots sequestrations which attempt to undermine appropriate foreign processes. Given the focus of jurisdiction on ordinary personal jurisdiction there also appears to have been some scope for no Scots sequestration to be commenced when such a process could be given wide international effect. The greater business emphasis of the 1985 Act may lessen this potential difficulty.

Scots jurisdiction has also been broadly based in relation to other insolvency processes, but, although it too has often been quite strictly applied, the more co-operative approach of such processes to foreign processes, discussed below, provides a better basis for workable international processes.

Scots law initially adopted a very broad approach to insolvency jurisdiction in general, apparently requiring little connection of a person with Scotland in order to institute an insolvency process in relation to his estate. Thus presence of a few assets in Scotland appeared to suffice in Cole v Flammare 1772 Mor 4820 to allow sequestration to take place under the 1772 Bankruptcy Act in respect of a person having little connection with Scotland other than ownership of such assets. The Scots courts were similarly willing to provide the benefit of cessio bonorum to persons not domiciled in Scotland and to persons having substantially English creditors.

This broad jurisdiction appears to have been tempered by two further factors: restriction of processes to Scots territory and an apparent willingness to decline jurisdiction in appropriate circumstances. The interlocutor in Cole v Flammare, for example, limited the sequestration to moveables in Scotland. So too in Shilletto (1862)24 D 848 cessio was refused on the ground that the debtor had no real connection with Scotland and should have invoked the relevant English procedure. If a co-operative approach is taken to other insolvency processes a discretion to institute limited processes on the basis of presence of assets or other less conventional jurisdictional bases can be of use in constructing coherent international processes.

The basis of jurisdiction to award sequestration under later Scots Bankruptcy Acts was more narrowly interpreted than that available under the 1772 Act, perhaps in part because of growing acceptance of unified and universal bankruptcies. Section 13 of the 1793 Bankruptcy Act provided for the sequestration of the estates of 'any Person .. in Scotland, being a Merchant or Trader'. In Ewing's Creditors v Douglas' Attorney 6 February 1802 FC and Keir v Dickie 27 May 1802 FC this provision was interpreted to exclude the sequestration in Scotland of persons trading largely abroad, but trading to a certain extent in Scotland and having assets in and a degree of personal connection with Scotland. Section 17 of the 1793 Act, which prevented sequestration unless the debtor had been resident or had a dwelling or place of
business in Scotland or had concurred in the petition, was considered qualified in both of these cases by such an interpretation of s.13. Section 13 of the 1793 Act was nevertheless relatively vague in expression and differed from the equivalent provision of the 1772 Act principally as regards the requirement in the 1793 Act that the debtor be a trader and as regards the additional provisions in s.17 of the 1793 Act2.

The jurisdiction provisions of the Scots Bankruptcy Acts gradually became more precisely expressed, apparently focusing increasingly on ordinary personal jurisdiction against the bankrupt, with variations in business or property related criteria. Section 15 of the 1814 Bankruptcy Act provided for the sequestration of 'any Person being a Merchant or Trader in Scotland'. This change appears to reflect the parties' arguments in Ewing's Creditors, clarifying the emphasis on trade in Scotland rather than the person being 'in Scotland' by reason of a non-business connection or by reason solely of the personal jurisdiction option provided in s.17 of the 1793 Act6.

Section 5 of the 1839 Bankruptcy Act provided for the sequestration of 'the Estates of any Debtor subject to the Laws of Scotland who is or has been a Merchant, Trader [etc]'. This provision is expressed in more modern jurisdictional language, but nevertheless remains vague. It may even be argued, under reference to the 'deceased debtor' sequestration provisions introduced by s.4 of the 1839 Act3, that the 'Estates' rather than or as well as the 'Debtor' required to be 'subject to the Laws of Scotland'. It is also notable that at that time an additional requirement that the debtor had carried on business in Scotland was added over and above the residence, dwelling and place of business options required on a creditor's petition since they were introduced by s.11 of the 1783 Bankruptcy Act.

Section 13 of the 1856 Bankruptcy Act brought together the jurisdiction provisions of the 1839 Act and made a number of detailed changes thereto. The basic structure of the main provisions remained the same. Sequestration was then possible of the estate of a 'Debtor subject to the jurisdiction of the Supreme Courts of Scotland'. As mentioned below, this provision was interpreted in Joel v Gill (1859)21 D 929 in terms of the ordinary personal jurisdiction of the court. The history of this provision may suggest that such an interpretation was neither necessary nor appropriate3.

It is also interesting that s.13 of the 1856 Act retained the requirement on a conventional creditor's petition that business have been carried on in Scotland only in relation to 'Companies' and removed all reference to business, residence and presence of assets in the 'deceased Debtor' provision, thereby facilitating analysis of the provisions in general in terms of ordinary personal jurisdiction.

The increasing detail of the basis of Scots sequestration jurisdiction appears to have been accompanied by stricter enforcement thereof. In Newall's Trs. v Aitchison (1840)2 D 1108 a judicial factor had been appointed in respect of the estate in Scotland of a deceased person, on the death of the last trustee under a mortis causa trust deed for creditors. The judicial factor had also been appointed to manage the trust property in England by the Court of Chancery and had had West Indian trust property conveyed to him. The majority of the Second Division nevertheless awarded sequestration of the entire trust estate, despite arguments made concerning the expediency of sequestration, particularly in view of the English proceedings. It was felt that the court had no discretion to
refuse the petition, even if Lord Medwyn at least (at 1111) considered sequestration inexpedient.

Joel v Gill reinforced this rather strict approach to enforcement of available jurisdiction, indicating in addition that such jurisdiction should be analysed in general in terms of ordinary personal jurisdiction. In this case an English domiciliary with only one minor secured Scots creditor and no unsecured assets in Scotland resided for a short period in Tobermory for the purpose of petitioning, with a concurring creditor, for his own sequestration, because it was cheaper than instituting an English bankruptcy. His only business activity appears to have been in England, and the rest of his assets and creditors were outwith Scotland.

As indicated above, s.13 of the 1856 Bankruptcy Act provided for sequestration on a debtor's petition of the estates of persons 'subject to the jurisdiction of the Supreme Courts of Scotland'. The Second Division reversed the decision of the Lord Ordinary on the interpretation of this provision and upheld the sequestration of Gill despite the facts and allegations of collusion to obtain the preferred Scots discharge. The Second Division considered this provision to refer to ordinary personal jurisdiction, with little consideration of the nature and functions of sequestration, least of all in its international context. As there were no additional criteria on a debtor's petition, Gill's 40 day residence in Tobermory accordingly sufficed for his sequestration.

As jurisdiction existed against Gill, the Second Division was then of the view that sequestration had to be awarded, Lord Justice-Clerk Inglis commenting (at 937) that 'in awarding and recalling sequestration, we are not exercising any discretion; .. and are bound to disregard all considerations of mere equity or expediency', continuing to note that 'if the case is within the meaning of the statute, we must sustain the sequestration, no matter how inconvenient the consequences may be. If the law, which we are bound to administer, be opposed to the principles of international jurisprudence, the sequestration will receive no effect in foreign countries, though, of course, it must receive full effect in England, because the law is contained in and created by a statute of the Imperial Parliament'. It may be wondered whether or not the English courts would have agreed with his Lordship's last remark. It is interesting to compare this case with that of Shilletto, mentioned above, in which the facts were quite similar and in which Lord Justice-Clerk Inglis was of the view that a Scots cessio bonorum should not be awarded in the circumstances.

The mechanical approach of Joel v Gill was followed in Croil, Ptnr. (1863)1 M 509, Strickland, Ptnr. (1911)1 SLT 212 and Wylie, Ptnr. 1928 SLT 665. The petition in Croil appears to have been granted solely because the debtor had heritage in Scotland, as this constituted ordinary personal jurisdiction. The petition in Strickland was refused, not on the grounds that the debtor had no genuine business connection with Scotland, as was probably the case, but on the grounds that there would have been no ordinary personal jurisdiction against him because, though domiciled in Scotland, he was not technically resident there. Indeed in Wylie there can be little doubt that a Scots sequestration would have been appropriate, as the debtor appeared Scots in every regard except his apparently permanent departure for Australia on granting a trust deed for his creditors to the petitioner, shortly prior to the petition. Lord Mackay refused the petition in Wylie after a detailed analysis of ordinary personal jurisdiction. Sequestration was awarded in Blair, Ptnr. (1846)8 D 807 and in Weinschel, Ptnr.
(1916)2 SLT 91 on similar facts to those in *Wylie*, the difference seeming to be the heritable property in Scotland still held by the bankrupts in these cases sufficed to constitute ordinary personal jurisdiction under Scots law.  

It would seem that the only situation in which a strict literal reading of the jurisdiction provisions of the former Scots Bankruptcy Acts has been departed from is where there has been a prior foreign insolvency process, as in the *Stein cases* and *Goetze v Aders* (1874)2 R 150. It may have been thought that such cases would have influenced the decisions in cases such as *Wylie*. They have not done so, and indeed the only argument to this effect was ignored in *Newall's Trs.*. This may be explained by suggestions in *Stein* and *Goetze*, discussed in section 2) above, that there were no assets to sequestrate in these cases.

Jurisdiction has fortunately been refocussed by s.9 of the Bankruptcy (Scotland) Act 1985 such that sequestration may now take place of the estate of an individual debtor who has 'an established place of business in Scotland' or who is habitually resident there. While it is possible that the reference to habitual residence may preserve analysis through personal jurisdiction, the expression reference to business connection is very much welcome. Reference to an 'established' place of business may, however, prove slightly restrictive.

It is probable that available jurisdiction will continue to be enforced relatively strictly. Such strict enforcement of available jurisdiction is, however, tempered by the flexible provisions introduced by ss.10 and 17 of the 1985 Act to dismiss, sist or recall Scots sequestrations for the benefit of analogous foreign proceedings, as discussed below.

Section 2 of the Bankruptcy (Scotland) Amendment Act 1860 contained a precursor to ss.10 and 17 of the 1985 Act. It provided that a Scots sequestration could be recalled within three months of its date if 'a majority of the creditors in number and value reside in England or in Ireland, and that from the situation of the property of the bankrupt or other causes his estate and effects ought to be distributed among the creditors under the bankrupt or insolvent laws of England or Ireland'. This provision was applied in *Cooper v Baillie* (1878)5 R 564, largely because, in Lord Gifford's words (at 569), 'the bankruptcy .. is really an English bankruptcy, .. almost all the obligations .. having been contracted in England while the bankrupt was trading and was resident in England, and chiefly also in favour of English creditors'. His Lordship continued to note that the property to which Baillie may have been entitled would be better dealt with in the English courts. Furthermore, the attempt by Baillie to obtain the benefit of the discharge provisions of Scots law which he preferred to differing English provisions was also considered relevant.

In *Smith, Payne and Smiths v Rischmann* (1869)8 M 100 the relevant creditors resided outwith the United Kingdom. Lord Ardmillan felt (at 104-105) this situation to be a *casus improvisus* but that the court had 'no right or power, under the statute, to say that the estate should be wound up and distributed under the laws of .. foreign countries'. Lord Deas dissent, preferring to direct the bankruptcy to England, where the majority of United Kingdom creditors and Rischmann's business were based. Lords Ardmillan and Kinloch felt (at 105) such a course of action to be expedient but incompetent. Lord President Inglis also indicated (at 103) that the sequestration could only be recalled under statute, thereby excluding a common law equivalent of s.2 of the 1860 Act. Such
an approach certainly seems consonant with that in Joel v Gill, the facts in which were not dissimilar to those in Rischmann.16

Rischmann and Joel v Gill accordingly suggest that the plea of forum non conveniens, which was upheld in Adamson's Executors v Mactaggart (1893)20 R 73817 in what was in effect the winding up of an Indian partnership, would not be available to prevent or recall a Scots sequestration. The plea may be of greater relevance in relation to other Scots insolvency processes18.

As mentioned above, s.17 of the 1985 Bankruptcy (Scotland) Act provides the Court of Session with a broad discretion to recall a Scots sequestration or to allow it to continue subject to conditions. In particular, s.17(1)(b) provides such a discretion when 'a majority in value of the creditors reside in a country'19 other than Scotland and that it is more appropriate for the debtor's estate to be administered in that other country', similarly to the discretion in s.2 of the 1860 Act.

In addition s.17(1)(c) provides a discretion to recall a Scots sequestration or impose conditions upon its continuance if, broadly, a remedy analogous to sequestration has been granted in another country. Section 10(4) of the 1985 Act further provides for a Scots sequestration petition to proceed or be sisted or dismissed if such an analogous remedy is proceeding.

Perhaps more importantly, s.16(4)(b) of the 1985 Act excludes from the ten week time limit for petitions to recall a sequestration petitions under s.17(1)(b) and (c), providing some of the flexibility necessary in order to integrate multiple processes.

There are not, as yet, any reported decisions upon these provisions. It might at least be hoped that the mechanical approach taken in Joel v Gill and some of the other cases referred to above will be abandoned. It may be less likely that the largely unco-operative effects of Goetzze v Aders and the other cases discussed in section e) below will be fully reversed, such that a truly ancillary Scots sequestration may be established after a foreign process has commenced.

As mentioned above, jurisdiction to institute insolvency processes in Scotland other than sequestration also appears relatively broad and, in some respects, inflexible. Jurisdiction to wind companies up under the 1986 Insolvency Act is, for example, based substantially upon the place of incorporation or registration of the company in question20.

Occasionally a company will have almost no practical connection with the legal system under which it has been incorporated. In Re Harrods (Buenos Aires) Ltd. (No.2) (1991)14 All ER 348 the English courts recently declined jurisdiction in respect of an unfair prejudice petition under s.459 of the Companies Act 1985 and to grant a winding up order in such a situation, considering it more appropriate that the company be wound up or such other remedies take place in Argentina. It is possible that this case will not be followed in Scotland as in Smyth & Co. v The Salem (Oregon) Capitol Flour Mills Co. Ltd. (1887)14 R 441 a winding up order was made in respect of a Scots registered company even though its assets appear all to have been situated in the USA and despite apparent acceptance that the liquidator's status and title would not be recognised there21.
The First Division in *Smyth v Salem Flour Mills* did, however, emphasise the fact that the petitioners were the only creditors independent of the company, Lord Shand indicating (at 442) that they were entitled to a Scots winding up 'unless it be shewn either that the general voice of the creditors is against the application or that refusal of the order will not prejudice the petitioners'. There was also no firm undertaking to commence an equivalent formal American process. It accordingly remains arguable that the Scots courts may be willing in some circumstances to decline jurisdiction to wind up a Scots registered company when it has little connection with Scotland other than its registration.

As discussed below, it is possible for a Scots liquidation to be ancillary to a foreign process and arguable that this proposition also applies when the company in question is registered in Scotland. Accordingly the rigid application of Scots liquidation jurisdiction which may be inferred, with the support of some of the sequestration cases, from *Smyth v Salem Flour Mills* may not give rise to practical problems and may indeed facilitate an effective international process.

Sections 117, 120 and 221 of the 1986 Insolvency Act ensure that Scots incorporated companies may not be wound up in England and that English incorporated companies may not be wound up in Scotland, allocating jurisdiction within Great Britain. Part V of the 1986 Act provides for the winding up of companies not registered in Great Britain in either Scotland or England or both. It was clearly stated in *Inland Revenue v Highland Engineering Ltd.* 1975 SLT 203 that the Scots courts could decline jurisdiction under the predecessor of Part V of the 1986 Act at their discretion.

This case illustrates both the breadth of the jurisdiction available under Part V of the 1986 Act and certain criteria relevant to its exercise. The *Highland Engineering* case related to a dissolved company which had been struck off the New Zealand register of companies about two years prior to the petition for its winding up. It was argued that jurisdiction to wind the company up under the predecessor of Part V of the 1986 Act was not available by reason of its dissolution unless it had, in addition, carried on or had a place of business in Scotland, or some other substantial connection with Scotland, but that presence of assets in Scotland was insufficient for this purpose. The relevant statutory provisions were interpreted broadly, rejecting this argument and allowing the court to exercise its discretion to assume jurisdiction.

Lord Grieve proceeded to grant a winding up order having, in his words (at 206), 'regard to the fact that it is not suggested that the company has assets in any country other than Scotland, and particularly not in New Zealand; that it is alleged that the company has an asset in Scotland, and that all persons concerned with the distribution of the company's assets, if any, are situated in Scotland'. It is clear that further criteria could have been considered relevant and that the criteria listed would not all be required in order to institute a Scots process. Indeed it should be noted that the existence of the relevant Scots asset was not admitted by the respondents to the petition. His Lordship referred with approval to comments made in *Re Compania Merabello San Nicholas SA* [1972]3 All ER 448 regarding criteria relevant to the exercise of this jurisdiction. These do not add significantly to Lord Grieve's remarks, while indicating the persuasive nature of English authority in this context.

It is therefore probable, despite the allocation of jurisdiction within Great Britain to wind up unregistered companies according to their principal place of
business, that even if a company has not been dissolved, the Scots courts would follow the Merabelllo case and be prepared to wind up such companies if they had never carried on business in Scotland, far less had a principal place of business there.

It is further evident from Marshall Ptnr. (1895)22 R 697 that a winding up order may be granted under Part V of the 1986 Act when a similar process has been commenced under the legal system under which a foreign corporation is registered and under which most of its business has been carried out. As in Marshall, such a Scots process would doubtless be considered ancillary to the foreign process in question. Presumably it would also require to perform some useful function, such as the prevention or reduction of preferences. The winding up in the Highland Engineering case was in effect designed to collect unpaid United Kingdom taxation, which presumably would not have been allowed to give rise to either an insolvency process in New Zealand or a claim under such a process. It may therefore be wondered whether or not a potentially conflicting Scots process would have been commenced had a reasonably substantial New Zealand process existed or been pending and how truly co-operative 'ancillary' Scots liquidations may be.

The 1986 Insolvency Act contains no provisions analogous to Part V concerning the granting of administration orders under Part II of the Act in relation to foreign corporations. It may therefore be inferred that administration orders may not be granted by the Scots courts except as regards companies registered under the Companies Act 1985. Hirst J certainly expressed the obiter view in Felixstowe Dock & Railway Co. v United States Lines (1988)12 All ER 77 (at 91) that 'Part II of the Insolvency Act 1986 does not give the English court jurisdiction to make an administration order in respect of a foreign company'. This dictum may be expected to be of some persuasive authority in Scotland.

Hirst J was not considering whether or not an English court had jurisdiction to make an administration order in respect of a Scots registered company, and, just as Part II of the Insolvency Act contains no equivalent to Part V, it also contains no express division within Great Britain of administration jurisdiction analogous to that on liquidation. It may therefore be suggested that administration orders may be made in Scotland in respect of English registered companies and vice versa, perhaps even if such an order has already been granted in the other jurisdiction. It would, however, seem more consistent with general theories of unity and universality of insolvency that each legal system restricts its administration orders to its own companies, as such orders are likely to be effective, in general, throughout Great Britain.

In Re Dallhold Estates (UK) Pty Ltd. (1992) BCC 394 an administration order was granted by the English courts in respect of a company incorporated in Western Australia. It was granted under s.426 of the Insolvency Act at the request of the Australian court. The s.426 procedure is presently available to relatively few foreign courts and, as mentioned above, it is arguable that an order could not have been granted in the absence of such a statutory request. Chadwick J certainly suggested (at 398) that s.426 gave 'to the requested court a jurisdiction that it may not otherwise have'. On the other hand, in Re International Bulk Commodities Ltd. (1992) BCC 463 a Liberian company was considered a 'company' for the purposes of provisions of the Insolvency Act relating to administrative receivers. While Mummery J reserved his position (at 469) relative to 'companies' which could be subject to administration orders, it
would seem that his Lordship impliedly criticised the obiter position adopted by Hirst J in the Felixstowe Dock case, inferring that foreign corporations could be subject to administration orders under the general provisions, rather than only under s.426.

Certainly the original broad and flexible approach of Scots law to insolvency jurisdiction seems appropriate to the flexible administration process, and it is perhaps of interest that such an approach continued to be taken to the process of cessio after sequestration jurisdiction started to be strictly interpreted. It is suggested that the Scots courts should be prepared to grant administration orders in relation to any companies, including foreign and English companies, in appropriate circumstances, provided such administration processes operate in a co-operative manner with relevant foreign insolvency processes.

There can at least be little doubt that the Scots courts have extensive discretion to refuse administration petitions. It is suggested that the presence or absence of foreign insolvency processes relating to the company in question and the effects of existing processes may influence significantly the exercise of such discretion. As discussed in section e) below, it is further suggested that a Scots administration process may then be considered ancillary to an appropriate foreign process, such as, for example, a re-organisation procedure pending at the main and foreign business centre of a Scots registered company.

Initial Scots insolvency jurisdiction is thus, by and large, broad. Unfortunately, sequestration jurisdiction has been inappropriately focussed on ordinary personal jurisdiction and also quite strictly applied. Although it is likely to be invoked in the presence of an existing foreign insolvency process only if assets are not considered transferred by that process and ss.10 and 17 of the Bankruptcy (Scotland) Act have introduced some welcome flexibility, assumption of sequestration jurisdiction may not facilitate effectively unified and universal insolvency processes as co-operation of Scots sequestrations with foreign processes remains, as discussed below, relatively limited. As other Scots insolvency jurisdiction is generally better focussed on business connections and may be rather more flexibly applied, its relative breadth may in fact facilitate effectively unified and universal insolvency processes, particularly in view of the more co-operative attitude apparently taken towards concurrent foreign processes by such other Scots insolvency processes.
c) Channelling of decisions. Generally the Scots courts have taken a rather more flexible approach to jurisdiction when asked to determine issues arising in the course of insolvency processes than they have when asked to institute them. It is suggested that the express provisions introduced for sequestrations by ss.10 and 17 of the Bankruptcy (Scotland) Act 1985, discussed in section b) above, will be interpreted in accordance with this existing case law.

The Scots courts have, for example, been willing to decline jurisdiction or sist actions in order to ensure that certain issues are determined in the course of appropriate foreign insolvency processes. They have also been willing to assert jurisdiction in the face of foreign actions and insolvency processes or deny effect to the exercise of such foreign jurisdiction in order to ensure that other issues are determined in the course of Scots insolvency processes or in other Scots actions. In this section simple methods are discussed which involve the channelling of decisions to Scots or foreign processes by means of asserting and declining jurisdiction and sisting actions. Other methods used are discussed in the following sections.

The situations in which Scots jurisdiction will be so asserted or declined or Scots actions sisted in this manner fall into broad categories. It would however seem that these categories are not completely fixed and that the manner in which an issue arises may also affect the view taken by the Scots courts. Broadly speaking, the Scots courts seem unwilling to decline jurisdiction when the issues concern a competition regarding property in Scotland which involves the rights relative thereto of an administrator of an insolvency process himself. On the other hand the Scots courts are generally willing to decline jurisdiction or sist actions to ensure that issues concerning claims by creditors relative to foreign processes are determined in those processes and will generally assert jurisdiction to determine such issues relative to Scots processes. There is a further tendancy of the Scots courts to channel decisions concerning jurisdiction to institute insolvency processes to the courts of the legal system under which a given process has been instituted.

The main line of Scots authority in the field of international insolvency has been established largely in the course of actions involving claims made by the administrators of foreign insolvency processes relative to property in Scotland, and the ranking of those claims with the rights of competing claimants. The Captain Wilson case', Strother v Read 1 July 1803 PC and Selkirk v Davis (1814)2 Rose 97 & 291, for example, all concerned competitions between English bankruptcy assignees and arresters of property in Scotland regarding the arrested property. Similarly the Falconer cases2 concerned competitions in relation to property in Scotland between English bankruptcy assignees and a Scots trustee in sequestration.

However certain dicta of Lord President Inglis in The Phosphate Sewage Co. (Ltd.) v Lawson & Sons' Tr. (1878)5 R 1125 may suggest that the issues in some of these leading cases should have been determined in the course of the relevant foreign insolvency processes rather than by the Scots courts. His Lordship was of the view (at 1138) that 'whenever the Court of the domicile has by proceedings in bankruptcy vested the moveable estate of the bankrupt in a trustee .. no part of the moveable estate, wheresoever situated, can be touched or affected except through the bankruptcy proceedings and by the orders of the Court of that country in which those proceedings take place. The jurisdiction of that Court is exclusive', observing further that 'in their character of trustee ..
[insolvency administrators] can be subject to the jurisdiction of no Court except the Courts of the country within which the bankruptcy proceedings have been instituted, and the concursus creditorum has been established'.

It is suggested that these dicta are too broadly stated and that in general the Scots courts retain discretions to sist actions and decline or assert jurisdiction in respect of both Scots and foreign insolvency processes. It is further suggested that these discretions are exercised broadly in the manner outlined at the beginning of this section.

In at least one situation the approach of the Scots courts is, however, quite rigid. In Roy v Campbell's Assignees (1853) 16 D 51 an action by a creditor, who had not participated in an English bankruptcy, to have himself found entitled to a dividend in the English process equal to other creditors was dismissed. Although Lord President McNeill joined Lord Curriehill, the Lord Ordinary, in stressing the 'inexpediency' of the action, the interlocutor of the First Division states the action to have been incompetent. The Scots courts would accordingly appear to have no discretion in this regard.

This view is supported by the decision in the Phosphate Sewage case in which an English decree to the effect sought in Roy v Campbell's Assignees was refused effect in a Scots sequestration. Lord President Inglis was of the opinion (at 1139) that as regards 'the question whether the appellants have established a claim to be ranked on the sequestrated estate .. the Courts of this country have exclusive jurisdiction, and the Courts of England have none'.

An action to constitute his debt had also been raised in Scotland by the pursuer in Roy v Campbell's Assignees. This action was considered competent. This course of action was approved in the Phosphate Sewage case, Lord President Inglis remarking (at 1138) that 'there will be no objection to the jurisdiction, for the constitution of the debt is sometimes a useful and even necessary proceeding for the purpose of preserving or securing recourse against co-obligants or cautioners'.

It is suggested that jurisdiction may be declined if such an action does not perform any such function which may not be performed by a conventional claim in the foreign insolvency process in question and that such decrees obtained in such actions may be refused effect in Scots processes if foreign, and vice versa. The first of these points appears to be supported by The Edinburgh and Glasgow Bank v Hwan (1852) 14 D 547, which provided the further option of sisting the Scots action. The second was upheld in the Phosphate Sewage case as the claim founding the English decree in that case was res judicata in the Scots process.

In the Edinburgh and Glasgow Bank case an action was raised in Scotland against the partners of an English joint stock company against whom Court of Session jurisdiction lay, on a company debt. It was held, following an opinion of English counsel, that the debt did not require to be constituted first against the company. However, while the Scots action was pending a winding up order was pronounced against the company in England under the Joint Stock Companies Winding-up Acts 1848 and 1849. Section 73 of the 1848 Act provided that proceedings against the company or its contributories should be stayed until the debt in question had been proved in the winding up process. The pursuers were of the view that they could in any event proceed in Scotland against the
individual partners of the company irrespective of the English process against the company.

The First Division did not consider itself bound by the statute per se. The court nevertheless had no doubt as to the expediency of sisting the Scots action, particularly as claims very similar to those of the pursuers would certainly be considered in the English process in any event. Indeed Lord Fullarton considered (at 554) it possible to make participation in the English process by the pursuers a condition of granting any future decree in the Scots action, were the sest to be lifted.

In Richardson v Gavin (1851)14 D 275, (1853)15 D 434, a partner in a joint stock company was allowed to sue other partners in Scotland, despite the fact that the company was being wound up in England. The powers of the court to dismiss the Scots action on the grounds of lis alibi pendens or to siste the action were noted (15 D 434 at 435.), but not exercised as the English process was considered dormant.

There was a less co-operative exercise of discretion in Low v Low (1893)1 SLT 43. In this case an action was raised in Scotland against the executor of a person apparently domiciled in England and while the action was pending a receiver was appointed to the executry estate in England. A plea of forum non conveniens was repelled as the claim would have inevitably failed in the English administration suit on application of the English Statute of Limitations. Low is distinguishable on the grounds of the nature of the English administration process and the fact that confirmation in the executry had also taken place in Scotland. It seems preferable to argue that the application of the lex fori to limitation of actions was considered unfair as regards this Scots debt and that this case would now be differently decided because of recent changes in choice of law regarding prescription and limitation. Low nevertheless suggests that an insular approach to constitution of debt is possible in international insolvency in the exercise of discretion to sist actions or decline jurisdiction.

As noted above, s.73 of the Joint Stock Companies Winding-up Act 1848 was not considered binding on the court per se in the Edinburgh and Glasgow Bank case. Similar provisions contained in s.87 of the 1862 Companies Act and s.177 of the 1929 Companies Act were, however, considered imperative by the courts in DM Stevenson & Co. v Radford & Bright Ltd. (1902)10 SLT 82'11 and Martin v Port of Manchester Insurance Co., Ltd. 1934 SC 143, actions in those cases accordingly being sisted pending leave of the English courts being obtained to proceed further in them. As these Companies Acts were United Kingdom statutes it is suggested that the common law discretion to siste actions, as used in the Edinburgh and Glasgow Bank case, was not affected by these two cases12. This common law discretion does indeed appear to have been exercised in Carbon Syndicate v Seton (1904)12 SLT 191 to siste an action in Scotland against contributories to an English liquidation under the 1862 Companies Act.

While it is clear from the above discussion that the Scots courts are willing to siste actions or decline jurisdiction so that certain issues are determined in the course of appropriate foreign insolvency processes, it is also clear that the Scots courts are not normally prepared to siste Scots insolvency processes so that actions relative thereto may be proceeded with abroad, unless such foreign actions are clearly of assistance to the Scots process. This point was very clearly made in one of the earlier Phosphate Sewage cases13 in which the House
of Lords refused to sist an appeal against a claim rejected in a Scots sequestration pending the outcome of a parallel English action.

It was also noted above that the categories of cases are not fixed in which the Scots courts will assert or decline jurisdiction or sist actions and that the manner in which a case arises may be of significance. Okell v Foden (1884)11 R 906 is a good example of these grey areas. In this case a fund recovered in Canada by a trustee under an English process of liquidation by arrangement was lodged with a Glasgow branch of the Union Bank of Scotland. A multiple poinding was raised in Scotland in relation to these funds, which it was claimed fell outwith the estate being administered in the English process. The First Division upheld a plea of forum non conveniens.

On the face of it, the issues concerned the ranking of claimants on a fund in Scotland, one of the claimants being the administrator of a foreign insolvency process, not significantly different from the issues raised in the Falconer cases14. It would, however, appear to have been significant that the funds in question had been lodged in Scotland by a trustee under the English process. As it appears to have been accepted that the estates of the relevant partnerships15 were being administered in the English process, it may also be significant that the opposing claim related to payments to be made to partnership rather than personal creditors under an agreement reached in Canada, constituting a ranking issue internal to the English process. It seems unlikely that an order of the English court to pay the funds into an English bank account was considered material, as it had been obtained after the commencement of the Scots action.

The Lord Ordinary, Lord Kinnear, with whom the First Division concurred, did however refer with approval (at 909) to the dicta of Lord President Inglis in the Phosphate Sewage case referred to above regarding the channelling of actions concerning moveables and those concerning insolvency administrators to the courts of the legal system from which an insolvency process derives. The First Division16 nevertheless stressed its exercise of discretion, and the factors mentioned above seem to have been those significant to such exercise.

Mein v Turner and Andrew (1855)27 J 185 is a similar case, concerning a competition between a Scots trustee in sequestration and assignees under a later English bankruptcy for acquirenda of the bankrupt. While, strictly speaking, jurisdiction was sustained by the Scots court, decree that the acquirenda had vested in the Scots trustee was refused with a strong suggestion that the Scots trustee should seek to challenge the title of the English assignees in England17. Again it is difficult to distinguish the Falconer cases. The decision may have been influenced by the doctrine described below whereby an insolvency process should be challenged in the courts of the legal system under which it had been instituted. It would, however, seem that the property in question was situated in England, and this was probably the most significant factor in the case.

It would, on the other hand, seem to be clear from Thomson v The North British and Mercantile Insurance Co. (1868)6 M 310 that where property may be recovered either in Scotland or another country a much greater degree of connection of the property and the claimants with that country than with Scotland will be necessary before the Scots courts will uphold a plea of forum non conveniens18. In this case an insurance policy, payable in London, had been taken out with an English insurance company. The business of the English company had been acquired by a Scots insurance company with a London office and the Scots trustee
in sequestration of the deceased beneficiary raised a multipelpoinding in Scotland in relation to the policy. Scots and Irish marriage contract trustees, to whom the policy had been assigned in English form, refused to lodge a claim in the multipelpoinding, preferring to raise a later action in the English courts.

Although the Second Division considered the raising of the English action unacceptable and its decision was certainly influenced by this factor, clearly other factors were also relevant to its decision, such as the law governing the property in question and number of parties against whom ordinary jurisdiction would otherwise be available. The fact that one competitor was a Scots trustee in sequestration does not seem to have been considered significant. It is however interesting that the plea of forum non convenienses was repelled in hoc statu, providing an element of flexibility in the light of doubts about the facts relating to the plea and possible difficulties caused for the nominal raiser by the English action19.

Arnott v Stewart (1843)5 D 715 is a case of the converse type to Okell v Roden and Mein v Turner and Andrew, in which the Scots courts asserted their jurisdiction to determine what may be considered a ranking issue within a foreign insolvency process. On the basis of Roy v Campbell's Assignees this issue should have been referred to that foreign process. In Arnott v Stewart the debtor in a Scots bond and disposition in security of certain land in Kinross-shire brought a declarator and multipelpoinding in relation to the debt, with a view to setting off a claim he had against the firm of which his creditor was a partner. Both the firm and the creditor in the bond and disposition had been bankrupted in England.

Lord Cockburn, the Lord Ordinary, upheld the argument of the English assignees that the issue should be settled in the course of the English bankruptcy and dismissed the action. Lord Jeffrey was of the view on appeal that the court had a discretion to decline jurisdiction, but the First Division nevertheless reversed the decision of Lord Cockburn.

Only Lord Mackenzie adverted on appeal to Lord Cockburn's view that the issue should be determined in the course of the English process, taking the odd view that the English assignee should not be entitled to determine his own claim. Most of the judgements appear more concerned with stating that the law governing the set-off did not determine the issue of jurisdiction. However the decision seems largely based upon the failure of the English assignees to raise the plea at an early enough stage, the heritable nature of the bond and disposition and, most importantly, the fact that the debtor in the bond and disposition could not be forced to participate in the English process and would accordingly require to be sued in Scotland by the assignees in any event. It is suggested that the last point is spurious as it was surely a matter for the English assignees to determine whether or not they felt it worthwhile to sue their debtor in Scotland. Jurisdiction against him may have been otherwise established in England or elsewhere. The procedural argument and the argument that the case principally concerned Scots heritable property seem preferable.

The issues arising in Salaman v Sinclair's Tr. 1916 SC 699 were not dissimilar to those arising in Arnott v Stewart. In Salaman v Sinclair's Tr. a Scots executry estate was sequestrated in Scotland shortly after the estate of the executor had been bankrupted in England. The executor had placed some executry funds on deposit receipt and these were claimed by both the Scots and English

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trustees on alternative grounds. The English trustee claimed that he was entitled to set them off against a claim the bankrupt executor had in the Scots sequestration, arguing in the alternative that the funds had been carried by the English bankruptcy subject to any preference available to executory creditors. It was further argued that the latter argument made it appropriate that the issue be determined in the course of the English process. The last argument was ultimately waived and it was held that the issue should be determined in the course of the Scots sequestration. Lord Skerrington at least (at 707) inferred that the waiver was required because the argument was bad! It is suggested that again the fact that the property in issue was in Scotland was the determining factor, rather than any antipathy towards foreign insolvency processes. It is also clear that the First Division were not impressed by the English trustee’s main argument.

Certainly there was no antipathy towards the English process in Queensland Mercantile and Agency Company Ltd. v Australasian Investment Company Ltd. (1888)15 R 935. As discussed in section d) below, Scots arrestments were recalled as their effect was to be preserved in an English liquidation. It would seem that the co-operative approach of the English court order in this case allowed for flexibility on the part of the First Division where the ranking of claims to the arrested property might otherwise have been determined in Scotland.

As also discussed in section d) below, in Lindsay v Paterson (1840)2 D 1373 the Court of Session asserted jurisdiction to determine in the course of a Scots sequestration the ranking of attachments executed in London. The reaction of the English courts to this approach to property in England does not appear to be reported. The cases discussed in section d) show that the Scots courts, in general, assert broader jurisdiction in relation to property abroad than they concede, voluntarily, to foreign courts.

There is one further issue which the Scots courts have consistently refused to determine: the validity of a foreign insolvency process. It has been suggested in sections 1) and 2) above that the Scots courts will not allow an inappropriate foreign process effect in Scotland, particularly if it relates to a Scot, and it is clear from the Falconer cases that otherwise appropriate foreign processes will not be allowed effect in relation to property in Scotland if the Scots court is of the view that such property should not fall within such a foreign process. Direct challenges to foreign processes are, however, generally channelled to the courts of the legal systems under which they have been instituted.

There are dicta to this effect in the first Stein case20 and in Vilkie v Cathcart21 it was held that it could not be argued in a Scots multiplepointing that an English bankruptcy was null due to lack of jurisdiction, as this was a matter for the English court. The basis of the English jurisdiction in Vilkie was that the bankrupt, who was an army officer, had contracted debt in England and left the jurisdiction. He appears to have had little other connection with England, and was possibly domiciled in Scotland.

As the English bankruptcy had not been challenged in England, the court then felt bound to give effect to it under the assistance provisions in s.219 of the English Bankruptcy Act of 1861, which were effective in Scotland. Lord President Inglis indeed felt bound to recognise the English decree in any event as he felt
(at 171) that the court should not 'scrutinise the decrees of another Court of the United Kingdom, as if they were those of a foreign country'. Presumably bankruptcy decrees of foreign countries, while not directly challenged, would not be given effect in Scotland if the jurisdiction therefor were considered inappropriate by the Scots courts.

Similarly in Young v Buckel (1864)2 M 1077 a Scots sequestration was recalled as there had been a prior English bankruptcy in relation to the same person. The bankrupt in this case was again probably Scots and the basis of English jurisdiction was even more tenuous than that in Wilkie v Cathcart, being, in effect, a mode of diligence. The distinction between the need to challenge the English bankruptcy in England and the effect to be given to the English bankruptcy in Scotland was less clearly drawn in this case than in Wilkie v Cathcart. It is nevertheless clear that the English bankruptcy took effect in Scotland largely because it derived from a statutory requirement of the 'Imperial Parliament'. Had the statute not so provided, it seems likely that the English process could only have been challenged in England in any event.

There can be no doubt that the person bankrupted in England in Salaman v Tod 1911 SC 1214 was a Scot in every relevant way and that the view was again taken that the English bankruptcy had to be challenged in England if it were not to be given full effect in Scotland by statute. The action was, however, sisted as a challenge was to be made to the English process in England. This challenge in England was successful and the defenders in the Scots action were thereupon assolized. As in Young v Buckel emphasis was placed upon the binding nature of the 'imperial' statute upon the court, and in particular the vesting provisions thereof. Although Lords Kinnear and Mackenzie considered all of the issues to be determined by the statute, and no issue of international law to arise, there can be little doubt that the court was not in any event willing to determine the jurisdiction of the English court to institute the bankruptcy.

There was greater ambivalence expressed in Colville v James (1862)1 M 41 as regards general averments of 'irregularities' in an Indian bankruptcy. While it was noted that the averments in this regard were insufficient it was also stated (at 45) that in any event the court 'should have been bound to assume that the proceedings had been regularly followed out in the Courts of India'. The issue was not dealt with fully and the Indian statute was, of course, 'imperial', and so firm conclusions cannot be drawn from this dictum. It seems unlikely that the First Division would have annulled the Indian process, although it is possible that extreme irregularity may have prevented it from being allowed effect in Scotland.

This type of approach certainly appears to have been envisaged in Home's Tr. v Home's Trs. 1926 SLT 214 (at 216-217), in which the jurisdictional basis of a South African sequestration was considered with a view to it being given effect in Scotland. Service of the South African proceedings was then considered a matter to be dealt with by the South African courts.

Salaman v Tod illustrates the smooth operation of the approach taken by the Scots courts to inappropriate foreign bankruptcy jurisdiction. If, however, the Scots court is bound to recognise the effects of a given foreign process, limitations on the right to challenge a foreign process under the system from which it derives, such as the strict time limits formerly existing under Scots law22, may lead to a degree of injustice, particularly if the process in question
is not allowed effect in further legal systems. The preference which may have arisen pursuant to Mein v Turner and Andrew to an English bankruptcy over an earlier Scots process illustrates the bizarre results possible under this approach. The solution appears to be to allow unquestioned effect within the territory of a legal system only to insolvency processes deriving from legal systems having acceptable jurisdictional rules.

It should be clear that directing decisions to existing insolvency processes can optimise the unity and universality thereof. It should, however, also be clear that limitations exist to such direction of decisions and that rigid rules in this regard may not lead to acceptable results.
Coercion. Channelling of insolvency decisions sometimes appears less cooperative than as described in section c) above. In some situations courts will attempt to prevent or undermine the institution of foreign insolvency processes or other proceedings or the involvement of creditors or the inclusion of assets therein. In other situations they will attempt to reverse the effects of such foreign processes. These actions tend to take place when such courts consider their own legal system to be the most appropriate system under which a unified and universal insolvency process should be instituted.

There is a lack of Scots authority regarding the prevention of the institution of competing foreign insolvency processes. In the light of the cases discussed below it seems likely that the Scots courts would be prepared to interdict the institution and continuance of such proceedings, given adequate jurisdiction to do so. Hopefully, the effectiveness of the Scots insolvency process within the foreign jurisdiction in question would be of weight to the court, in addition to the effectiveness of any interdict itself.

Although Lindsay v Paterson (1840)2 D 1373, which is discussed below, was distinguished in Young v Barclay (1846)8 D 774, the latter case may provide support for this view. In Young v Barclay a man died leaving moveables in both Scotland and Canada. An attempt was made in Scotland by a certain relative to be appointed executrix, which was effectively superseded by an action for declarator concerning the domicile of the deceased. Interim interdict was granted relative to an application by one of the parties to the declarator for letters of administration in Canada, pending decree in the action of declarator. The assumption was made that the domicile issue would have been central in the Canadian process and that the Canadian courts would give effect to a Scots decree of declarator in this regard. Multiple administration processes are commonplace in succession. If they were not, as theories of unity and universality would have us believe in insolvency, it would have been little extension of Young v Barclay if permanent interdict had been granted relative to the Canadian process.

The California Redwood cases, the Pacific Coast Mining case3 and Lindsay v Paterson show that the Scots courts are willing, given adequate personal jurisdiction against the creditors involved, to attempt to prevent, by interdict, the continuance of actions and execution against assets abroad in order to ensure that the issues involved are determined in the course of Scots insolvency processes.

Jurisdiction in this context appears broad, but flexible. Thus in California Redwood Company v The Merchant Banking Company of London, lodging of a qualified claim with a liquidator provided interdict jurisdiction against the claimant, whereas in Liquidators of the California Redwood Company v Walker jurisdiction against one of the partners in a Californian firm was not exercised as it would have been 'inexpedient' and 'unjust' (at 815) to do so in the absence of jurisdiction against the other partner, who apparently had no connection whatever with Scotland.

The First Division in Lindsay v Paterson did not discuss the argument made (at 1376) that creditors outwith the court's jurisdiction would obtain preferences over foreign assets if creditors subject to the court's jurisdiction were restrained relative thereto. In the Walker case such creditors against whom the Scots courts had no jurisdiction were connected with those against whom there
was Scots jurisdiction. It seems unlikely that the court in *Walker* would have refused to grant interdict had they not been so connected and accordingly probable that the Scots courts would not generally refuse to grant interdict solely because creditors over whom there is no jurisdiction may benefit.

The probable ineffectiveness of any interdict granted also influenced the decision in *Walker*, although Lord President Inglis said of the same respondents in the *Pacific Coast Mining* case (at 818) that 'so long as the respondents have important pecuniary interests in this country and are litigating in this Court, there will not be much difficulty in finding ways and means of enforcing our orders upon them'. Effectiveness of interdicts was clearly considered a matter of degree. Arguments concerning the convenience of American litigation in the *California Redwood* cases appear, however, to have been ignored by the bench. There was presumably greater concern about the efficacy of American attachments. Lord Gillies was singularly unimpressed by such convenience arguments in *Lindsay v Paterson* (at 1377).

Potential ineffectiveness of an interdict relative to disposal by a Scots bankrupt of Spanish land was considered important by Sheriff Principal Mowat in *Ferguson's Tr v Ferguson* 1990 SLT (Sh Ct) 73. More restrictively the Sheriff Principal doubted his jurisdiction at common law to grant such an interdict in relation to foreign land. The other cases previously discussed in this section were not referred to in *Ferguson* and it is suggested that the Sheriff Principal's 'dicta should not be followed. It is further suggested that the assumption should not be made, in view of the following cases, that foreign courts will not assist Scots courts in the enforcement of their interdicts in this regard.

While interdict may effectively prevent the acquisition of further preferences abroad, it was made clear in *Lindsay v Paterson* that the validity of existing preferences would be determined in the course of the Scots process, being preserved by the terms of the relevant statute. In the case of *Lindsay* the relevant provision was s.78 of the 1839 Bankruptcy Act, under which 'moveable estate .. wherever situated .. vested in .. [the] trustee .. subject always to such preferable securities as .. are not null or reducible'.

The converse situation arose in *Queensland Mercantile and Agency Company Ltd. v Australasian Investment Company Ltd.* (1888) 15 R 935, where arrestments in Scotland were recalled by the First Division pursuant to an order by the High Court in England. This order restrained further proceedings in a Court of Session action for payment but preserved any security constituted by the arrestments as regards the relevant funds thereafter to be segregated by the English liquidator. The preservation in the English process of the effects of the arrestments recalled was clearly central to the granting of the recall.

It is also notable that the Scots interlocutor restraining further proceedings in the Scots action for payment remained 'subject to the orders of Court', preserving the powers of the court in that regard. It is of further note that, with the exception of Lord Shand, the First Division appeared to consider the specific co-operation provisions in ss.122 and 123 of the 1862 Companies Act immaterial to their decision, particularly as to the recall of the arrestments. The Scots courts may therefore be prepared to assist any appropriate foreign insolvency process in this manner at common law. Such a common law approach accords with the view of Lord President Inglis in the *Merchant Banking Company*
case (at 1027) that corresponding Scots interdicts take effect at common law to restrain actions outwith Scotland.

The flexibility of the assistance which the Scots courts will provide may be illustrated by Jamart v Jossie 1672 Br. Supp. 1.655 and 659, 11.661, although doubt must exist regarding its authority and breadth of application as it was decided prior to the main insolvency authorities and related to a type of composition, being a transfer of assets for creditors, approved by the majority of creditors and the Parliament of Bordeaux. It appears to have been accepted that assets in Scotland had not been transferred under the Bordeaux transfer and a French creditor who had not approved that transfer raised an action in Scotland against the Scots 'bankrupt', with a view to attaching those assets.

It was argued that the creditor was bound by the approved composition according to the custom of Bordeaux and would be compelled in Bordeaux to pass on to other creditors sums recovered in Scotland. The bankrupt sought caution that the creditor would act in this manner. Caution was not required, largely, it would seem because the creditor would have had difficulty in finding a cautioner and because he had adequate assets in Bordeaux to ensure his compliance with the custom of Bordeaux. It may be argued that in other circumstances caution may be required to ensure compliance with appropriate foreign laws, although it should be added that willingness of a foreign court to enforce its laws in an extraterritorial manner will not in itself persuade the Scots courts to cooperate.

Perhaps less controversial than obtaining interdict of creditors' actions abroad is the negative procedure adopted in Stewart v Auld (1851) 3 D 1337 whereby dividends obtained in a foreign insolvency process are taken into account when determining a claimant's entitlement under a domestic process, thereby effectively requiring their contribution to that domestic process. Such a course of action was, in effect, sanctioned expressly by the Bankruptcy Acts 1783 to 1814, as noted below. Its application at common law is discussed in section e) below. It is sometimes suggested, on the basis of Still v Worswick (1791) 1 H B 665 that English law provides the more extensive remedy of requiring participants in English insolvency processes, and indeed most other persons against whom personal jurisdiction can be established, to contribute positively to such processes in excess of the amount to which they may otherwise be entitled therewith.

The present Scots position is not clear. Section 40 of the 1793 Bankruptcy Act certainly provided a Scots trustee in sequestration with a powerful remedy in this regard. It stated 'That in case any Creditor shall, after the first Deliverence on the Petition for Sequestration, obtain any legal or voluntary Preference or Payment on or out of any Estate or Subject belonging to the Bankrupt, directly or indirectly, situated without the Jurisdiction of the Court, he shall be obliged to communicate and assign the same to the Trustee for Behoof of the Creditors, before he can draw any Dividend out of the Funds in the Hands of the Trustee; and he shall in all Events be liable to an Action before the Court of Session at the Instance of the Trustee, to communicate the said Security or Payment in so far as the Jurisdiction of the Court can reach him'. This provision was re-enacted as s.51 of the 1814 Bankruptcy Act but was not contained in later Scots statutes. Section 37 of the 1783 Bankruptcy Act was to similar effect as regards the withholding of dividends, but did not provide express grounds upon which sums in excess thereof could be recovered.
In Young, Ross, Richardson & Company v Muir (1824)2 Sh. App. 25

the House of Lords reversed the decision of the Court of Session under s.51 of the 1814 Act to compel communication to a Scots sequestration of funds recovered in Jamaica. the House of Lords decision did, however, turn upon the payment in question not having been received from property of the bankrupts and the case contains no indication that jurisdiction under s.51 of the 1814 Act was considered limited in any way. The creditors in question were clearly subject to the ordinary personal jurisdiction of the Court of Session and no mention is made of their participation in the sequestration.

Section 51 of the 1814 Act was not referred to in Aitken v Greenhill (1826)4 S 474, although it is difficult to see how it was not applicable to the case. Mrs Ford inherited a share in certain property from two uncles resident in the West Indies not long before her husband was sequestrated in Scotland. This property was being administered in England under the authority of the Court of Chancery. In previous litigation it had been decided that the liferent of some of this property to the date of the divorce of Mrs Ford and her husband fell within the husband's jus mariti and therefore passed to his trustee in sequestration.

Mrs Ford claimed in the sequestration in respect of provisions under her marriage contract, but the trustee refused to pay her a dividend until the relevant part of the Chancery funds had been paid to him. However, the Court of Session ordered the trustee to pay this dividend, but only on the condition that Mrs Ford should execute deeds necessary for the trustee to recover the relevant funds in England. It is probable that Mrs Ford was subject to the ordinary personal jurisdiction of the court in any event and it is not clear whether or not the funds likely to be recovered in England were greater than the dividend to be paid to Mrs Ford. It is however interesting that the court adopted a pragmatic approach to the recovery of the assets in England. It is of course possible that the English courts would in any event have recognised the title of the Scots trustee.

The common law position is difficult to assess. As the statutory provisions were not discussed in Aitken v Greenhill, it may suggest that a broad pragmatic approach can be taken at common law. It is probable at least that participation in a Scots insolvency process will expose the participant to claims against him exceeding dividends to which he is entitled.

Thus in Barr v Smith & Chamberlain (1879)7 R 247 the lodging of a claim in a Scots sequestration by an English firm entitled the trustee to raise an action against the claimants for redelivery of certain lamps and gasaliers which the bankrupt's partner had been persuaded to hand over to the English firm after the award of sequestration. The value of such property was in fact less than the sum claimed in the sequestration, but this point does not appear to have been considered material by the Second Division. Indeed Lord Justice-Clerk Moncreiff suggested (at 249) that the basis of jurisdiction was 'not a mere equitable balancing of claims'. The remedy of redelivery which was granted tends to reinforce this view. Enforcement of the decree for redelivery was not discussed. It was doubtless assumed, as in Ord v Barton below, that assistance could be sought, if necessary, from the English courts.

However, on one interpretation, Smyth v Ninian (1826)5 S 8, which was not referred to in Barr, may suggest that Barr should be narrowly interpreted. In this case a Scots firm and its sole surviving partner were sequestrated in
Scotland. An English creditor of its predecessor firm lodged a claim in the sequestration. The sequestrated partner had been a partner in the predecessor firm, but neither the predecessor firm nor the estate of the deceased other partner therein had been sequestrated. An unsuccessful action had been raised by the trustee in sequestration against the estate of the deceased partner in the predecessor firm and the trustee's solicitor obtained decree in absence in an action against the claimants on the sequestrated estate to recover his fees and served an arrestment pursuant thereto in order to enforce his decree against the English creditor. The action of forthcoming brought in relation to the arrestment was dismissed.

The ratio in Ninian is not, however, clear. The judgements do not adequately indicate whether the cause of action under Scots law was a matter of agency or bankruptcy law, complicating the issue further by suggesting that the action may not in any event have been in the interests of the English creditor as it had been raised by the insolvent estate of one of the English creditor's co-debtors against its solvent co-debtor. This last point was indeed considered pertinent to the issue of jurisdiction by some of their Lordships. It may nevertheless be argued that Ninian is weak authority to the effect that participation in a Scots insolvency process does not in itself expose the participator to positive actions against him.

It is, on the other hand, interesting that it was considered obvious in Ninian that arrestment to found jurisdiction would have been sufficient to justify recovery of the fees in question. Bearing in mind the doubts regarding the cause of action, it may accordingly be argued from Ninian that positive contributions to Scots insolvency processes may even be enforced by means of ordinary personal jurisdiction. Similarly in Barr the Sheriff also upheld jurisdiction against the English firm on the basis of a rather tenuous place of business in Glasgow. This point does not appear to have been argued on appeal. The Sheriff's decision may also suggest that reliance may be placed upon ordinary personal jurisdiction in order to recover foreign preferences for the benefit of Scots insolvency processes.

Broader jurisdiction may also be derived from Ord v Barton (1847)9 D 541. In this case participation by an Englishman in a Scots sequestration was considered to provide sufficient jurisdiction for an action to reduce an alleged preference constituted by the transfer of shares in a ship17. Lord Justice-Clerk Boyle remarked (at 544) that "the first effect of the decree of the Court, should it set aside the preference, may be only to entitle the trustee to refuse Barton a dividend. He may require to go to England to recover the balance'. It may accordingly be inferred that the trustee could also have executed diligence in Scotland upon any of Barton's assets there in respect of the balance18.

As Scots jurisdiction to reduce prior preferences does not depend upon the participation of the preferred creditor in the insolvency process in question19, the inference may thus be drawn from Ord v Barton that under Scots law any person against whom personal jurisdiction may be founded may be compelled at common law to contribute in full to a Scots insolvency process any benefit obtained outwith that process.

Such reasoning may be considered somewhat to stretch the obiter dicta of Lord Justice-Clerk Hope in Ord v Barton as the reduction of prior preferences may, of course, be distinguishable from compelling the contribution of later preferences.
However, arguments in favour of the contribution of later preferences appear, if anything, stronger than those regarding the reduction of prior preferences. Certainly in *White v Briggs* (1843) 5 D 1148 the prospective effects of the 1696 Bankruptcy Act were considered applicable at least as broadly as its retrospective effects\(^{20}\).

*Galbraith v Nicholson* (1888) 15 R 914 may be considered to provide some further support for an argument in favour of broad Scots jurisdiction to reverse actions abroad for the benefit of Scots insolvency processes\(^{21}\). As the assets in question were allegedly situated in Scotland, its authority must, however, be limited as regards assets outwith Scotland.

In this case a Glasgow tailor granted two English form trust deeds in favour of creditors, appointing a Scots and an English trustee, the latter of whom effectively managed the trusts. The estate of the tailor was sequestrated in Scotland after his death and the trustee in sequestration sought an accounting from the trust deed trustees, as under Scots law the sequestration superseded the trust deeds. The English trustee was held accountable in Scotland for reasons relating largely to the trust deeds\(^{22}\). However, Lord Mure did note (at 920) that 'it is not unimportant to observe that it also now appears that the whole estate has been sequestrated in Scotland, which is therefore the *forum* where it must be finally wound up'. It may be inferred from this *dictum* that jurisdiction would have been assumed against the English trustee on any available ground by reason of the sequestration and his intromission with assets alleged to be included therein.

The reported judgements make no comment upon further arguments concerning the appearance of the English trustee to oppose the award of sequestration and his actions as trustee being taken for the benefit of certain English creditors who had lodged a claim in the sequestration. Jurisdiction against the English trustee may also have been available on these grounds.

It is of further note that an action had been raised in England to enforce the trusts, but that jurisdiction against the Scots trustee and the trustee in sequestration had been declined, on the ground that the issues could be more conveniently dealt with in Scotland. The First Division obviously took the view that the English court should next stay its proceedings relative to the English trustee, given the assumption of jurisdiction against him in Scotland and were equally obviously unimpressed by the argument that jurisdiction should not be assumed in view of the subsisting English process. Indirectly, therefore, the First Division was also attempting to bring the other parties to the English action fully into the Scots sequestration.

Some additional support for a broad Scots jurisdiction to compel contribution to Scots processes may also be drawn from *Black and Knox v Ellis & Sons* 1805 Mor Foreign App. No.7. In this case the execution of a poinding by an English creditor in itself entitled another creditor to raise an action against that English creditor to redistribute some of the poinding proceeds under s.6 of the 1793 Bankruptcy Act\(^{23}\). Such redistribution did not of course constitute a full formal insolvency process and, indeed, the poinding proceeds may still have been in Scotland. *Black and Knox* nevertheless illustrates a willingness on the part of the Scots courts to compel participation in Scots insolvency procedures.
The case law is, on the whole, ambiguous regarding compelling contribution to Scots insolvency processes of foreign preferences and, as mentioned above, the most that may confidently be suggested is that participation in a Scots process may expose a creditor to counter-claims in excess of dividends to which he is entitled therefrom. Jurisdiction to prevent foreign insolvency processes, court actions and attachments is probably broader, although exercisable with a degree of pragmatic discretion. It is of further interest that the Scots courts are willing to assist coercive decrees of foreign courts to a certain extent.
e) Co-operation. Clearly coercion of various persons by the legal system under which an insolvency process has commenced can be effective to compel such persons to take part fully in that insolvency process. Equally clearly other legal systems sometimes acquiesce or assist in such coercion, with a view to facilitating a unified and universal process. As discussed in section c) above in relation to the channelling of decisions, assistance in the construction of unified and universal processes may be provided by other legal systems without any demand to that effect from a legal system under which an insolvency process has been instituted. Sometimes greater assistance is provided than simple declination of jurisdiction. Indeed in some further situations the aims of unified and universal processes may be facilitated by co-operation between several separate insolvency processes.

Institution of second and further insolvency processes can, paradoxically, be an effective method of establishing a controlled international process, under which the aims of unity and universality may be better achieved than under a single process. A co-operative approach to multiple processes and the establishment of principal and ancillary processes is helpful in this regard. Co-operative ancillary processes can apparently be instituted in Scotland when an appropriate foreign process does not operate by means of asset transfer, provided the Scots process instituted also does not operate by asset transfer. In other situations there appear to be considerable limitations upon the ancillary or co-operative scope of Scots insolvency processes.

The headnote to Goetze v Aders (1874) 2 R 150 states that 'sequestration .. in a foreign country renders a subsequent award of sequestration in Scotland incompetent'. Certainly this view of Goetze has made it difficult to institute insolvency processes in Scotland in the face of foreign processes instituted under appropriate foreign legal systems. Thus in Bank of Scotland v Youde (1908) 15 SLT 847 such a view of Goetze was apparently applied when an award of sequestration was refused in Scotland because an old English bankruptcy was still technically in effect, though effectively at an end. Lord Young did express the obiter view in Gibson v Munro (1894) 21 R 840 at 847 that the Scots courts have a general discretion to award sequestration in the presence of a prior foreign process, approving in this regard the English doctrine in Ex parte Robinson (1853) 22 ChD 816. There is, however, little further support for such a general proposition in Scots international private law.

A slightly more practical approach may be taken by the Scots courts if several processes have in fact been instituted. It nevertheless seems unlikely that they would have expressly authorised an asset pooling and distribution agreement between domestic and foreign bankruptcy trustees as the English court did in In re P. MacFadyen & Co. (1908) 1 KB 675].

A similar consensual arrangement existed without prior court approval in Stewart v Auld (1851) 11 D 1337. In this case a firm was bankrupted in New South Wales and sequestrated in Scotland shortly thereafter, without opposition. A creditor who had received a dividend in the New South Wales process was refused a dividend in the Scots process which equalised the position of other claimants in the Scots process with such creditor]. There was an uneasy acceptance by the court of the existence of the Scots process, Lord Ivory indeed considering (at 1344) that 'if we were to go to the rigour of the law, we must hold that the Scotch sequestration is altogether null'.

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The rigour of the law seems not to have been applied largely because nobody appeared to have any interest in undermining the Scots sequestration. While Lord Ivory also felt 'bound between these two subsisting sequestrations to secure substantial justice to all the creditors', the rigour of the law still remained, as his Lordship further felt it necessary (at 1344) that claimants repudiate the Scots sequestration in order to claim extra benefits which may have been available under Australian law, such as an exclusion of late claims by creditors. It may accordingly be inferred that the Scots sequestration could only have been ancillary and of assistance to the process in New South Wales as an accidental result of the operation of conventional Scots insolvency law. Indeed if Australian law did exclude late claimants, the decision in Stewart v Auld may not have assisted the New South Wales process, and the assignee thereunder would presumably have required to enforce Australian law by recovering dividends paid under the Scots sequestration from recipients thereof or by attempting to undermine the Scots process.

This unco-operative view of Stewart v Auld may be supported by obiter dicta of Lord Young in Gibson v Munro®. In Gibson a Scots sequestration was carried fully through and the trustee discharged prior to an action being raised for its reduction by the trustee under a prior English liquidation by arrangement in respect of the same bankrupt. While Lord Young did not completely exclude the possibility of reduction, the view was clearly taken that the sequestration should remain unreduced as the opportunities to oppose its award or obtain its recall within the statutory period® had not been taken.

Certainly Lord Young did not concur with Lord Ivory's view in Stewart v Auld that the second Scots process was, strictly, null. It may also be inferred that Lord Young considered that full effect should be given to a second Scots process which cannot be challenged formally, supporting an analysis of Stewart v Auld to such effect.

However, Lord Young also suggested (at 848) that the Scots sequestration might not be considered to have its usual effect, because of the existence of the prior English process, inferring that the English trustee would be able to recover sums at credit of the bankrupt's Scots bank account even if the Scots sequestration were not reduced.

As discussed in section 2) above, the Falconer cases show a similar ambivalence towards multiple insolvency processes, indicating that Scots insolvency statutes should be enforced when invoked, while accepting some limitations thereon deriving from a prior foreign process. In the Falconer cases the limitation was the exclusion from the Scots process of Scots moveable property, and perhaps also the concession of some role for English law as regards ranking.

It is also clear from Salaman v Sinclair's Tr.® that a later Scots sequestration will take its statutory course despite a potentially competing prior English bankruptcy, but that the prior English process may give rise to certain preferences in the later Scots process. This approach may explain the refusal of the Second Division in Mein v Turner and Andrew® to declare that acquirenda in England of a bankrupt had vested in a Scots trustee in sequestration. An English bankruptcy had subsequently been awarded and it was suggested that the Scots trustee raise this issue in England. It was presumably felt that the English courts would either recall the English process or prefer the claim of the Scots trustee in that English process, as appropriate®.
There are further limitations upon co-operation in this context. Thus in Gibson v Monro Lord Young clearly considered (at 849) the Scots trustee in sequestration to be protected under the Scots statute in respect of his intrusions with the property of the bankrupt. It is suggested that persons acquiring such property from the Scots trustee in sequestration would normally have been similarly protected from the claims of the trustee under the prior English process. It may be argued that the ranking of claims in Stewart v Auld was accordingly another example of enforcement of the Scots statute, and even that the rigour of such statutes should be applied except as regards narrow issues, such as the transfer of assets under an appropriate foreign process. However, the other instances of co-operation by the Scots courts with foreign insolvency process noted in this section suggest the contrary, as does Lord Ivory's indication in Stewart v Auld (at 1345) of the ancillary nature, in practice, of the Scots sequestration in that case.

The effect given in Scotland to a transfer of assets under an appropriate foreign insolvency process underlies the main line of authority under which second processes have not been instituted in Scotland, and in particular Goetze v Aders. Accordingly such further processes may perhaps be instituted in Scotland when assets in Scotland of a person subject to an appropriate foreign insolvency process have not been transferred by virtue of that process to an administrator thereof. Such assets may exist either because the foreign process in question does not purport to transfer them or because Scots law will not permit such a purported transfer to take effect in Scotland. Corporate insolvency processes give good examples of the former and purported transfers of Scots heritage give good examples of the latter.

Queensland Mercantile and Agency Co. Ltd. (1888) 15 R 935 contains strong dicta supporting distinctions based upon asset transfer, or an absence thereof. Thus Lord President Inglis commented (at 939) that 'it has been contended that the effect of the liquidation is the same as that of a sequestration in making the administration of the estate of the company one and indivisible; but that I think is a mistake. In a sequestration under our statute... the entire estate of the bankrupt is transferred... (and, therefore, in such a case as that, it is quite impossible to say that there can be a second sequestration...); the whole estate is vested in one person, and it cannot, therefore, become pro parte vested in some other person by a subsequent proceeding. But a liquidation is followed by a very different state of matters. The estate of the company is not transferred... and the liquidator is a mere administrator of the affairs of the company... It may, therefore, very well be, that although there is a winding up in [Queensland] which would enable the liquidator there to in gather the whole assets of the company, if he can reach them, it may aid him very much in the performance of that duty that there should be another liquidation in England or elsewhere where also the company has been carrying on business. There seems to me to be nothing incompatible in the co-existence of the two.'

It is thus of particular note that the precise scope of the Saxon concourse in Goetze v Aders was considered with a view to assessing whether or not it purported to transfer all of the bankrupt's assets, wherever situated. The attention paid to title in the Stein cases is similarly instructive. It would not be unreasonable to suggest that sequestration may have been awarded in Goetze and Stein or some other remedy provided had the relevant assets not been considered adequately incorporated in the relevant foreign processes.
Goetze does, of course, contain a comment (at 153) by Lord President Inglis that 'If it was ever supposed that there might be a partial sequestration, the sooner such a notion is put to an end the better'. Accordingly a second sequestration would presumably have required to relate to the bankrupt's entire estate, wherever situated. The Lord President continued, to express the views that the assets in Saxony in that case would have been sequestrated again and that the title of a Scots trustee pursuant to such a sequestration would have been in competition with that of the Saxon trustee. As indicated elsewhere in section 2 above, it is arguable that the entire estate of the bankrupt would have constituted only assets not transferred by the Saxon process and any reversionary rights to transferred assets. Lord President Inglis did not seem to take this view, and in any event clearly felt that the relationship between the existing Saxon process and any Scots process would not be co-operative. It is difficult to reconcile some of these views with Lord President Inglis' own dicta in the Queensland Mercantile case quoted above.

A slightly more co-operative approach was taken in the Falconer cases than in Goetze v Aders. The Scots sequestration in Falconer had been instituted, unopposed, largely because the prior English bankruptcy did not transfer the bankrupt's heritage in Scotland and in order to prevent creditors obtaining preferences for themselves in Scotland over the Scots heritage. It would seem, on balance, that the court was of the view that the Scots sequestration would have been awarded even if opposed, as there were assets to sequestrate. Assets other than the Scots heritage do not appear to have fallen within the Scots sequestration, and it was indeed expressly decided that Scots moveables fell within the prior English process. It was also decided that the Scots heritage had to be realised and the proceeds thereof, net of debts secured thereon, distributed by the Scots trustee in sequestration. There was then some suggestion that English law might be considered relevant in such distribution, although this suggestion was not fully developed. The cases otherwise indicate that as the Scots process had been instituted, it should proceed strictly in accordance with the Scots statute.

In Gardner v Woodside (1862)24 D 1133 it was suggested that a Scots sequestration could be awarded in the apparent absence of assets, Scots or otherwise. It may, perhaps be argued therefrom that insolvency processes should be available in Scotland to discover Scots assets for the benefit of an existing foreign process, as perhaps in the reduction of unfair preferences and gratuitous alienations. This issue appears undecided, but the influence of Goetze v Aders, and arguments based upon a lack of assets to sequestrate in cases like Stein suggest that such a Scots process would be unavailable when the foreign process in question proceeds by asset transfer.

The general approach of Lord President Inglis in Goetze v Aders to co-operation between insolvency processes seems contrary to the decisions and dicta in the Falconer cases. It also seems contrary to dicta of the Lord Chancellor in Selkirk v Davis (1814)2 Rose 291 to the effect that a Scots insolvency process may be ancillary to a foreign process and difficult to reconcile with Lord President Inglis' own dicta in the Queensland Mercantile case quoted above. It is suggested that the co-operative approach suggested in Selkirk, Falconer and the Queensland Mercantile case is preferable to the dogmatic implications of Lord President Inglis' dicta in Goetze, and that Stewart v Auld and Gibson v Munro should be interpreted accordingly. Indeed the attention paid in Goetze to the effect of the concourse under Saxon law serves to undermine the generality of
the Lord President's dicta therein. In any event, where assets are transferred by a foreign or Scots insolvency process, the tendency of the Scots courts towards strict statutory interpretation has had the effect of limiting the assistance which the Scots courts may afford to foreign insolvency processes. This tendency seems counter-productive and should be avoided.

As suggested in the Queensland Mercantile case, a more co-operative approach to multiple insolvency processes is evident in situations where no asset transfer takes place. In Marshall, Ptnr. (1895)22 R 697 a winding up order was sought from the Court of Session in respect of a company incorporated in Iowa in the USA under the 'unregistered company' provisions contained in s.199 of the 1862 Companies Act19. A receiver appointed to the company in Iowa indicated that he did not object to the Scots petition and certain English debenture holders indicated that they did not intend to have a receiver appointed to the company20. Committees of creditors in Scotland and the USA had agreed a reconstruction plan and the winding up in Scotland was felt necessary by the petitioners in order to make the plan binding upon all creditors under the Joint Stock Companies Arrangement Act 1870.

The winding up order was pronounced, and in doing so it is reported (at 699) that the court 'expressed the view that the proceedings here should be ancillary to those in the United States, the proper domicile of the company'. The limitations upon the ancillary nature of the Scots process were not elaborated. It is perhaps instructive that the petitioners considered the winding up 'necessary for the protection of .. creditors .. in this country' and that it was indicated that the assets in the United States would be administered .. for the benefit of .. creditors there' (See p.698). The Marshall case may therefore be less co-operative in approach than it appears at first sight.

Section 221(3) of the 1986 Insolvency Act allocates jurisdiction within Great Britain to wind up unregistered companies according to places of business of the company in question and s.225 refers to the carrying on of business in Great Britain by such a company. It would, however, appear from Inland Revenue v Highland Engineering Ltd. 1975 SLT 203 that neither a present nor former place of business nor the carrying on of business in Scotland is required in order that an unregistered company be wound up under Part V of the Insolvency Act. The view of the court in Marshall regarding the possible ancillary nature of a Scots winding up is presumably even more pertinent to a process instituted in Scotland merely to collect assets situated there.

A winding up order was also pronounced by the the First Division in Smyth & Co. v The Salem (Oregon) Capitol Flour Mills Company Ltd.21 in respect of a Scots registered company connected otherwise almost wholly with the USA. It appears to have been accepted that a receiver would require to be appointed in the USA, although the integration of the Scots liquidation with any future process in the USA was not fully discussed. Lord Shand certainly felt (at 442) that the Scots liquidator should be investigating claims and securities and participating to some degree in the appointment of a receiver in the USA. It is suggested that the role of the Scots liquidator would have become ancillary to that of an American receiver, given the connections of the business with the USA22.

If the company's business in the Salem Flour Mills case had been less predominantly American, it is arguable that a significant role should have remained for the Scots liquidator after the appointment of an American receiver.

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Obviously scope could then exist for conflict between the two insolvency processes. It is suggested that, by analogy to the Stein cases, the first process instituted should predominate when there is doubt or disagreement as to the main commercial centre of a company.

However, despite the predominance of American assets, the English administration process in Re Maxwell Communications Corporation plc (No.2) [1992] BCC 757 was probably considered by the English court to be the primary insolvency process then in effect, as the company was incorporated in England. There can nevertheless be little doubt as to the co-operative approach adopted by Hoffmann J (at e.g. 759-760) towards the concurrent process under Chapter 11 of the US Code instituted in New York. The attempts to harmonise appointments and to coordinate a single plan as a re-organisation under Chapter 11 and a scheme of arrangement under s.425 of the 1985 Companies Act are particularly striking, as is his Lordship's obvious unwillingness to undermine the New York process. There can also be little doubt that the English administration of an Australian company in Re Dallhold Estates (UK) Pty Ltd. [1992] BCC 394 was ancillary to the concurrent Australian liquidation process, as it was instituted at the request of the Australian court for the specific purpose of preserving the value of an English leasehold interest. It is suggested that the Scots courts develop a similar approach to the co-existence of Scots and foreign insolvency processes where possible, while avoiding a requirement that an insolvency process at the place of incorporation predominates. As mentioned above, this may be difficult where either process proceeds by asset transfer, in view of the existing Scots case law in that regard.

As mentioned above, the Scots courts sometimes co-operate actively with foreign insolvency processes when there is no co-existing Scots process. This co-operation takes place in a number of ways.

Araya v Coghill 1921 SC 462, for example, indicates a willingness, outwith statutory co-operation provisions, on the part of the Scots courts to provide quite flexible assistance to the administrators of foreign insolvency processes when the courts are not constrained by the statutory requirements of instituting second or further insolvency processes. In this case a petition was presented to the Court of Session by an official receiver appointed in Chile to the insolvent estate of a deceased Scotsman, who had traded for many years in Valparaiso. The petition craved inter alia confirmation of the appointment of the official receiver and authority to sell Scots heritage.

Confirmation was refused, largely because, in the words of Lord President Clyde (at 466), there was 'no useful or legitimate purpose which could be served by it'. It would seem that the petitioners had in mind the analogy of an executry, in which similar procedures are unexceptionable. The report does not elaborate the consequences of confirmation envisaged by the petitioner and the Lord President's concerns about the nature and effect of such a confirmation are understandable. It may be suggested that the petitioner had in mind some limited form of Scots sequestration and that if such was the case a petition for sequestration would have been more appropriate. It would then have been open to the court to decide whether or not the Scots heritage could have been sequestrated and whether or not such a sequestration would have been ancillary to the Chilean process. The view was perhaps taken, in the light of Goetze v Aders, that sequestration would have been refused or, if awarded, counter-productive.

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Authority to sell the Scots heritage was granted to the Chilean receiver, as a sale of the property was clearly expedient, subject to the free proceeds of sale, net of a secured debt, being consigned with the Accountant of Court to abide the orders of the court and remaining heritable in nature. The court also retained power to determine the conditions of sale if the interested parties could not agree them.

The inference that court authorisation to deal with heritage was considered necessary may suggest that the receiver otherwise had no title to deal with it which was recognised by Scots law. However, given the early cases according a personal *ius ad rem* to foreign bankruptcy assignees in relation to Scots property, it is possible that the Chilean receiver was allowed such a right in relation to Scots heritage but that he felt it preferable to establish his title more formally in Scotland in view of possible objections to his actions by the bankrupt’s heir-at-law. It is in any event interesting to observe the similarity between the authorisation obtained in *Araya* and doctrines of *exequatur* orders obtained from courts of the *lex situs* in similar situations under certain legal systems.

It is also interesting that the court retained powers to oversee the actions of the Chilean receiver, but unfortunate that no further comments were made upon their exercise. In particular, it is unfortunate that there appears to be no report concerning the court order pursuant to which the proceeds of sale were presumably distributed and the law under which such distribution took place. The bankrupt’s heir-at-law was concerned that funds should not be remitted to Chile until the court was satisfied with the assets and liabilities being dealt with in the Chilean process. Opinions were reserved upon what Lord President Clyde referred to as these ‘points of nicety’. However, while the power was retained to distribute the proceeds in Scotland, Lord Skerrington expressed (at 468) the issue as preventing the remission of the proceeds to Chile if information regarding the Chilean process were not forthcoming. It may be suggested that only serious injustice in the Chilean process would have prevented the remission of the free proceeds to Chile for distribution under the law of Chile and that such an argument of public policy would have been available as regards any property subject to the jurisdiction of the court.

The *Falconer* cases were not referred to in *Araya v Coghill*, although these cases have certain features in common, being in particular the payment of a debt secured on land outwith the territory of the main insolvency process prior to the determination of the distribution of free proceeds of sale and the retention by the court of the *situs* of the land of power to distribute such proceeds. As there was in the *Falconer* cases a second insolvency process under the Scots *lex situs* of the land in question, and a suggestion that, nevertheless, the law governing the main insolvency process may be relevant to the distribution of the free proceeds of sale, it may be suggested that the *Falconer* cases support an interpretation of *Araya v Coghill* to the effect that the law of Chile was potentially applicable to the distribution of the free proceeds of sale.

The procedure adopted in *Araya v Coghill* may not be sufficient to the administrator of a foreign insolvency process if there is a prospect of genuine competition in relation to assets in Scotland which his foreign process may not in itself reach. If a Scots insolvency process may be instituted, the institution of such a process may assist in this regard, provided its role is
truly ancillary. A further alternative may be the execution of diligence on behalf of creditors participating in the foreign process.

An argument in relation to such representative diligence was raised in Strother v Read I July 1803 FC and accepted in principle by both parties, although the decision in the case proceeded on the more general ground of giving direct effect in Scotland to an English bankruptcy. In any event there were technical problems in Scots law with the arrestment founded on in Strother and it must furthermore be doubtful in Scots law that the benefit of an arrestment can be transferred to general creditors to the effect of increasing the ranking attributable to that arrestment. No comment by the bench upon this argument is reported.

Some support for the execution of representative diligence may be drawn from Davidson v Fraser 1798 Mor 4564, Scott v Leslie 1787 Mor 4562 and Glover v Vasie 1776 Mor App Foreign No.3. These cases were decided at a time when it had not yet been finally established that moveables in Scotland vested in foreign bankruptcy assignees. The court in Davidson v Fraser noted that 'it is not very long since assignees under an English commission of bankruptcy were allowed to sue or insist in diligence in Scotland at all' (emphasis added) and it was accepted in argument in Scott v Leslie that diligence could be executed in Scotland by English bankruptcy assignees in order that they might compete with creditors using diligence in Scotland. It was also argued in Glover v Vasie, though no comment from the bench is reported thereon, that diligence executed by creditors participating in an English bankruptcy vested in the English assignees.

It may accordingly be argued that such representative diligence may still be executed in Scotland as regards assets not transferred by a foreign insolvency process. It was indeed suggested by Lord Meadowbank in one of the Falconer cases (1814 FC at 35.) that adjudication of Scots heritage may be carried out for the benefit of an English bankruptcy.

Davidson v Fraser also suggests that any representative of creditors claiming under a foreign process may execute such diligence, although the diligence in this case was not directed at the bankrupt's estate. In Davidson v Fraser attorneys for an English bankrupt obtained decree in Scotland against one of the bankrupt's debtors and adjudged heritable property in Scotland belonging to that debtor to enforce the decree. The appointment of the attorneys declared that they should account to the English assignees for recoveries made. In a ranking and sale of the heritable property it was objected that the bankrupt had no title to sue his debtor or adjudge his debtor's property, as the debt in question had vested in the English assignees. While the bankrupt was considered to have a 'radical right' to the relevant property, entitling action and diligence, the representative nature of his title was also upheld.

The civil imprisonment in Scotland of an English bankrupt in Dickie v Dick 20 December 1811 FC may also have assisted the English bankruptcy in that case, as it was suggested that imprisonment would compel disclosure of Scots assets which the bankrupt had failed to disclose in the English process. Lord Meadowbank dissented from the majority view upholding the imprisonment. His Lordship took the view, in the light of the English bankruptcy, that imprisonment in Scotland could not compel payment to the creditor involved as Scots assets had vested in the English assignees. Lord Meadowbank therefore took the view that the bankrupt should return to England, noting (at p.452) that
"If the diligence was to be used at all, it ought to have been in the name of the English assignees'. His Lordship's approach seems co-operative with the English process in theory, if not in effect.

The majority upheld the imprisonment, although the attitude taken to the English bankruptcy is ambivalent. The English assignees neither instigated nor opposed the imprisonment, and may indeed have had no further powers against the bankrupt under English law to compel disclosure of property. It also appears that the bankrupt could have been imprisoned in England, and that this factor influenced the decision reached. Whether or not the majority were seeking to assist the English process, it is nevertheless interesting that the effect of the Scots imprisonment could have been to provide further assets to it.

Preventing or undermining competing diligence is another way in which the administrator of a foreign insolvency process may protect his position in Scotland, although if Scots assets have been transferred to him the need for such protection is not so great after such a transfer has taken place as before. Channelling of claims to the foreign process in question, as discussed in section c above, can of course prevent the execution of diligence occurring after the commencement of a foreign process, as can the institution of a further insolvency process in Scotland, if that is feasible. However, the Scots courts provide only limited assistance to the administrators of foreign processes in the undermining of diligence executed prior to an asset transfer taking effect or, outwith the channelling of claims and the institution of further insolvency processes, after a foreign process has commenced.

Although there is little authority on the point, it would seem that diligence executed in Scotland prior to a second or further insolvency process instituted in Scotland will be nullified by the appropriate Scots 'suspect period' rules. Had sequestration been awarded in Goetze v Aders, Lord President Inglis suggested (at 154) that the relevant Scots rules would have been applicable. A similar view may be inferred from the Falconer cases.

In the absence of such a Scots process, it would seem, as discussed in section 4) above, that the Scots suspect period rules are potentially applicable as a matter of choice of law, but largely inapplicable because of the manner in which particular formulations thereof have been interpreted. It would further seem that the appropriate suspect period rules of relevant foreign insolvency processes are not allowed effect in Scotland. The approach of the Scots courts is thus theoretically unco-operative with foreign insolvency processes in this regard, but could be of practical assistance thereto if the Scots rules were broadly interpreted. As suggested in section 4) above, the availability of Scots common law gratuitous alienation provisions to a French syndic in Obers v Paton's Tr. should thus be extended to other Scots suspect period rules.

However, Glover v Vasie suggests that the Scots courts will refuse to give effect to diligence executed in Scotland by persons participating in a foreign insolvency process and refusing to contribute the benefit of their diligence to that process. This case was, as mentioned above, decided at a time when uncertainty remained as to the general effects to be accorded within Scotland to foreign insolvency processes, and as to the manner in which any such effects were to be accorded. It is suggested that the progressive decrease in hostility of the Scots courts to foreign insolvency processes renders the approach taken in this case all the more pertinent today. It is also notable that in Glover v
There was no foreign court order requiring the contribution of the benefit of the Scots diligence to the foreign process. At the time this case was decided it is possible that the Scots court may have reacted unfavourably to such perceived coercion.

In Glover v Vasie two arrestments were executed in Scotland of a debtor’s property, prior to a commission of bankruptcy being obtained in respect of that debtor in England. The conventional arguments of the time were made as regards the effectiveness in Scotland of the English process, the court finding that the English assignees have a right of action entitling them to recover the bankrupt’s effects in Scotland, and to compete for the same, in effect a ius ad rem. The court continued to find that Vasie ‘an Englishman, claiming under an English debt, and having already drawn a dividend of the bankrupt’s effects on account of the said debt, under the said commission, is barred from competing with the assignees, or claiming preference on his arrestments’.

It seems unlikely, in view of other authorities, that such Scots diligence would be undermined by the Scots courts to the effect of enforcing, indirectly, foreign suspect period rules against diligence or otherwise to the effect of undermining the Scots court’s view of the appropriate ranking of the Scots diligence in question. This case does not appear contrary to these propositions, and it was probably central to the court’s decision that Vasie had received his dividend in England on the basis that he had no security for his debt.

A similar decision was made by the court the previous day in Rhones v Parish and Schreiber 6 August 1776 FC, in which accession to a bankruptcy trust, the administration of which involved the Senate of Bremen, was held to preclude the taking of separate measures in this country in order to obtain a preference over the rest of the creditors. The German trustees were accordingly preferred in a multiplepointing to arresters of the bankrupt’s yarn in Scotland who had acceded to the German trust.

The report is very brief, and it is not clear whether or not the arrestment preceded the German process or whether or not the arrester had received a dividend from the German trustees. If the arrestment preceded the German process, the case seems similar to Glover v Vasie, perhaps suggesting an even greater willingness on the part of the Scots court to assist a foreign insolvency process. If, on the other hand, the German process was instituted first, the case suggests either that a German insolvency process which may be analysed broadly in terms of a Scots trust deed for creditors took effect in Scotland as a transfer of assets or that the Scots court was willing in any event to nullify Scots diligence at common law for the benefit of such a foreign process.

Given the ius ad rem approach adopted by the court to an English bankruptcy the following day in Glover v Vasie, it seems unlikely that the German process was considered to transfer assets in Scotland. Rhones v Parish would thus seem to provide some support for the nullification at common law for the benefit of a foreign insolvency process of diligence executed in Scotland either before or after that foreign process has commenced, irrespective of the effect in Scotland of that process as a transfer of assets, provided the person executing the diligence has participated in the foreign process in question. There is little other authority for such a broad argument and the brevity of the report of
Rhoones v Parish must make the support to be derived from the case for such argument rather weak.

Obiter support for such an argument can, however, be drawn from Thomas v Pellatt, Muspratt and Stephens (1861)23 D 1349. In this case the Second Division refused to liberate an English bankrupt who had been imprisoned in Scotland by a creditor who had not participated in the English process, even though the bankrupt had been granted protection from personal diligence under the English process. The decision rested largely upon a narrow interpretation of the relevant provision of the English statute as territorially limited to England, and a limited view of the effects allowed in Scotland to a foreign insolvency process.

However, Lord Cowan commented (at 1354) that had the creditor 'proved his debt under the commission, he could not have taken measures at law against the bankrupt's person, whether under statutory protection or not', continuing to note that such a creditor 'may well be debarred from resorting to personal diligence in Scotland'. His Lordship felt (at 1354) that 'by admitting that exception to the use of personal diligence in Scotland, the law of Scotland sufficiently recognises any international principle that can be justly held applicable'.

As noted above, in Dickie v Dick an English bankrupt was successfully imprisoned in Scotland by a creditor who had claimed, but not proved, under the English process. While the degree of participation in a foreign insolvency process may be important, particularly if full dividends have been received, it is suggested that the decision in Dickie v Dick was, as mentioned above, based more upon the practical effects of permitting the imprisonment in that case to stand and upon the competence at that stage of the English process of imprisonment in England than upon fine distinctions of degree of participation in the English process41.

In Radford & Bright Ltd. v D.M. Stevenson & Co. (1904)6 F 429, arrestments in Scotland on the dependence of an action raised in the Court of Session against an English company in liquidation were recalled by the Second Division. Leave to continue the action had been given by the English court under s.87 of the 1862 Companies Act.

The principal reason for recall of the arrestments was that they were considered void under s.163 of the 1862 Companies Act, because they had been executed after the commencement of the winding up. The decision may therefore be considered restricted to diligence executed against companies being wound up under that Act and its successors42.

It was argued that the English courts had interpreted s.163 to the effect that leave under s.87 to commence or continue actions against the company in liquidation could also permit valid diligence to be executed pursuant thereto. The Second Division refused to interpret the statute for itself43. The application of the Scots, rather than the English, interpretations of a Great Britain statute in the context of English winding up processes tends to show an unco-operative attitude towards such processes. This attitude does not seem to be affected by the willingness in the alternative of the Second Division in Radford & Bright to recall the arrestments by exercise of the court's common law powers, as these powers appear to have been exercised solely because of delay on the part of the arresters in pursuing an appeal in their main action to the House of Lords. Nor does it appear affected by the comment of Lord Justice-
Clerk Aitchison in *Martin v Port of Manchester Insurance Co.* 1934 SC 143 (at 147) that 'since a winding-up has begun .. the assets of the company .. must be preserved for the benefit of all .. entitled to participate therein', as again the Great Britain Companies Act was applicable and the issue before the court was leave to continue an action rather than recall of diligence used relative thereto. It therefore seems unlikely that a provision of foreign law similar to s.163 of the 1862 Companies Act would be given effect in Scotland, whether directly or via the courts' common law powers of recall.

As discussed in section d) above, arrestments in Scotland were recalled at Scots common law for the benefit of an English liquidation in *Queensland Mercantile and Agency Company Ltd. v Australasian Investment Company Ltd.* (1888)15 R 935. Recall would probably not have been granted had there not been provision made for preservation in the English process of any security effect of the arrestments in question. It seems unlikely that the court would have recalled the arrestments had it been thought they would be nullified by a provision of English insolvency law, such as relation back of the English process prior to the date of the arrestments or, perhaps, s.163 of the 1862 Companies Act. A foreign court may nevertheless nullify the effect of such 'preserved' diligence and the administrator of a foreign process may therefore prefer to attempt to channel the ranking of such diligence to his own process rather than to attempt to challenge it outright in the Scots courts.

The assistance of the Scots courts regarding diligence executed after the commencement of a foreign insolvency process is of course normally only required when that process does not transfer the assets in dispute. Since, as discussed above, a Scots insolvency process is likely to be available in such circumstances, it may be preferable for such a Scots process to be instituted.

Suspect period rules against unfair preferences and gratuitous alienations are discussed in sections 4),c) and d) above. Although doubts remain as to the appropriate choice of law rules concerning such issues and there is little authority regarding the operation in Scotland of the equivalent suspect period rules of foreign systems, it is probable that the institution of a second Scots insolvency process, if that can be achieved, will be effective to undermine certain unfair preferences and gratuitous alienations under the relevant Scots rules, particularly if the transaction challenged took place in Scotland and concerned Scots assets. This much is suggested in both the *Falconer* cases and *Smyth v Salem Flour Mills*.

If a Scots insolvency process is not instituted for this purpose, it would seem that at least the present Scots statutory devices will be unavailable, outwith s.426 of the Insolvency Act 1986, to a foreign insolvency administrator, because of the apparent connection of such devices to Scots insolvency processes. *Obers v Paton's Tr.* does, however, suggest that at least the Scots common law rules against gratuitous alienations should be available to the administrator of a foreign insolvency process in order to strike down at least alienations of Scots assets carried out in Scotland. It is suggested that the Scots common law rules concerning unfair preferences should be available to at least the same degree.

Scots courts thus appear willing, to a greater or lesser extent, to co-operate with foreign insolvency processes, whether or not a concurrent Scots process is to be or has been instituted. If assets are transferred by neither process, concurrent Scots and foreign processes may optimise practical unity and
universality of the insolvency. If assets are considered transferred by a foreign process, its unity and universality may be optimised in certain circumstances by invoking the assistance of the Scots courts in respect of certain assets or competitors, although in other situations a potentially conflicting Scots process may provide greater practical unity and universality.
6) Ranking.

a) Introduction. General issues relating to the ranking of rights in and to items of property in international private law are discussed in Chapter 3,B,3) above and particular problems of ranking in international insolvency, both in relation to individual items of property and otherwise, are referred to in section B,3) above. As ranking is of great substantive importance, it has, in summary, been argued that it should not be characterised mechanically as procedural and that the lex fori should not be applied thereto in a mechanical application of the supposed rule applying the lex fori to procedure. As ranking concerns the comparison and relative evaluation of rights, it is also technically important that it be carried out, in the first instance and to the extent practicable, in accordance with a single legal system.

Third party certainty is very important in property law and there is a consequent emphasis on the lex situs as regards corporeal property and the law under which incorporeal property comes into existence or is otherwise generally governed in relation to rights in such property. It has accordingly also been argued that the lex situs, or such other law, should be the law under which rights in and to a given item of property should be compared and evaluated relative to each other to assess their rankings in relation to that item of property. Further legal systems may then determine further ranking issues which do not relate to specific assets, such as a preference for employees' claims over those of other ordinary creditors. It may even be argued that such legal systems may alter asset rankings if they contain a special rule to that effect, such as a limited preference for unsecured creditors over secured creditors. Further legal systems yet may then refine the ranking process, for example by re-ranking rights deriving from a different single legal system by that system.

International insolvencies obviously give rise to many ranking issues. Theories of unity and universality of international insolvency also give rise to an obvious single legal system under which to compare and evaluate rights: the law under which an insolvency process has been instituted. As this law will often also be the lex fori, the co-incidence of procedural characterisation of ranking and theories of unified and universal insolvency might be expected to exclude other legal systems. However, the importance of third party certainty in property rights has ensured that a major role exists in ranking for the law generally governing the property over or relative to which such rights exist. Outwith ranking issues relating to specific assets, the law governing the insolvency process appears to be of some relevance.

Although there are a great many ranking rules which operate upon insolvency, it is nevertheless suggested that the ranking structure on insolvency is similar to that in other situations, with rankings relative to assets being determined first in accordance with the lex situs, or other law governing the asset in question, prior to reference of most remaining general ranking issues to the law governing the insolvency process in question. The special ranking rules of an insolvency process may then affect preferences in relation to assets which have been established at the first stage of the ranking process.
b) Asset Ranking. There can be little doubt that in the Scots international private law of insolvency, rights in and to assets are ranked, in the first instance, in accordance with the law generally governing the relevant assets. Thus the lex situs governs ranking in relation to corporeal property and the law under which a given item of incorporeal property has come into existence or by which it is generally governed regulates such matters in relation to it.

This approach is evident in the main line of authority concerning the Scots international private law of insolvency, in, for example, the Falconer cases. It is also evident in suspect period cases, such as Hunter v Palmer and Dunlops' Creditors v Brown and Craw, where the claims of arresters of Scots property were preferred to those of later English bankruptcy assignees. It is further implicit in the maintenance of rankings in Mercantile and Agency Company Ltd. v Australasian Investment Company Ltd. (1885)15 R 935 and Lindsay v Paterson (1840)2 D 1373, where diligence was respected and interdicted.

There is little direct authority as regards immovable. In the Falconer cases and Araya v Coghill securities over Scots heritage required to be satisfied in terms of the Scots lex situs before the possibility of applying any other law to the ranking of claims upon free proceeds could be considered. A similar view appears to have been taken in Wilsons (Glasgow and Trinidad) Ltd. v Dresdner Bank in relation to foreign immovable.

The main issue in Wilsons v Dresdner Bank was the jurisdiction of the Scots court in relation to land in Trinidad which was alleged to fall within a Scots liquidation. Jurisdiction was upheld. Lord Hunter remarked (at 438) that 'it is in accordance with the principles of private international law that the competing claims of creditors to estate falling under the bankruptcy should be determined in the forum of the bankruptcy although the determination of the question may involve enquiry as to the law of the situs of part of the estate where real rights in that estate are claimed by creditors'. Although his Lordship formally reserved his position regarding the liquidator's argument that all preferences must be determined by the lex forf there can be little doubt that the law of Trinidad was considered applicable both to the validity and the initial ranking of mortgages over land in Trinidad relative to each other and relative to the rights of the liquidator and general creditors of the company in liquidation.

The lex situs was applied in Murphy's Tr. v Aitken 1983 SLT 78 to the ranking in relation to Scots heritage of Scots inhibitions in an English bankruptcy. The case is also interesting for the acceptance and expansion by Lord Allanbridge of the general proposition at pp.705-706 of the 10th edition of Dicey and Morris that property is subject on bankruptcy to charges under the lex situs. 'Charge' was interpreted broadly to include a Scots inhibition, on an analysis of the practical effect of an inhibition in Scots law. That analysis of inhibition was then integrated in terms of Scots law with the effect allowed in Scotland to an English bankruptcy, to prefer the inhibitions to the claims of the English trustees.

It was then suggested that the ranking of the inhibitions in accordance with the Scots lex situs should not be interfered with in England. Lord Allanbridge appeared (at 81) to base this proposition upon a rather odd view of an inhibition as a process of universal distribution. The result seems credible.
nevertheless, unless a special ranking rule of English insolvency law were to undermine, as discussed in section e) below, preferences similar to those deriving from inhibitions.

There is also little direct authority in relation to moveable property other than the cases referred to above concerning general issues of international insolvency, the suspect period and the maintenance of preferences established abroad. These cases suggest that the law generally governing the property in question regulates, in the first instance, ranking issues relating to that property. It is also suggested that the comments of Lord Allanbridge in relation to heritage in Murphy's Tr. v Aitken are equally applicable to moveables, consistently with the more general cases referred to above.

The Captain Wilson case10, Ewing and Co. v McLelland (1860)33 J 1, The Scottish Provident Institution v Cohen & Co. (1886)16 R 112, Gordon Anderson (Plant) Ltd. v Campsie Construction Ltd. and Anglo Scottish Plant Ltd. 1977 SLT 7, Scottish Union and National Insurance Co. v James (1886)13 R 928 and the set off cases discussed in section c) below may provide further support for such an approach11.

As discussed in section 1),b) above, in the Captain Wilson case the claim of English bankruptcy assignees was preferred in relation to English bonds to the claims of arrestees in Scotland of such bonds, apparently as a result of the relation back of the English assignment under English law to an act of bankruptcy prior to the arrestments. Assignees of these bonds, under a prior uninitiated English assignment thereof, were then preferred to the English bankruptcy assignees. One explanation of these preferences is the reference of the ranking of the various rights to the law governing the bonds.

A similar situation arose in Ewing v McLelland, in which a Scots arrestment was denied a preference in a Scots sequestration. The property arrested was a claim under an insurance policy taken out in respect of Irish land through the Belfast agent of an English insurance company. While the Lord Ordinary, Lord Jerviswoode, considered the arrestment inept as laid in the hands of the Glasgow agent of the insurance company, who was not liable under the policy, his Lordship also noted that 'the transaction, too, out of which the liability of the company arose, was one with which their agency in Glasgow had no concern'. Lord Jerviswoode presumably considered diligence under the law governing the policy more appropriate. It may be inferred that diligence under that law would have grounded a preference in the Scots sequestration if so provided by that law.

At first sight in Scottish Provident v Cohen the preference of an equitable mortgage over a Scots insurance policy in a Scots sequestration was referred to English law, because the policy was deposited in England with the creditor. Indeed the criterion of preference under English law, the timing of notice by mortgagee and bankruptcy trustee to the insurance company, was set out in an agreed minute on English law. However the evidence of English law was obtained for application to the extent it was applicable12. English law was in fact only applied to the extent that the deposit of a policy of insurance might be considered an assignation thereof and thus constitute a ins ad rem to be completed in accordance with Scots law. Issues of the assignability of and the creation of rights in rem in the policy and the ranking of rights in and to the policy were referred to Scots law13.
Lord President Inglis commented (at 117) that 'Sleeping that the deposit of the policy by the transaction in England was fully equivalent to a deed of assignment executed in Scotland, the intimation completed the right and put the receiver of the intimation in the position of holding no longer for the original creditor, but for his assignees'. It is notable that no mention was made of any intimation to the insurance company by the trustee in sequestration. While the case related more to the creation of the secured creditor's right than its ranking and Scots law was the lex fori and governed the policy and the sequestration, its substantive emphasis suggests Scots law governed the ranking of the security in the sequestration as the law governing the policy. 

The Scots lex situs of certain goods was considered in the Campsie Construction case to determine the ranking relative thereto in an English liquidation of a floating charge and an arrestment. The arrestment was executed after crystallisation of the charge by the appointment of a receiver in terms of English law. The liquidation was, however, voluntary and scarcely mentioned in the report. The case must nevertheless be of some relevance in this context.

Much of the case concerned the effect as regards Scots assets of the crystallisation of the floating charge. As s.15(4) of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 provided for the powers of an English receiver to take effect in Scotland, much of the argument concerned the interpretation of this provision. Section 15(4) was interpreted to the effect that on the appointment of a receiver in England the charge crystallised in relation to Scots assets under Scots law in the same manner as a Scots floating charge. Lord President Emslie did indeed consider English law irrelevant to the effect of the crystallised charge on Scots assets. These points are discussed further in Chapter 5,3,2 above. Such analysis in terms of the Scots lex situs of the goods did, of course, facilitate the ranking of the crystallised charge with the arrestment in terms of Scots law. Indeed the Lord President's comment suggests that the lex situs was the appropriate law under which to rank the rights of the respective claimants.

Scots law also appears to have been applied as the lex situs in Scottish Union and National Insurance Co. v James to the basic preference in a later English bankruptcy of a poinding of the ground of certain property in Scotland. As discussed in section e) below, the Scots restrictions of such preference were not, however, applied, on an interpretation of the Scots statute.
c) Set-off. It is sometimes difficult to characterise set-off claims, as they may seem either to relate to asset ranking or to constitute ranking rules operating generally on insolvency.

There is authority to the effect that certain set-off claims are governed on insolvency by the law governing the bankrupt's claim against his debtor, that is the law governing the asset in respect of which the set-off is claimed. Thus in Cowan v Dixon (1828)5 Fac 137 the Lord Ordinary, Lord Newton, was of the view (at 142) that the preference in a Scots sequestration derived from applying a Bank of England bill, received from the bankrupt for a specific purpose, in diminution of a general account with the bankrupt was governed by English law. An opinion of English counsel was obtained to the effect that such a set-off was generally effective in English law.

The main point in the case was, as discussed in section 4),c) above, the application of the Scots Bankruptcy Act of 1696 to reduce the transaction as a fraudulent preference and on appeal the 1696 Act was considered inapplicable on interpretation, choice of law issues being avoided. As the preference may have been effective in Scots law outwith the 1696 Act, the authority of Lord Newton's reference of this issue to English law is not clear. As payment had been obtained under the bill, it may even be argued that no true ranking issue arose in this case and that it merely concerned the attempted reversal, under suspect period rules, of a completed transaction. Lord Newton's view must thus be of only limited authority.

Issues of set-off were more clearly addressed in Arnott v Stewart (1843)5 D 715, in which the debtor in a Scots bond and disposition in security of certain lands in Kinross-shire attempted to set-off a recourse claim under a bill of exchange he had accepted for a firm later bankrupted in England. The main issue concerned the jurisdiction of the Scots court to determine the ranking issue, which was upheld. Although the First Division formally reserved its opinion on the role of English law in the case, Lord Fullarton did state (at 717) that 'the general question in this case is, whether a Scotch security is, or is not, to any extent extinguished? That is essentially a Scotch question'.

The Lord Ordinary, Lord Cockburn, was less convinced (at 716) about the role of Scots law in the case, as the claim under the bill was against the bankrupt partnership and the Scots bond was held by one of the partners thereof. It is suggested that the ranking issue in this case contained two elements, the first being the validity of the claim under the bill against the partner holding the bond and the second being the set-off of a valid claim under the bill against the partner against the partner's claim upon the Scots bond. The first appears to relate to the general law of obligations, to which the law governing the partnership may have been relevant. The second element may be considered an asset ranking issue, referable to the law governing the asset. Thus the views of both Lords Cockburn and Fullarton remain relevant. As any further stages of the case appear unreported the final resolution of the issues in this case cannot be assessed.

As discussed in section d) below, insolvency laws generally contain ranking regimes relating to partnerships. It may be suggested that the asset ranking position be determined outwith such insolvency rules, which may be applied thereafter, as appropriate, to alter asset rankings, as discussed in section e) below.
Salaman v Sinclair's Tr. 1916 SC 698 also related mainly to the jurisdiction of the Scots courts, which was again upheld. This case concerned Scots deposit receipts deriving from a Scots executry estate which was later sequestrated in Scotland. The executor had been bankrupted in England and the English bankruptcy trustee alleged that he was entitled to set-off against the deposit receipts a debt due by the deceased to the executor.

It was not argued that this issue was governed by English law. However, as the effect on a Scots executry estate of the bankruptcy in England of the executor was discussed, the emphatic references to Scots law in the judgements, and particularly that of Lord Skerrington, infer that Scots law was considered to govern the set off issue. Scots law did, of course, govern the deposit receipts, the executry estate and the sequestration and it is therefore difficult to determine the precise manner of its probable application to the set off. Lord Skerrington was of the view that the issue would have been determined in accordance with Scots law even if jurisdiction were to have been declined and the issue determined in the course of the English bankruptcy. This suggests that Scots law was considered applicable as the law governing the property in issue.

Had the executry estate been considered vested in the English trustee in bankruptcy, the issue would have arisen in a different manner; as a claim for a preference out of executry estate by executry creditors. It is suggested that such preferences, like those of creditors of partners in partnerships discussed below, are general insolvency ranking rules referable to the law governing the insolvency process. The delimitation of executry estate and the ranking of asset securities relative thereto seems nevertheless to have been referred to the law governing the assets in question.

Salaman v Sinclair's Tr. suggests a further ranking conundrum, to which there is no obvious answer. Had the facts in that case been slightly different set-off claims could have been referred to two different legal systems by two different courts. Thus if a debt governed by English law were owed by a Scots bankrupt to an English bankrupt and a debt governed by Scots law were owed by the English bankrupt to the Scots bankrupt, the set-off of the two debts may be governed in the English bankruptcy by English law and in the Scots sequestration by Scots law. Each process might then attempt to enforce its own view by interdict, adjustment of rankings, recovery of foreign dividends and the other methods discussed in section 5) above. As this situation could arise irrespective of any simple choice of law rule applied to set-off, it is suggested that it does not detract from a general rule referring ranking of set-off to the law governing the property in respect of which it is claimed.

Refinement of the choice of law rule may, however, be necessary in the light of the situation of individual and partnership claims in Arnott v Stewart. Although difficulties in ranking securities in relation to partnerships or guarantors in an international context is not limited to set-off claims, it is suggested that the nature of set-off as a security increases such difficulties to a degree that characterisation distinctions of types of set-off should perhaps be drawn.

It was suggested above that in Arnott v Stewart the general law of obligations and partnership could determine the liability of a partner for a partnership debt and that English law, as the law governing the partnership, might influence that decision. It was then suggested that Scots law, as the law governing the
property against which the set-off was claimed would determine the ranking of that set-off, but that English law might alter such ranking in view of insolvency ranking rules concerning partnerships. Given the close relationship likely between special insolvency rules relating to partnership ranking and set-off, it may be preferable to characterise set-off in this context solely as an insolvency ranking rule and refer it to the law governing the insolvency process in question, and thus ignore the *dictum* of Lord Fullarton in *Arnott v Stewart* quoted above, referring the issue to the Scots law governing the asset in question.

Indeed, given the existence of many special applications of set-off in insolvency⁴, it may even be argued that all set-off claims should be characterised on insolvency as insolvency ranking rules rather than asset securities. It is suggested that such a broad characterisation goes too far and that only those rules applying specifically on insolvency and perhaps also those effectively nullified by rules so applying should be so characterised.

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⁴ Indeed, given the existence of many special applications of set-off in insolvency, it may even be argued that all set-off claims should be characterised on insolvency as insolvency ranking rules rather than asset securities.
d) General insolvency ranking rules not relating to assets. It was suggested above that the ranking of claims on insolvency which do not relate to specific assets should be referred to the law governing the insolvency process in question. There is little authority regarding the ranking of such claims. One reason for the lack of such authority is the manner in which the determination of such claims is channelled, as discussed in section 5) above, towards the courts of the legal system from which the insolvency process in question derives. This in turn facilitates the application of the lex fori to ranking issues and a perception of the application of foreign ranking rules relating to specific assets as exceptional to the enforcement of the rules, including the ranking rules, of a unified and universal insolvency process of the lex fori. Distinctions between the lex fori applying as such and its application as the law governing the insolvency process in question are also thereby occluded.

Preferences under Scots insolvency statutes are arguably linked to Scots insolvency processes. It may therefore be difficult to make them available to creditors claiming under foreign processes as part of the Scots lex fori, even if it were desirable to do so. The relevant Scots provisions may be considered inadequate for this reason. They are nevertheless substantive parts of the code governing the Scots processes in question, applicable as parts of such code. If equivalent foreign provisions are analysed in a similar substantive manner they should be invoked in Scotland as substantive parts of the law governing the foreign process in question rather than being ignored as 'procedural' and the equivalent Scots provisions being considered inapplicable to foreign processes on interpretation of the inadequate Scots lex fori.

However, an emphasis on the lex fori is certainly evident in Lusk v Elder (1843)5 D 1279. In this case a Kirkcaldy rope and sail maker was sequestrated in Scotland and shortly thereafter one of his partners in a Liverpool firm of merchants was bankrupted in England. A creditor of the Liverpool firm attempted to rank upon the estate of the partner thereof sequestrated in Scotland. The trustee in sequestration rejected the claim as in English law a partnership creditor was not entitled to rank upon the non-partnership estate of a partner until all of his non-partnership creditors had been paid in full.

The First Division considered Scots law to be applicable to this issue and that the partnership creditor was entitled to rank in the sequestration for the balance not recoverable from the partnership estate. Lord Fullarton thought (at 1282) the issue was 'a mere question of remedy, and must be regulated by the lex fori'. The remaining judges made no express reference to the lex fori and only Lord Jeffrey expressly considered the issue a matter of remedy. Despite this absence of express application of Scots law as the lex fori, Scots law was probably applied by all of the judges as the lex fori to a remedy.

One reason for this may be that the trustee in sequestration argued that the rule of English law related to the essence of the creditor's claim as opposed to the remedy deriving from that claim. As the creditor agreed broadly with this approach, but characterised the English rule as a matter of remedy, there was little reason for the court to distinguish the application of Scots law as the lex fori from its application on any other basis.

However, the creditor also argued that in a Scots sequestration Scots ranking rules required to be applied in order that distribution took place in accordance with a single uniform and consistent bankruptcy code. Such an approach infers
that Scots law was to be applied as the law governing the sequestration. Cases on other issues have certainly tended to the application in their full rigour of Scots sequestration statutes and Lords Mackenzie and Fullarton did note the requirements of the Scots bankruptcy statute. Scots law was probably nevertheless applied as the lex fori.

Galloway v Liddell and Reid 3 February 1815 FC was considered irrelevant to the issue arising in Lusk v Elder. While the final ratio in Liddell was clearly not in point, the approach of the Lord Ordinary, Lord Craigie, appears relevant in part to the application of insolvency ranking rules. In Liddell a partner in an English firm was bankrupted in England and a creditor of the firm arrested debts due to the bankrupt partner in Scotland on the dependence of an action against the firm. Non-partnership creditors of the bankrupt partner also arrested the debts in question. The English bankruptcy assignees did not enter appearance.

Much of the argument related to constitution of the partnership creditor's debt against the partnership, it being held ultimately that the constitution requirements had effectively been complied with, entitling diligence to proceed against the non-partnership estate of the bankrupt partner. The arrestsments were then ranked by Scots law, as, presumably, the law governing the arrested debts, apparently standing because the English assignees had not entered appearance.

No comment was made on appeal on arguments relating to the requirement under English law that non-partnership creditors be paid in full before partnership creditors are paid from non-partnership estate. Such arguments appear to have been considered irrelevant to the ranking of the arrestsments. The Lord Ordinary had also taken that view, but had separately considered such arguments irrelevant as the English assignees had not entered appearance. It is suggested that, in the absence of the arrestsments, the Lord Ordinary would have considered the English ranking rule applicable had the English assignees entered appearance. It is further suggested that English law would have been considered applicable as the law governing the bankruptcy and that this view of Liddell is consistent with the result in Lusk v Elder, if not its apparent ratio.

However, the analysis of Lusk v Elder in terms of the lex fori appears to be supported by Williamson v Taylor (1845) 8 D 156. As in Lusk v Elder, the argument in Williamson v Taylor concerned the distinction between matters relating to the essence of a claim and those relating to the remedy to which a claim was entitled, the former being referred to the law governing the claim and the latter to the lex fori. In Williamson v Taylor an English bond granted in respect of a divorce annuity was considered, on the basis of an opinion as to English law, not to be onerous and was therefore postponed in a Scots sequestration.

Characterisation of onerosity as pertaining to the essential validity of a claim appears justifiable. Assessment of onerosity by reference in part to the ranking to which the bond would be entitled in English insolvency processes, as occurred in the opinion obtained on English law, may also be justifiable. The risk then arises of determining the ranking of the bond in the Scots sequestration as it would have ranked in English insolvency processes. This would be the application of the law governing a claim to its ranking in an insolvency process. Such a bizarre rule was suggested in argument in Galloway v Liddell.
and Reid. It was not accepted in that case nor does it appear to have been proposed in argument or by the bench in Williamson v Taylor⁴, despite the opinion of English counsel and the result of the case.

Instead it would appear that an English bond, which would have been considered onerous in Scots law, was given the ranking in the Scots sequestration of a gratuitous Scots bond. Although the law governing the Scots sequestration coincided with the lex fori, all of the judges appear to have considered the ranking of the bond a matter of remedy to be determined in accordance with the lex fori.

Similarly, the restricted nature of a claim under a Scots trust deed for creditors based upon an English penal bond appears to have been assessed initially under English law in Scott v Sinclair (1865)3 M 918. However, Scots law was then applied to determine the final ranking of the claim, not as the lex fori, but as the law governing the trust deed and deeds of accession. As the Second Division based its decision largely upon an analysis of accession to the trust deed as a variation or novation of the penal bond, this case detracts little from the lex fori approach taken in Lusk v Elder and Williamson v Taylor⁵.

It has been suggested elsewhere⁶ that the Scots courts may have been willing in Weston v Falconer 17 Dec 1817 FC and Araya v Coghill 1921 SC 462 to apply the law governing a foreign insolvency process to the distribution of the free proceeds of sale of Scots heritage. As discussed, this issue was not clearly determined in these cases. They at least suggest that the lex fori rule in Lusk v Elder and Williamson v Taylor requires to be re-examined.

It was also noted above that the tendency of the Scots courts to channel the determination of many ranking issues to the courts of the legal system from which an insolvency process derives tends to provide a co-incidence of the lex fori and the law governing the process in question. If the lex fori were considered applicable to such issues by the Scots courts as such, it seems illogical that such issues would be diverted, as in Roy v Campbell's Assignees (1853)16 D 51, to a foreign court, as that foreign court may then be expected to apply its own lex fori. Some other basis of decision is surely necessary to prefer the substantive results of one lex fori to another.

Despite Lusk v Elder and Williamson v Taylor, it is accordingly suggested that reference be made by the Scots courts to the law governing an insolvency process and not to the lex fori when they are asked to determine issues of insolvency ranking which do not relate to assets. The continual references in the main line of authority on the international private law of insolvency to the 'inextricable' ranking consequences of multiple insolvency processes⁷ also suggests a substantive approach to ranking and the application to such issues of the law under which a favoured single process has been commenced.

Difficulties inevitably arise when preferences are claimed under more than one law or are not available to foreign creditors. This may arise when there are competing insolvency processes and when there is only one such process.

If, for example, the bankrupt in Lusk v Elder had also been bankrupted in England and neither process could be recalled, creditors of the partnership could have recovered larger dividends in Scotland than in England from non-partnership
estate. These dividends may then have been recovered in England from such creditors by an English trustee in bankruptcy, particularly if a claim was made in the English process by the relevant partnership creditors. Similar problems in relation to set-off are referred to in section c) above.

This situation may also have arisen in Stewart v Auld (1851) 13 D 1337 as extra dividends paid in a Scots sequestration to equalise dividends received in an Australian bankruptcy by other creditors may not have been payable in accordance with the relevant Australian law. Accordingly the receipt of the Scots dividends may in turn have been open to equalisation in the Australian process. The possibility of infinite adjustment to ranking may be best eliminated by co-operation between insolvency processes and acceptance of the pre-eminence of one process. As mentioned in section 5) above, such co-operation and pre-eminence seems more evident in insolvency processes not transferring assets than in those transferring assets.

Insularity in ranking prevents effective co-operation and fragments the coherence of international insolvency processes. It is clear, for example, that taxation preferences on insolvency operate on a territorial basis. Indeed the rule which apparently prevents the enforcement of foreign revenue laws appears to prevent all foreign revenue claims being made in an insolvency process, for a preferred ranking or otherwise.

Although there is an absence of authority, it seems likely that the Scots courts would not abandon their main choice of law rules to favour United Kingdom taxation claims by, for example, allowing a Scots sequestration to be instituted after an appropriate foreign process has transferred Scots assets. However it seems more likely that discretions would be exercised to prevent the foreign revenue law rule operating to the detriment of United Kingdom taxation claims.

A Scots liquidation of a dissolved New Zealand company rather than a New Zealand process was accordingly instituted in Inland Revenue v Highland Engineering 1975 SLT 203 for the purpose of recovering United Kingdom taxation. It might be expected that an 'ancillary' Scots liquidation may have been instituted to protect the United Kingdom taxation claims had a New Zealand process been instituted. It might also be expected that jurisdiction would be retained by the Scots courts to determine the ranking of Scots diligence on taxation claims rather than a decision thereon being directed to the courts of a foreign legal system under which a relevant insolvency process has been commenced.

However the difficulty with taxation claims lies not in choice of law rules relating to ranking in insolvency but in the rule against the enforcement of foreign revenue laws, and perhaps in inadequacy in the lex causae to prefer foreign revenue claims if the rule against foreign revenue laws were to be abolished.

It has been suggested that the international effect of employee and other similar preferences is territorial in a similar manner to that of taxation claims. Problems in this regard may, however, also derive largely from inadequacies in the lex causae. There is an absence of Scots authority on these matters. It is nevertheless suggested that certain of the Scots provisions are not limited to Scots claimants and that, for example, employees working in Germany of a company in liquidation in Scotland would be entitled to receive a preference in respect of their unpaid wages in a similar manner to their Scots colleagues.
It should be clear that whether the *lex fori* or the law governing an insolvency process determines general insolvency ranking other than asset ranking, continued insularity as regards taxation and in the interpretation of ranking rules of the *lex causae* can significantly distort the unity, universality and fairness of international insolvency processes. Furthermore, otherwise fair rules can lead to unfair results when there are several conflicting co-existing insolvency processes. Enlightened internal laws and co-operative multiple insolvency processes should hopefully lead to fairer results.

Thus in *Portes v. The Official Receiver in Bankruptcy* [1986] B.T. 523 Lord Portes said that the holder of an English law mortgage over an interest in a lease having a contract trust was to be preferred to the Official Receiver under an English bankruptcy taking effect prior to realization of the mortgage in the lease. What distinguished situations where the interest may have been arrested or a lease created in constructive or equitable tenure, exercising but not there to be in dispute about a separate legal estate situated in Germany or another domicile. The question was therefore, the question as to the respective rights to it, later to be deducted by the law in England. It was agreed that the mortgage gave a possessory in English law.

Lord Esher relied upon a dictum of Lord Vansittart in the House of Lords in *North-Western Bank v. Egyptian (1949) 2"[A.D.] to this effect. The decision in *Dunlop v. Mabey* (Chapter 3,13) made clear that an insolvency system cannot go to the issues rather than the custom domicile in the appropriate legal system in this context. In any event, unless all the claims in the English bankruptcy were domiciled in England or their claims governed by English law, it is difficult to see how this doctrine could have been applicable to the Portes case.

The Portes case appears to have much in common with *Conway v. Lister* (1967) 1 All. 509 as regards the facts and may thus have dealt with a point of ranking in English equity. In *Conway v. Lister* (Chapter 2.93) above, the claimant in equity was preferred to English mortgagee in bankruptcy appointed to the assets of the firm. The distinction of the situations in the *Portes v. The Inland Revenue* (Chapter 5.19) above, the ranking of equity in the firm was reduced in the first instance by the rule that equitable rights under English equity subject to the insolvency proceedings the mortgagee was preferred.

The operation of English current law was rather more. It may suggest the English bankruptcy law has very limited rights to the firm under the English insolvency at any event. It may, on the other hand, indicate that "unsecured" without limitation existed in equitable rights to the firm which preferred the mortgage as secured creditors. The English insolvency, as regards the firm, if the latter view is correct, it may well be wondered why the ranking of an equitable security in relation to assets properly was referred to the law governing the English insolvency process. The result that the fact that such security preference should be considered could rank the rules of English insolvency processes which any operate after such proceedings have been referred to in accordance with the law governing them.

Both characteristics have a parallel in English equitable securities ranked to assets and against, as discussed in Chapter 5.19 above generally be considered.

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e) Alterations to Rankings. It was suggested above that on insolvency the ranking of rights in and to property is governed in the first instance by the law governing the property in question. It was also suggested that subsidiary rules may operate thereafter to alter such rankings when, for example, rights derive from the same legal system. It was further suggested that special ranking rules of the law governing the insolvency process may alter asset rankings. Such subsidiary and special rules appear to have been applied in a number of cases.

Thus in Forbes v The Official Receiver in Bankruptcy 1924 SLT 522 Lord Morison held that the holder of an English form mortgage over an interest in a Scots marriage contract trust was to be preferred to the Official Receiver under an English bankruptcy taking effect prior to intimation of the mortgage to the marriage contract trustees. His Lordship distinguished situations where the interest may have been arrested or a Scots trustee in sequestration appointed, considering (at 524) there to be 'a dispute about a moveable fund - situated in Scotland - between domiciled Englishmen' and therefore 'the question as to their respective rights to it inter se must be determined by the law of England'. It was agreed that the mortgage gave a preference in English law.

Lord Morison relied upon a dictum of Lord Watson in the House of Lords in North-Western Bank v Poynter (1894)22 R(L) 1 to this effect. This dictum is discussed in Chapter 5,D,3) above, where it is suggested that the legal system common to the claims rather than the common domicile is the appropriate legal system in this context. In any event, unless all the claimants in the English bankruptcy were domiciled in England or their claims governed by English law, it is difficult to see how this doctrine could have been applicable in the Forbes case.

The Forbes case appears to have much in common with Connal v Loder (1868)6 M 1095 as regards its facts and may thus have dealt with a point of ranking in English equity. In Connal v Loder indorsees of delivery warrants relating to iron warehoused in Glasgow were preferred to English inspectors in bankruptcy appointed to the owner of the iron prior to intimation of the indorsements to the warehousemen. As discussed in Chapter 5,D,3) above, the ranking of rights in and to the iron was referred in the first instance to the Scots lex situs, eliminating later arrests. Thereafter, on the basis of an opinion of English counsel that a prior personal right deriving from indorsement alone preferred the indorssee to the inspectors in bankruptcy, the indorssee was preferred.

The opinion of English counsel was rather brief. It may suggest the English inspectors in bankruptcy had only very limited rights to the iron under the English statute in any event. It may, on the other hand, indicate that indorsement without intimation created an equitable right to the iron which preferred the indorssee to unsecured creditors in the English process as regards the iron. If the latter view is correct, it may be wondered why the ranking of an equitable security in relation to Scots property was referred to the law governing the English insolvency process. One possible view is that such equitable preferences should be considered special ranking rules of English insolvency processes which may operate after asset rankings have been determined in accordance with the laws governing assets.

Such characterisation seems misplaced as English equitable securities relate to assets and should, as discussed in Chapter 5,E,2) above, generally be considered
rights in rem. Although the opinion of English counsel may be more credibly interpreted in terms of equity, it would seem that the Second Division considered only very limited rights to have been conferred on the inspectors under English law.

The consequences of characterising equitable preferences as special ranking rules of English insolvency processes is clear from In re Anchor Line (Henderson Brothers) Ltd. (1937) Ch 483. In this case an English registered company trading largely in Scotland was wound up in England. It had granted a floating charge over all of its assets to the Union Bank of Scotland, at a time when floating charges did not exist in internal Scots law. Most of these assets were in Scotland and the proceeds of realisation were thereafter remitted to England. The Union Bank were preferred in relation to these assets on the basis of the equitable right deriving from their charge.

This result is outrageous, particularly as the statutory diligence for the benefit of all creditors against the Scots property under s.270 of the 1929 Companies Act was ignored. The asset rankings of the lex situs would thus appear to have been reversed by the operation of English equity. Such a rule must be considered a rogue choice of law rule under English law concerning asset securities rather than being given credence by other legal systems considering it a special preference under an English insolvency process. This propensity of English law should also be resisted by the distribution of assets outwith England, in compliance with other applicable rules, if an equitable re-arrangement is likely to take place in England.

As discussed in section b) above, Scottish Provident v Cohen suggests that English equitable securities be treated as asset preferences, to be governed by the law applicable to the asset in question. They should not therefore be given a second function as special rules of ranking on insolvency. It is accordingly suggested that Forbes v The Official Receiver and Connal v Loder should not be interpreted so as to permit English equity to upset third party certainty in asset ranking.

Forbes v The Official Receiver does in any event suggest that rights having a single legal system in common should be ranked in accordance with that system. It is suggested that such a rule may also apply to alter rankings of asset securities. Thus, for example, when several securities over goods are created in accordance with an earlier lex situs and arrested in a later lex situs prior to insolvency, initial rankings may be determined by the later lex situs, with the securities then being re-ranked inter se in accordance with their common lex situs.

Returning to special ranking rules, it is suggested that rules of the law governing an insolvency process such as those which prefer wages claims or create preferences for unsecured creditors over secured creditors be applied to alter foreign asset rankings, if applicable to such a case.

It is probable that English bankruptcy law contained no relevant such provision in Scottish Union and National Insurance Company v James (1886)13 R 928 to restrict the preference available under Scots law to a heritable creditor executing a poinding of the ground in relation to moveables in Scotland. The restriction of the poinder’s preference to limited current interest and arrears of interest under s.3 of the Scots Conveyancing Act 1874 Amendment Act 1879 was
considered unavailable to an English trustee in bankruptcy. As discussed in section 4) above, this provision should perhaps have been considered applicable as a suspect period rule. It may, on the other hand, have been considered a special restriction of preference under Scots insolvency law. The court merely considered that the provision was not available to an English trustee in bankruptcy on interpretation, without seriously considering choice of law issues. It is suggested that the interpretation made is correct if the provision may be considered a special ranking rule of Scots insolvency law and that the perceived unfairness of the result could then be explained by the absence in English bankruptcy law of an appropriate restriction of analogous preferences. It is to be hoped that the Scots courts would give such a foreign rule effect in Scotland.

The draft EC Bankruptcy Convention is a good example of such an international multilateral treaty. Work commenced on this draft convention in 1976, a preliminary draft was published in 1978 along with a report by J.C. Ronan and Lomond. The further committee report on the then current draft was published in 1982 and, while a certain amount of further work has since been carried out upon it, the EC Bankruptcy Convention is now generally considered territorially inadequate. There can be little doubt that one of the main reasons for the failure of this venture was attributable to principle in a multilateral treaty to a unified and universal approach to insolvency procedures. As described in the committee’s report, it became clear that this unified and universal approach would require to be qualified as regards such central issues as the ranking of secured and preferential creditors. Such qualifications, as J.M. Ronan observed, are “deviating from the deviating effort”, seriously undermined the general adherence in the draft convention to theories of unity and universality of insolvency.

Greater unity and universality can be achieved in unilateral treaties or among states with similar legal systems and approaches to international insolvency. Multilateral treaties may better enable more modest aims such as, perhaps, harmonisation of approaches to jurisdiction, preferences and priorities, period of administration, or the principles of recognition of administration, or different insolvency proceedings, or appropriate publicity thereon.

The Insolvency Convention, promulgated in 1990 by the Council of Europe, seeks to address certain of such more modest aims. While it is not intended to discuss this convention here in detail, it is interesting to consider that it does not seek to achieve full unity and universality of international insolvency procedures, but seeks instead to provide minimum norms within the territories of other parties to the convention by requiring that insolvency proceedings instituted at the “request of main interests” of a debtor—chapter III of the convention that recognises the reality and potential autonomy of further insolvency proceedings and provides for co-operation between different proceedings for the transmission of assets from secondary to main insolvency proceedings, if such secondary proceedings are instituted.
D. Prospects for coherent solutions in international insolvency?

1) Treaties.

It has long been recognised that individual legal systems cannot provide coherent unified and universal international insolvency processes. As recently as in Re Paramount Airways Ltd. (No.2) [1992] BCC 416 (at 424) Nicholls V-C remarked that 'there is a crying need for an international insolvency convention'.

Attempts have been made for a great many years to meet this need, and indeed various conventions have been entered into from the 17th century. Such attempts illustrate well the limitations upon what can be achieved by means of treaty in this field. It would thus appear that bilateral treaties, having a relatively narrow scope, and made between states with similar legal systems, are most likely to succeed. Ambitious multilateral treaties which endeavour to establish fully unified and universal insolvency processes seem destined, at present, to fail.

The draft EC Bankruptcy Convention is a good example of such an ambitious multilateral treaty. Work commenced on this draft convention in 1960, a preliminary draft was published in 1970 along with a report by MM. Noel and Lemontey, the further Lemontey Report on the then current draft was published in 1982 and, while a certain amount of further work has since been carried out upon it, this EC Bankruptcy Convention is now generally considered terminally comatose. There can be little doubt that one of the main reasons for the failure of this venture was adherence in principle in a multilateral treaty to a unified and universal approach to insolvency processes. As described in the Lemontey Report, it became clear that this unified and universal approach would require to be qualified as regards such central issues as the ranking of secured and preferential creditors. Such qualification, as Hirsch observed to such devastating effect, seriously undermined the general adherence in the draft convention to theories of unity and universality of insolvency.

Greater unity and universality can be achieved in bilateral treaties, or among states with similar legal systems and approaches to international insolvency. Multilateral treaties may better achieve more modest aims, such as, perhaps, harmonisation of approaches to securities, preferential creditors and the suspect period or the provision of simple recognition of administrators of different insolvency processes, or appropriate publicity therefor.

The Istanbul Convention, promoted in 1990 by the Council of Europe, seeks to achieve certain of such more modest aims. While it is not intended to discuss this convention here in detail, it is interesting to observe that it does not seek to achieve full unity and universality of international insolvency processes, but seeks instead to provide minimum powers within the territories of other parties to the convention to administrators of insolvency processes instituted at the 'centre of main interests' of a debtor. Chapter III of the convention then recognises the reality and potential usefulness of further insolvency processes and provides for co-operation between different processes and transmission of assets from secondary to main insolvency processes, if such secondary processes are instituted.
The Istanbul Convention can, of course, be criticised on points of detail. It does, however, provide a useful foundation upon which other conventions and individual legal systems may build. It is to be hoped, therefore, that it will have greater success than most of its predecessors.

2. Individual legal systems.

Although individual legal systems cannot resolve all of the problems of international insolvency, they can certainly facilitate solutions and address specific problems. Flexibility may be seen as the key in this regard. The American system shows how a flexible approach can facilitate workable international insolvencies6. Thus a 'foreign representative' under a 'foreign proceeding' may institute or obtain dismissal or suspension of full American insolvency proceedings under ss.303 and 305 of the US Bankruptcy Code. Such a foreign representative may, in the alternative, raise ancillary proceedings under s.304 of the Code. 'Foreign representatives' and 'foreign proceedings' are quite broadly defined.

Section 304 of the US Bankruptcy Code provides a discretion to the court, at the instance of a foreign representative to prevent or stay actions against the debtor's property, order it to be turned over to the foreign representative or order 'other appropriate relief'7. The criterion by which the court's discretion under s.304 is to be exercised is assurance of 'an economical and expeditious administration' of the relevant estate, subject to consistency with a further list of criteria which include the just treatment of creditors, the prevention of preferences and substantial equivalence of distribution to that under American proceedings. While the breadth of the availability of and the discretion under s.304 may be criticised by some and criteria such as equivalence of distribution by others, there can be little doubt that s.304 and the involvement of foreign representatives in full American proceedings under ss.303 and 305 provide flexible mechanisms with which to address the undoubted injustice which can arise in international insolvencies.

The equivalent provision in Scots law to s.304 of the US Bankruptcy Code is s.426 of the Insolvency Act 1986. However the position outh with s.426 should also be considered.

Initial exercise of Scots insolvency jurisdiction is discussed in section C,5),b) above. Sections 10 and 17 of the Bankruptcy (Scotland) Act 1985 have introduced some flexibility in the commencement, sitting and recall of Scots sequestrations for the benefit of foreign proceedings, although the scope may remain limited for a Scots sequestration which is truly ancillary to co-existing foreign proceedings. It is also suggested in section C,5),b) that Scots liquidation jurisdiction is broad and may be quite strictly invoked, if, as discussed in section C,5),e) above, a degree of co-operation with a foreign process might be expected. In such discussions the further suggestion is made that flexibility should exist both as regards the institution and operation of Scots administration processes.

Strother v Read 1 July 1803 FC did, of course, establish direct effect in Scotland of certain asset transfers by foreign insolvency processes and further possible direct effects are discussed in section C,5),e) above, including assistance regarding Scots land and the execution and prevention of Scots diligence. The difficulties regarding the suspect period are discussed in
section C,4) above. Obers v Paton's Tr. (1897)24 R 719 may indicate a degree of willingness on the part of the Scots courts to invoke Scots insolvency rules for the benefit of foreign processes.

Section 426 of the 1986 Insolvency Act makes specific provision for international insolvencies'. Section 426(1) to (3), (6) and (7) relate solely to the constituent parts of the United Kingdom. Section 426(1) provides that courts in different parts of the United Kingdom will enforce orders of courts in other such parts as if made by the courts of the enforcing part of the United Kingdom exercising corresponding jurisdiction. A potentially limiting territorial analysis of s.426(1) is supported by s.426(2), which entitles enforcing courts to decline assistance under s.426(1) in relation to property situated within their part of the United Kingdom', and by s.426(3), which empowers the Secretary of State and Lord Chancellor to provide by order to those administering insolvency processes in each part of the United Kingdom equivalent rights in relation to property situated in each other part to persons administering insolvency processes under the laws of such other parts. Such a co-operative territorial approach may have much to commend it if and when orders are made under s.426(3). In the interim s.426(2) may well limit s.426(1)10.

Subsections (4) and (5) of s.426 are of more general significance, although they are also of relevance in a United Kingdom context. Section 426(4) provides that 'the courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any ... relevant country or territory'. There are, at present, only a limited number of relevant countries and territories11. This will no doubt be remedied in due course.

More significantly, 'insolvency law' is defined in s.426(10) as a list of United Kingdom provisions and 'in relation to any relevant country or territory, so much of the law [thereof] as corresponds to the provisions falling within [the United Kingdom list]'12. Corresponding law and jurisdiction provides scope for limited interpretation12. It seems equally limiting that a request for assistance under s.426(4) should be required from a foreign court when within the United Kingdom those administering insolvency processes in one part may, under s.426(6), invoke such court assistance under s.426(4) directly when claiming property situated in another part of the United Kingdom13.

Once s.426(4) has been invoked, s.426(5) does, however, provide to the requested court the flexibility 'to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction'. Although again limited by an approach of equivalence in the definition of 'insolvency law' and the reference to 'comparable matters', s.426(5) has great potential14. While the institution in Re Dallhold Estates (UK) Pty Ltd. [1992] BCC 394 of an English administration process on the request of an Australian liquidation court may be considered by some a rather broad application of s.426(5), it at least shows a willingness to address the difficulties of international insolvency. It was suggested in section C,4) above that s.426(5) might also be applied to strike down actions and transactions during either relevant suspect period. Section 426(5) does, however, contain the obscure proviso that '[i]n exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law'. It is to be hoped that this proviso is not used to deprive s.426(5) of any innovative content in international private law!
3) An optimum solution?

It is suggested that a combination of a number of the provisions discussed above could optimise workable international insolvencies. The Istanbul Convention may provide an initial foundation upon which individual bilateral treaties of a more comprehensive, detailed, and indeed unified and universal nature may be concluded15. Individual legal systems may then implement such treaties and facilitate co-operation outwith such treaties by providing both general assistance provisions broadly similar to ss.303 to 305 of the US Bankruptcy Code and more detailed assistance provisions broadly similar to s.426 of the 1986 Insolvency Act. In addition to the development of existing co-operation at common law, greater unity and universality may thereafter develop by means of conscious co-operation and use of the permissive renvoi discussed in Chapter 3,C,2).
Footnotes:

Chapter 1: Introduction.

1. Of the type described above.

2. References to the *lex situs* in this thesis should be considered, relative to incorporeal property, to be references to the law under which such incorporeal property has come into existence. As issues relating to incorporeal property have not been fully discussed, analogies should not be drawn automatically from corporeal property to incorporeal property.

3. Being persons against whom real rights are valid without a reason particular to such persons.


Footnotes:


5. (1957)70 Harv LR 812 at 818 & 823.


7. (1957)70 Harv LR 812 at 818.

8. (1957)70 Harv LR 812 at 819.

9. (1957)70 Harv LR 812 at 817.


Footnotes:

Chapter 2.B: Traditional concepts and functional analysis.


2. See the Crowther and Diamond Reports, Atiyah, TB Smith and Goode, referred to in note 1 above.

3. At p.1151. See further pp.1151-1162.

4. The persistent delays in bringing into force the partly "functional" Part IV of the 1989 Companies Act concerning registration of charges seems significant in this regard. These provisions are discussed in Chapter 5,D,6) below.


2. See Anton Chap.2.


5. See Anton pp.4-5.

6. See too Beale Chap.1 (esp. pp.6 & 64-67), as supported by Hohfeld p.78, n.34.

7. (1937) 50 Harv LR 557 at 564-566.

8. Batiffol, Choix d'Articles, pp.199 & seq.


10. A striking example of both of Batiffol's points is the failure (discussed in Chapter 6,C,4(b)) of the House of Lords in Galbraith v Grimshaw (1910) AC 505 to nullify pre-insolvency diligence in a situation with an international element when both potentially relevant systems would have nullified such diligence in an entirely domestic situation.
Footnotes:

Chapter 2.D: Real and personal property rights.

1. See TC Williams (1888)4 LQR 394 and Hohfeld pp.68-70 for a discussion of some of the acute terminological difficulties here. Hohfeld objected to the particular correlation of Latin and English terms made here.

2. See the discussion by Feenstra 1982 JR 166 of some early European monographs on the subject.

3. Austin's analysis is very full (Lectures on Jurisprudence pp.374-404). Coke (1628) discussed the vexed question of the nature of a trust beneficiary's rights in relation to trust property (Coke on Littleton, nota to 272b - 17th ed, Butler, 1817) and Stair (1681) carried out rather an elaborate and abstract analysis: i.1.22, i.14.5 & ii.1.pr/1.


7. E.g. Rodger (Builders) Ltd. v Fawdry 1950 SC 483.


12. This is, of course, a slightly inaccurate rephrasing of Kocourek, as he defines real rights by exclusion: as those which are not personal.


18. See Kocourek p.197.

Chapter 9. Real and personal rights in international private law.

1. To some extent Konrath's terminology discussed in Section B above.

2. This analysis in international private law is suggested in Murphy v. Audit (1952 SLT 43), as discussed earlier in Chapter 5.


4. There is some evidence of such analysis by the South court in Legris v. Robertson & Baxter (1907) 20 LJR 208. It is certainly involved by various foreign legal systems and commentators. See Chapter 4.1 and 5.2, and in particular Dunsby, Budapest Report p.399.

5. This analysis is not without its difficulties. In Australian terms such a "secondary" fault-based right is often considered to be in primary form, although in personal enforcement. It is not, however, a property right in either form, and also, for the suggested practical analysis in international private law, the primary right may be considered collapsed with the secondary enforcement, and thus in personam, given the obvious personal factors surrounding the investiture.

6. Some difficult remain with this analysis. It is not inconceivable that a successor might be modelled with complete and automatic liability for the predecessor's debts as a matter of equity, without any credible personal factors being involved.

7. Possibly the result of the interaction of various branches of equity; see as in 'looking at that on done which ought to be done' and the current operation in personam. See Chap 1-2 of Part II of Small and Wallison's Lectures on Equity (1905).
Chapter 2.E: Real and personal rights in international private law.

1. To abuse slightly Kocourek’s terminology discussed in section D above.

2. This analysis in international private law is suggested in Murphy’s Tr. v Aitken 1983 SLT 78, as discussed further in Chapter 6.

3. See Moore v Bennett (1678)2 Chan Cas 246, though the dicta of Farwell LJ in The Birnam Wood [1907] P 1 at 14 suggest more realistic limits. However there has been a resurgence of less than credible constructive notice in William & Glyn’s Bank v Boland (1981) AC 487. See Megarry & Wade’s Law of Real Property (5th ed, 1984) pp.148-153 for other examples. See Redfearn v Somervails 1st June 1813 FC for a Scots example.

4. There is slight evidence of such analysis by the Scots courts in Inglis v Robertson & Baxter (1897)24 R 758. It is certainly favoured by various foreign legal systems and commentators. See Chapters 4,D and 5,D,4), and in particular Drobnig, Budapest Report p.309.

5. This analysis is not without its difficulties. In Austinian terms such a "subsidiary" fault-based right is often considered to be in rem in primary form, although in personam in secondary enforcement. It is not, however, a property right in either form, and also, for the suggested practical analysis in international private law, the primary right may be considered collapsed with its secondary enforcement, and thus in personam, given the obvious personal factors surrounding its investiture.

6. Some difficulties remain with this analysis. It is not inconceivable that a successor might be saddled with complete and automatic liability for the deceased’s debts as a matter of status, without any credible personal factors being involved.

7. Possibly the result of the interaction of various maxims of Equity, such as it "looking on that as done which ought to be done" and its coercive operation in personam. See Chaps.1-3 of Part I of Snell and Maitland’s Lectures on Equity (1909).
Footnotes:

Chapter 2.F: Further analytical issues.


3. See Lawson & Rudden pp.88 & seq.

4. See Dicey & Morris pp.902-903 and North pp.775-776. There is a clear analysis of these and other problems of corporeal and incorporeal classification in Cook Chaps.10 & 11, esp. pp.254-255, 259-263, 284-289 & 292-293.


6. See section A above and HLA Hart (1954)70 LQR 37 at 41.

7. See Anton pp.4-5.

8. See RWM Dias, Jurisprudence (5th ed) p.292 and REM (1941)57 LQR 23.


10. There is, however, another argument regarding those persons that their claims "through" the trustee, are on they are affected in the same way as to his. This argument may derive some from the forms of action than Equity, since it appears to bear some relation to concepts of relative title.

11. See e.g. JAC Thomas, Textbook of English Law (1920) pp.131, 139, 168, 194.

12. The absence of extensive mode analysis in English law may explain why the floating charge has caused such difficulties since it was incorporated into English law in 1888.

13. See e.g. JAC Thomas, Textbook of English Law (1920) pp.131, 139, 168, 194.

14. This particular topic is rather controversial. See S. Leveridge (1948)79 LQR 379; O. K. Groom and J. A. Croup (1953)83 LQR 658, 609; P. Matthews (1952)84 LQR 79.

15. See Groom pp.74-75.

16. This particular topic is rather controversial. See S. Leveridge (1948)79 LQR 379; O. K. Groom and J. A. Croup (1953)83 LQR 658, 609; P. Matthews (1952)84 LQR 79.
Chapter 2.G: Real rights, personal rights and English law.


5. Per Lord Kenyon CJ at 490 in Ward v Macauley (1791)4 TR 489.

6. See now the Torts (Interference with Goods) Act 1977 s.5.


8. There is, however, another argument regarding these persons: that their claim lies "through" the trustee, and so they are affected in the same way as is he. This argument may derive more from the Forms of Action than Equity, since it appears to bear some relation to concepts of relative title.

9. See e.g. JAC Thomas, Textbook of Roman Law (1976) pp.131, 153 n.16 & 204.

10. The absence of extensive funds analysis in Scots law may explain why the floating charge has caused such difficulties since it was transplanted from English law in 1961.


12. See Goode pp.72-77.

Footnotes:

Chapter 2.H: Real rights, personal rights and other legal systems.

1. See e.g. Chapter 5.B,3).


3. See On Law and Justice Chap.7.

4. See e.g. H Tiberg, Bailees' and Lessees' Protection against Third Parties under Swedish Law (1965) Sc St L 217. Tiberg is, however, hesitant.

5. Taken from S Zitting's, Attempt to Analyse the Owner's Legal Position (1959) Sc St L 227. See esp. pp.242 & seq..

6. See "Danish and Norwegian Law" (note 2) pp.138-140.

Footnotes:

Chapter 3.A: The rationale and inherent tensions of the lex situs rule.


2. There are obviously some exceptions to this, like the issues discussed in section H,1) below concerning property in transit. However the lex situs does provide a useful general rule.


4. See Dicey's Introduction, esp. pp.3-15, 23-33, 42 & 52-59 and Beale Chap.1, esp. pp.1-2, 12 & 64-86 and Chap.3 of Beale's Appendix, esp. pp.1967-1975. Pillet's theory is probably most accessible in (1924)1 Rec des Cours 447 and (1925)2 Rec des Cours 485. A searching criticism of such theories by Arminjon appears in (1933)2 Rec des Cours 1. Arminjon makes the important point that droits acquis might be useful in some circumstances, although untenable as a general theory. The baby need not go out with the bathwater.

5. See Chapter 3.B and E. It is now difficult to think of an example of a supposed real right which is covertly personal in operation. See section D below.

6. See Chapter 3.D and E.


10. See section 7.27 below for a discussion of different types of protection of rights in the actio personalis moriendi. It is assumed for the purposes of this example that the 1908 Hague Convention on the Law Applicable to Trusts is silent and that recognition would be considered irrelevant by the courts in this case.

11. See Chapter 2.0.5.

12. See Re Cohen, Manual of German Law (1926) 369, section 120.

13. Such is the characteristic of prescription as compared with prescription in court. As such dispute is now largely resolved in the United States and English international private law see Acta 186-192 and compare a Remark in pp.185-192.

14. See Chapter 2.0.3.

15. In a number of defaults, the doctrine is characterised as considering itself to be a part of the law.
Footnotes:

Chapter 3.B: The basic scope and structure of the lex situs rule.

1. As discussed in section C,4) below, some cases concerning ships suggest that such issues should not be separated. The general authority of the ship cases is not clear.


5. See Chapter 2,E and G,3). It is, however, intriguing that Cheshire might have reached the position of more recent European theorists by further refining his theory to eliminate "representatives" from his "transactional" category.

6. See Chapter 2,D and E. It is more difficult to think of an example of a supposed real right which is covertly personal in operation. See section D below.


8. See further possible examples in Chapter 4,B,3) and 5).

9. See Batiffol, Choix d'Articles p.199, esp. pp.207 & seq..


11. See section F,2) below for a discussion of different types of translation of rights in the extinction of rights. It is assumed for the purposes of this example that the 1984 Hague Convention on the Law Applicable to Trusts and on their Recognition would be considered irrelevant by the court in question.

12. See Chapter 2,G,3).


14. The characterisation of prescription as substantive or procedural is, of course, an old dispute, which is now largely resolved in both Scots and English international private law: see Anton pp.300-304 and Dicey & Morris pp.188-192.

15. See Chapter 2,G,3).

16. Or indeed to characterise a law considering itself extinctive as a ranking rule.

18. See Cook Chap.6, Ailes (1941)39 MichLR 392, Falconbridge Chap.13, Szászy (1966)15 ICLQ 435 and Leflar p.240. Cook's criticisms of the supposed distinction between substance and procedure apply equally to the supposed distinction between right and remedy (see pp.170-177). The terms may be usefully adopted if their shortcomings are borne in mind.

19. E.g. North pp.88-90, though cf the application by North (at pp.812-814) of the proper law of a debt to priorities of multiple assignments thereof. See too Dicey & Morris pp.964-966.

20. E.g. s.51(1)(e), (2) & Sch.3, Part I of the Bankruptcy (Scotland) Act 1985.


22. See e.g. Rodger (Builders) Ltd. v Fawdry 1950 SC 483.

23. See the different rankings of claims of "necessaries men", their possible maritime liens and various mortgages and hypothecs in The Colorado (1923) P 102 and The Zigurds (1932) P 113 which are discussed further in section C,4) below.

24. See Chapter 2,H.

25. See Chapter 2,G,1) and 3).


27. Or the law generally governing the insolvency process. See Chapter 6,C,6).

28. Or, with regard to incorporeal property, the law by which it has come into existence or is otherwise generally governed.

29. See section F,3) below for a discussion of the translation of rights for ranking.

30. Or indeed hybrid.

31. Or perhaps, as discussed in Chapter 6,C,6), the law governing an insolvency process.

32. See Bell Comm. ii.407-413.

33. As seems to have occurred in Re Anchor Line (Henderson Bros.) Ltd. [1937] Ch 483. See Lord Keith's comments upon this case in Carse v Coppen 1951 SC 233 at 244 & 248.

34. Extra-judicial remedies are not generally discussed here.
35. See e.g. Dicey & Morris pp.175-176, where it is considered that the availability of a remedy is governed by the *lex fori*, but may sometimes be limited, though not extended, by the *lex causae*.

36. Thus, for example, it would not have been overly inconvenient for the English court in *Phrantzes v Argenti* [1960]2 QB 19 to exercise a "Greek" discretion and then award a mandatory injunction analogous to those normally awarded in purely English proceedings. See the comment in (1961) Duke LJ 316 and Cook's general comments upon the distinction between rights and remedies (pp.170-177). Webb ((1960)23 MLR 446) seems overly kind about the *Phrantzes* decision.

37. Dicey & Morris pp.937-939 & 944 and Falconbridge (p.626), Zaphiriou (pp.66-83) and Lalive (pp.120-129) argue particularly cogently for the application of the *lex situs* as regards corporeal moveables. Their analyses of the thorny *Republica de Guatemala v Nunez* [1927]1 KB 669 case is particularly instructive.

38. See Batiffol & Lagarde para.524 and Zaphiriou pp.67-71.

39. Wolff (p.523 n.3) seems to have regarded as odd the application of the *lex situs* by English international private law. The principal English authority for the reference of the capacity to transfer immoveables to the *lex situs* (*Bank of Africa v Cohen* [1909]2 Ch 129) is scarcely uncontroversial (see e.g. North p.781).

40. See Lord President Cooper at 242 and Lord Keith at 247. *Carse v Coppen* is not a straightforward decision. See Chapter 5,E,2). Capacity issues may have related to the capacity of corporations or doctrines of *ultra vires*.

41. On the other hand, in *Carse v Coppen*, Lord Keith suggested (at 245-246) that the form of a transfer of corporeal moveable property is governed by the *lex loci actus*!

42. (1945)22 BYBIL 232 at 236.

43. (1897)24 R 758 at 807. Lord Young indeed dissented on the main issue of international private law in the case, considering the essential validity of the transfer to be governed by the domiciliary system.

44. See section D below.

45. E.g. von Bar paras.134, 221 & 232.


47. See section C below on these two points.
Footnotes:

Chapter 3.C: Flexibility in application of the lex situs rule.


3. See H Debois (1931) Clunet 281 at 298-308 and Chapters 4,B,1) and 5,D,5).


5. See further below and in section D.

6. If the question involves a third party: see section B,1) above.

7. See Anton Chaps.10 & 11.

8. See further section D below.


10. Evidence is, of course, normally considered to be "procedural" and therefore governed by the lex fori (e.g. Dicey & Morris pp.179-185). This "evidential" matter is in fact the definition of a substantive issue, what Brett LJ referred to in The Gateano & Maria (1882)7 PD 137 at 144-145, as "the facts to be proved". The distinction between the facts to be proved and the manner of proving them is a narrow one and this may be why Lord Justice-Clerk Moncreiff sought, in The Owners of The Immmanuel v Denholm (1887)15 R 152 at 158 (see too Anton pp.745-747), to restrict the ambit of Brett LJ's comments. It is suggested that the admissibility of a contract as evidence of intent to convey ought to be characterised as the definition of a substantive issue: the type of required intent.

11. This is what would be termed by Ehrenzweig a "validating rule". See Ehrenzweig's Treatise on the Conflict of Laws pp.465-485 for such a rule in contract.


13. Dicey & Morris pp.83-84, North pp.796-798, Griswold (1938)51 HarvLR 1165 at 1202, Falconbridge pp.141-142 and Leflar pp.9-10. Cook approves its application to immoveables, but is notably silent as regards moveables. Lorenzen (1918)27 Yale LJ 509 at 530-531 is grudging even of its application to immoveables.

15. See p.558. In the same passage Story also speaks of property having a "necessarily implied locality" as another reason not to apply the domiciliary law.


17. Italics added.

18. (1956)56 CollR 969 at 982-989.


21. Or any other more suitable system. See section E below.

22. (1938)51 HarvLR 1165 at 1194-1198. See too Beale paras. 7.3, 8.2 & 208.1.


27. See (1958)58 CollR 212.

28. See White & Summers pp.1063 & seq.

29. See too Constant v Christensen 1912 SC 1371.

30. Or possibly the lex situs at the time of the grant of the mortgage or the lex loci contractus. See too The Tagus [1903] P 44 and The Colorado [1923] P 102. Constant v Christensen is ambiguous regarding the law governing the essential validity of a ship mortgage.

31. See too Hooper v Gumm as regards sale transactions.

32. And perhaps also the lex situs and the lex loci contractus.

33. E.g. The Bold Buccleugh (1851)7 Moo PC 267.

34. Admiralty actions in rem not based upon maritime liens appear to give rights in an arrested ship to claimants, such as suppliers of necessaries, only prospectively. See The Colorado.

35. At 84, though the Lord Ordinary (at 77) favoured attachment by virtue of an admiralty action in rem.

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37. See too The Zigurds [1932] P 113 and The Colorado.

38. See too The Ioannis Daskalelis [1974] 1 Lloyd's Rep 174, The Zigurds and the discussion of all of these cases in The Halcyon Isle.
Footnotes:

**Chapter 3.D: Personal rights and the real rights rule.**


2. See section B.1) above.


4. Art.929 BGB.

5. Whether or not categories of rights are crossed.

6. For an example of the confusion of the distinction and non-recognition of rights see by discussion in 1969 BLY (Nev. 226 and in Chapters 4 and 18 in certain cases reservation of real cases. The distinction of "order public interest" and "ordre public international" is unclear. This distinction was suggested by Brocker in 1972 (see National J. Lagarde para. 305 et al.).

7. See e.g. Anglo-Iranian Oil Co. v Jaffrate (1937) NER 246, as explained by Philip J. in Sir Gilbert Vine & Co. Ltd. v China (1929) 22 CA.

8. Of the form, perhaps.


12. Much by Debate in 1951 Ewost 261 at 250 (emphasis added). See also pp.154-159 and J.L. Davis (1991) JIC 59 for a discussion of such matters in the USA, prior to the introduction of the Uniform Commercial Code.


14. See Chapters 6.9 and 6.9.2.
Footnotes:

Chapter 3.E: The inappropriate or undesirable lex situ*

1. See too section H,1) concerning property in transit.

2. See section B,1) above.

3. See e.g. RD Leslie 1976 SALJ 46.


5. Ordre Public (note 4) pp.201-212.

6. For an example of the confusion of the extinction and non-recognition of rights see my discussion in 1986 SLT(News) 265 and in Chapters 4 and 5 of certain Scots reservation of title cases. The distinction of "ordre public interne" and "ordre public international" is crucial. This distinction was suggested by Brocher in 1872 (see Batiffol & Lagarde para.365 n.1).

7. See e.g. Anglo-Iranian Oil Co. v Jaffrate [1953]1 WLR 246, as explained by Upjohn J in Re Helbert Wagg & Co. Ltd.'s Claim [1956] Ch 323.

8. Of the forum, perhaps.


10. See Wolff pp.140-145 and Graveson (1962)2 Rec des Cours 1 at 48-58.

11. See Chapter 5, B,3) and D,6).

12. Quoted by Debois in 1931 Clunet 281 at 310 (emphasis added). See Lalive pp.169-175 and JLR Davis (1964)13 ICLQ 53 for a discussion of such statutes in the USA, prior to the introduction of the Uniform Commercial Code.


14. See Chapters 2,6 and 5, E,2).
Footnotes:

Chapter 3.F: Translation of rights.


2. See section B above.


4. As discussed in section C,4) above, The Colorado [1923] P 102 suggests that efforts can be made to find analogous rights in this context.

5. See section B,3) above for a discussion of the general problems of ranking and Chapter 2,H for a discussion of doubts concerning general ranking structures in Scandinavian legal systems.


7. Or indeed characterise it in terms of some hybrid right within that ranking system.
Footnotes:


3. Some interactions of time and law, such as state succession, are difficult to classify. See Rigaux (note 2) at 345-346 and Mann (note 2) for detailed lists of interactions of law and time.

4. Which might be expected to leave the lex fori applicable (see section E above), though it seems tacitly assumed that the former ("petrified") lex causae is applicable. See Grodecki (note 2) para.29.

5. See e.g. Knittel (note 2).

6. E.g. Mann's argument (note 2) pp.243-247 that retrospective changes in law ought not to take effect in situations of conflit mobile when no links remain with the system changed. See too Castell (note 2) p.624, Gavalda (note 2) pp.377-379 and Giardina 1972 RCDIP 401 at 412-413.

7. There is another strand in the argument against the automatic application of a retrospective droit transitoire in a situation of conflit mobile. This is the injustice of the alteration of people's legal relations by changes made to a legal system to which these legal relations have no continuing substantial connection. One might hazard a guess that this injustice is related to a perception of a violation of vested rights.

8. Authority is, however, sparse. The marriage cases, like Starkowski v the Attorney-General [1954] AC 155 (favouring the retrospective droit transitoire of the lex causae) and Ambrose v Ambrose (1961)25 DLR(2d) 1 (rejecting the retrospective droit transitoire of the lex causae), do not seem to give rise to a true conflit mobile, as the relevant connecting factor indicates a specific (relative) time of operation and a specific legal system, rather than indicating the consecutive application of several legal systems at several (relative) times.


12. See Grodecki (note 2) para.47 nn.184 & 185.
15. In the immutable example the system which is altered is that applicable at the real time of alteration, whereas in the mutable example the system which is altered at the real time of alteration is one formerly applicable in real time. There is no logical distinction between these two examples; merely the perceived distinction of vested rights.
16. Particularly when property is analysed as separate items rather than as ideal funds. The effect in terms of real rights of matrimonial property régimes may of course be analysed in terms of funds. See Chapter 6,A for a general discussion of funds in international private law.
17. See further E Spiro (1960) ICLQ 357 at 371.
19. See e.g. Gavalda (note 2) pp.377-379.
20. Lalive (pp.138-144) and Zaphiriou (pp.137-141) briefly allude to the problems of conditions. The interaction of several systems of prescription in situations of conflit mobile is an old problem. See e.g. von Bar paras.237 & 281.
21. See Chapter 2,E and section B,1) and 2) above.
23. See section B,3) above for a discussion of the general difficulty of characterising ranking rules as rules concerning the existence of rights. The related distinction between conditions and ranking rules is discussed below.
24. This is probably a ranking rule in English law. The conditions would therefore pertain to the ranking of the rights rather than to their existence, or practical operation as rights. The rather more elegant Civilian equivalent would be a conditional right in security, vested in A at the time of sale in market overt, the operation of which was suspended until the thief had been convicted.
25. This of course assumes that B has a real right from the date of execution and that law S1 normally ranks real rights by the date of their creation.
26. See section B,3) above.
27. It is not impossible that conditions may relate to rules of ranking. See the former rules of English law discussed above relating to the combination of theft, sale in market overt and conviction of the thief.

28. See section B,3) above.


31. See Chapter 6.

32. See Chapter 6, C,4).

33. See Chapter 6.

34. There is a possible variant on this situation. If the property is only transiently in S2 a passive permissive renvoi might be applied to law S2, to see if any provision of law S2 prevented retrospective operation of law S1, rather than requiring an active permissive renvoi. See section H,1) below.

35. As for example in the registration of securities.

36. As perhaps with "suspect period" devices striking down transactions prior to formal insolvency, such as the former doctrine of relation back in English law.
Footnotes:

Chapter 3.H: Conflit mobile: problems of space.


2. See section B,1) above.

3. It is instructive in this context to examine the glib conclusions which are often drawn from the case of North-Western Bank v Poynter (1895)22 R(HL) 1. See e.g. Dicey & Morris pp.947-948 and North p.801. See further Chapter 5,C.

4. Although it might occur immediately upon the departure of the cargo from Singapore. See section 2) below.

5. See Hellendall (note 1) and North pp.800-801. Even the owner's domiciliary system has been suggested as an appropriate option, begging a number of questions, like the identity of the owner.


7. See Zaphiriou pp.196-198.

8. (1901)4 Sirey 25. See Zaphiriou Chap.16 and Lalive pp.147-150 for a synopsis of the debate surrounding this case.


10. See Batiffol & Lagarde para.512 n.4
Footnotes:

Chapter 3.1: Applications of the *lex situs* rule.

None!

2. (1971) 7 Rev de Materiel 376, 390 & 391 and (1973) 9 Cahiers de Droit 335

3. See (1974) 8 Mejaalj 456

4. Forbes v The Official Receiver 1954 2 T.L.R. 522 may also be considered to favour application of the ostensible owner to transfer of ownership. As discussed in Chapter 8.1.2.1(a), this case appears rather to relate to special rules of ranking.

5. See The North Western Bank v Popper 41(2) 122 B.C.H. 1, Hardwick Green Farm v Hutt 1190021 V.L.R. 308 at 308 & 309; 1190015 AD 21 at 201 & 206 and 1190015 Colls 212.

6. For the true appreciation of a bill of exchange to a corporal owner.
Footnotes:


1. See Chapter 5.B.1).


4. Forbes v The Official Receiver 1924 SLT 522 may also be considered to favour application of the domiciliary system to transfers of moveables. As discussed in Chapter 6.C.6).e), this case appears rather to relate to special rules of ranking.


6. For its trite approximation of a bill of exchange to a corporeal moveable.
Footnotes:

Chapter 4.B.1): Delivery and linked personal rights.

1. The characterisation of risk is discussed further in section C below.


3. The ratio of Robertson is not however clear, since the main issue was a plea of retention for a general balance against the indorsee of a delivery order. Ownership of the iron may have been irrelevant. See section 5) below.
Footnotes:

Chapter 4.B.2): Conflit mobile.

1. (1901)4 Sirey 25.

2. Perhaps because the main issues concerned original acquisition by specification while the lex situs was Scots law.

3. See section A.2) above. No third parties had acquired any rights while the property had been in Germany. See Brokaw v Seatrain UK Ltd. [1971] QB 476 and Attorney-General of New Zealand v Ortiz [1984] AC 1.

4. 1990 SLT 891.

5. See further Chapter 5.D.2).
Footnotes:


1. See Sauveplanne: Bona Fide Acquisition p.54.


6. E.g. 'other' sales in Germany: Art.932. This is one element of the quite subtle French rule that 'possession vaut titre': Code Civil Art.2279, on which see G Marty & P Reynaud, Droit Civil, vol.2, Les Biens (Paris 1965) pp.377-397.


10. See further Sauveplanne: Bona Fide Acquisition and Murray (note 2).

11. (1897)24 R 758 at 804. See Chapter 5.C.


15. See Nussbaum's Principles of Private International Law (1943) pp.70-73 and P Francescakis, La Théorie de Renvoi (Paris 1958) pp.11-16, where the term 'loi d'application immédiat' was coined. Batiffol & Lagarde (para.251) prefer the term 'loi de police'. This latter term seems to have too many insular connotations of ordre public. See Chapter 5,B,3),b).


17. See too Falconbridge pp.460-462.
18. See Zaphiriou Chaps.4 & 5 and Voulgaris Chap.II. Ironically the Quebec courts have tended to analyse proprietary issues in contractual terms to evade the terms of the Civil Code on choice of law. See Talpis (1970-71)73 Rev du Notariat 275 at 277 & 286 & seq, (1972)13 Cahiers de Droit 305 at 349-353.

19. See Chapter 5.

20. It is suggested that a reimbursement rule operating in terms of a transfer of ownership coupled with a secured pre-emption right should be analysed in a similar manner.
Footnotes:

Chapter 4.B.4): Further issues in the security of transactions.


2. At 751, although dissenting on the general choice of law issue.

3. See The Laws of Scotland: Stair Memorial Encyclopaedia (Edinburgh) vol.17, paras.401 & seq..

4. Other sales with judicial sanction may be subject to similar analysis.

5. At p.616 n.28.

6. Or perhaps the Danish judgement.

7. The modern relationship between private and public international law and precise distinctions between choice of law and exclusion of foreign law were not, of course fully established at the time these prize cases were decided. Henderson & Riddle v Lothian (1803)4 Pat 484 would seem to indicate that an error in public international law of a foreign prize court might very exceptionally be refused recognition, on policy grounds.
Footnotes:

Chapter 4.B.5): Rights arising on sale: liens.


3. (1973)22 ICLQ 213 at 214.

4. Relating to the constitution between the parties to a relevant contract of a special claim.

5. Or a subsidiary fictional situation of property in transit or represented by documents of title. See Chapter 3,H,1).


7. (1973)22 ICLQ 213 at 251-252.

8. And in a manner which is structurally unsatisfactory. As discussed in Chapter 3,B,3), ranking may be determined both coherently and subtly by the lex situs coupled with subsidiary choice of law rules.

9. See Chapter 3,B,3) and C,3).

10. As discussed below, a narrow right of an unpaid seller under the law of Quebec was analysed in terms of conditional sale by the Supreme Court of Nova Scotia in Re Satisfaction Stores (1929)2 DLR 435. It would also have been difficult to characterise the rights of an unpaid seller under s.1 of the Mercantile Law Amendment Act 1856. It is odd that this latter issue does not appear to have come before the courts.

11. See Chesterman (1973)2 ICLQ 213, p.221, text to n.42.

12. As in securities. See Chapter 5,B,3).

13. See e.g. Carnahan (1935)2 UChiLR 345.

14. A law other than that lex situs could of course be applicable in its place in terms of the subsidiary choice of law rules mentioned above.

15. To use the term applied by Khairallah in relation to the analogous situation in securities. See Chapter 5,B,1) and 3).

16. It should be noted that the application of the lex situs on ranking does not provide such third party certainty.

17. Most of the cases discussed in section g) below appear to favour such translation at a relatively abstract level.
18. It is possible that this issue would have been considered at this time to have been governed by the domiciliary law of the Scots merchants, on the basis of the doctrine *mobilia sequuntur personam*.

19. Who may at the time of payment to the seller by one of the merchants have owned the property in question.

20. See Lalive Chaps.3 & 4 and Zaphiriou Chap.3.

21. See too the ship cases discussed in Chapter 3,C,4), where it is suggested that ships fall into a special category of property for the purposes of choice of law. The ship cases may therefore be distinguished.

22. See e.g. Lord Ivory at 1020. Lord Cunningham's views (in his dissenting judgement) are less clear. His Lordship may have considered delivery orders to be documents of title and thus subject to special rules (see section A,5) above), or even that the domiciliary system applied to moveable property in general.

23. The view may even be taken that the contractual law was considered applicable to property rights, such as liens, as between the parties to the contract, and that on assignation of this contract to the Glasgow merchant this position was preserved. See Lord Cunningham at 1018 and section b) above.

24. At 1020. See too the Lord President at 1014.

25. Chesterman's view ((1973)22 ICLQ 213 at 248) that Russian law was the *lex situs* at co-existence of rights depends upon giving retrospective effect to an English bankruptcy transfer in Russia. As indicated in Chapter 6, this might well be an insular unilateral view for an English court to take.

26. At first instance Fisher J appeared to attach some importance to the *lex situs*, referring (at 932-933) to Westlake and Inglis v Robertson & Baxter (1897)14 R 758, (1898)15 R(HL) 70, and also attaching some importance to the proposed future situation of the goods in Ontario.

27. It may, of course, be difficult in some instances to distinguish liens from special insolvency preferences. Rules against unfair preferences on insolvency may also give rise to difficulties in integration. See Chapter 6,C,6).

28. Or perhaps the law governing the insolvency process. See Chapter 6,C,6). It is possible that the Nova Scotia registration requirements related to the ranking rather than the extinction of rights. See Chapter 5,D,6).

29. See esp. *The Halcyon Isle* [1981] AC 221, where the law governing the relevant contract was favoured by the majority.

Footnotes:

Chapter 4.C: Some conceptual difficulties.

1. See the Introduction to White & Summers and e.g. Article 2.401 regarding 'title'.

2. If this argument is correct, it would seem that the 1893 Sale of Goods Act imposed on Scots law, via s.17, a revolutionary new rule on consensual transfers which was not even part of the English law consolidated in 1893!

3. E.g. Art.932 of the BGB, discussed in section B,3) above.

4. It is notable that s.24 of the Sale of Goods Act also refers to the good faith of a third party acquirer of goods from a seller in possession.

5. See the 2nd ed. (1938) of Cheshire's Private International Law pp.415-439, Chapter 3,B,1) above and Morris (1945)22 BYBIL 232.


7. A similar position may exist in English law regarding sales by a seller in possession under s.24 of the Sale of Goods Act.

8. See DL Carey Miller, Corporeal Moveables in Scots Law (Edinburgh 1991) paras.10.15 & seq..

9. See Snell Part I, Chap.4 and Goode pp.68-75 and Chap.27.

10. See Chapter 5,E.

11. See Chapter 3,F,2).

12. See Chapter 3,B,3) and F,3).
Footnotes:

Chapter 4.D: International conventions.


7. Those effective in Scots law, such as the 1980 EC Contracts Convention, relate to contractual rather than proprietary issues.

8. See KH Nadelmann (1965) Yale LJ 449 for a devastating critique of residual problems of international private law deriving from the 1964 UNIDROIT uniform sales laws referred to below, and on more general issues of uniform laws (1968)16 AJCL 1, esp. Nadelmann, Graveson and David.


14. The failure of attempts to conclude general insolvency conventions appears further to illustrate this point. See Chapter 6.D.


17. See Honnold (note 1) paras.70, 262 & 244 and Kahn (1981)33 RIDC 951 at 969.

19. See Art.5(4) of the 1955 Convention.

20. See Art.5(3) of the 1955 Convention.

21. In accordance with Rabel's plea: (1938)5 UChiLRE 543 at 551.


24. As discussed below, Art.4 of the 1958 Convention treats résolution as the right of an unpaid seller relative to the buyer's creditors.

25. See Chapter 3,C,1).

26. Or perhaps the European Court of Justice.

27. On the 1958 Convention in general, see de la Morandiére (1957)46 RCDIP 1, Nial, Liber Amicorum of Congratulations to Algut Bagge (Stockholm 1956) p.155 and (1960)3 Rec des Cours 255 at 271-283 and Frédéricq (1958)1 Rec des Cours 1, esp. at 68 & seq..

28. See e.g. the comments of the Scandinavian delegates in (1956) Hague Conference Acts at 24 & 69.


30. See e.g. the comments of the Swiss, German and Austrian delegates in (1951) Hague Conference Acts at 84.

31. In addition Art.4 concerns the relations of the unpaid seller and the buyer's creditors.


33. As is a seller's right of résolution.

34. Of the 'concrete' version of the convention.

35. See the arguments of von Caemmerer: (1956) Hague Conference Acts at 32-33, 44-45 & 48-49. The difficulties of this type of characterisation distinction are also discussed in section B,5) above in relation to liens.

36. And, in the 'abstract' version of the convention, other third parties.
37. From which the law of the situation of documents of title might detract. See further the discussion of liens in section B,5 above.


Footnotes:


None!


2. To assume the personal life applies to capacity.

3. If perhaps controversial; compare e.g. Vandegarre Chap.1.

4. 1852 & seq. and 59 & seq.

5. However, similar approaches may also be taken in certain other European legal systems. See Schilling (1966)24 ICL 97.


8. The registration provisions of Articles 6-162 are also interesting. Registration of securities is discussed further in sections 5.2 and 6.4 below.


10. See e.g. (1974)29 Frederic 425.

11. See e.g. Praydzyj, Budapest Report p.16.


14. Upon which see Anton pp.59 9 sqq., Story & Morris Chap.9 and North Chap.9.

15. Cf the suggestion in Sherman v. Manufacturer's Life Insurance Co 1965 3 QL 302 and Brookes v Centraul Ind. (1971)12 QB 476 that the rule excluding foreign revenue laws be applied to a revenue attachment and to a revenue fine.

16. Upon which see Bernard Audit, La Fraude à la Loi (Paris 1974).

17. (1965)3 Rev des Cours 49-60. See further Chapters 5.2 and 6.3.3 above.


Footnotes:

Chapter 5.B: General issues in securities.


2. He assumes the personal law applies to capacity.

3. If perhaps controversial: compare e.g. Voulgaris Chap.1.

4. Pp.32 & seq. and 88 & seq..

5. However similar approaches may also be taken in certain other European legal systems. See Schilling (1985)34 ICLQ 87.

6. (1978)26 AJCL (Sup) 145.

7. (1978)26 AJCL (Sup) 145 at 166.

8. The registration provisions of Article 9-103 are also interesting. Registration of securities is discussed further in sections 3) and D,6) below.


10. See e.g. (1974)38 RabelsZ 468.

11. See e.g. Drobnig, Budapest Report p.16.


13. It also contains some further specialities. See Jeunger (1978)26 AJCL (Sup) 145 at 156 & seq. and 168.

14. Upon which see Anton pp.99 & seq., Dicey & Morris Chap.6 and North Chap.8.

15. Cf the suggestions in Rossano v Manufacturers' Life Insurance Co (1963)2 QB 352 and Brokaw v Seatrain Inc. (1971)2 QB 476 that the rule excluding foreign revenue laws be applied to a revenue attachment and to a revenue 'lien'.

16. Upon which see Bernard Audit, La Fraud à la Loi (Paris 1974).

17. (1963)2 Rec des Cours 48-58. See further Chapters 3,E and 4,A,6) above.


19. See e.g. D. Lloyd, Public Policy (London 1953) Chap.V.


23. See e.g. Batiffol & Lagarde para.251.

24. E.g. in (1927)40 HarvLR 805.

25. See e.g. (1935)2 UChiLR 345 and (1947)47 ColLR 767.

26. In an inter-state context within the USA such an argument might, of course, have some force in the light of the 'full faith and credit' and 'due process' provisions of the US Constitution. The role played by the US Constitution in its international private law is, however, rather controversial.


28. See the cases discussed by Schilling in (1985)34 ICLQ 87.

29. See e.g. Cabrillac 1979 RCDIP 488 at 494-495.

30. See the cases discussed in Drobnig, Budapest Report and Schilling (note 28).

31. *Luckins v Highway Motel (Carnarvon)* Pty Ltd (1975)133 CLR 164 is a striking example of this analysis. The charge registration provisions of the Companies Act of Western Australia were applied to render invalid a floating charge granted over all of its assets by a Victorian company, as regards a bus brought to Western Australia after creation of the charge in question.

32. See Chapter 3,F,3) for a more general discussion of the translation of rights for ranking purposes and Chapter 3,B,3) for a discussion of more general ranking issues.
Footnotes:

Chapter 5.C: Securities: The general Scots rule.

1. E.g. Anton p.617.

2. See too Janesich v George Attenborough & Son (1910)26 TLR 278.

3. After the bills of lading had been transmitted to the English agents of the Toronto Bank.

4. 'Pledge', 'hypothecation' and 'deposit' were also argued, in the alternative.

5. At 796. See too the Lord Justice-Clerk at 801 and Lord Trayner at 814.

6. There may be scope for arguing that Lord Watson considered exceptions to this rule to exist. See the discussion of North-Western Bank v Poynter (1895)22 R(HL) 1 below.

7. See Chapter 4,B,3) above.

8. See p.807. Lord Young's analysis of the Factors Act in the second part of his judgement reflects the same frustration with the restrictiveness of Scots security law. Little seems to have changed in the past hundred years!


10. A 'contractual' approach may have been adopted later in Higgins v Ewing's Trs. 1925 SC 440 in relation to incorporeal heritable property, although, as noted below, the issue effectively arose between the parties to the security.

11. It had only been recently determined in internal Scots law that iron warrants were not negotiable instruments: see Dimmack v Dixon (1856)18 D 428 and Dixon v Bovill (1856)3 Macq 1. Regrettably, issues of international private law were not argued in the latter two cases.

12. See Chapter 6 below.

13. See e.g. Falconbridge p.469 and even Wolff p.509. Continental commentators have been even less careful: see e.g. Khairallah p.153 and Voulgaris pp.54-56.

14. Poynter is so analysed by several commentators, e.g. Dicey & Morris pp.947-948. The judgements do not mention these issues.

15. See Chapter 3,B,3).

16. This proposition may have been applied in Higgins v Ewing's Trs. 1925 SC 440 to an English security over a beneficiary's rights under a Scots trust over Scots heritage. Substantive limitation provisions under English law were considered relevant to extinguish the security. There was no third party competition, although this was not expressly considered significant.

17. Lord Watson's dictum appears to have been applied in this latter manner in Forbes v The Official Receiver 1924 SLT 522, in relation to the ranking of an
English mortgage over Scots incorporeal property in an English bankruptcy. See Chapter 6,C,6).


19. I have also reviewed these cases in 1986 SLT (News) 265 & 277. The general English position regarding the international aspects of reservation of title is discussed by North in (1990)1 Rec des Cours 23 at 265-273 and by Morse in [1993] JBL 168.


21. Other than an argument that the clause in question had not been incorporated into the contract.

22. 1986 SLT 452. Choice of law issues were not discussed in detail by the Second Division (1989 SLT 182) nor the House of Lords (1990 SLT 891) on appeal, the views of the Lord Ordinary, Lord Mayfield, being effectively accepted in this regard.

23. At 456D. As the onus of proof regarding the German law pled had not been discharged, Lord Mayfield's view is, however, technically obiter.

24. Foreign authority is substantially to the same effect. See Morris (1945)22 BYBIL 232, Lalive Chap.4, Zaphiriou Part II & Chap.6, Ziegel (1967)45 Can Bar Rev 284 and Drobnig, Budapest Report p.289. Adherence to the lex situs may be slightly waning in the USA: see Jeunger (1978)26 AJCL (Sup) 145.
Footnotes:

Chapter 5.D: Detailed operation of the lex situs rule.

1. Specialities of ships and property in transit are discussed in Chapter 3,C,4) and H.

2. See Anton Chaps.4 & 5.

3. See Anton pp.20-22. I have also reviewed the policy aspect of these cases in 1986 SLT(News) 265 at 268-272.


5. 1990 SLT 891.


7. Kenny J did, however, seem (at 392) to accept with little question expert evidence 'that when goods are sold outside Germany, the German law about reservation of ownership or title prevails'. Initial reservation of ownership was probably not contentious, as Irish law may not have objected to the German clause in the case.

8. The situation of the bus at that time was not clear. Gibbs J may (at 174-175) have considered this point relevant.

9. See section 6),f) below. These provisions may have been considered lois d'application immédiat.

10. The criticism by Lord Keith in Carse v Coppen 1951 SC 233 (at 247-248) of the approach taken to the conflit mobile in Re Anchor Line (Henderson Bros.) [1937] Ch 483 also suggests a favour for the lex situs at the time it is alleged a real right has vested. See section E,2),c) below.

11. See too the arguments of the pursuers' counsel at 772, Lord Kinnear at 778, Lord Justice-Clerk Macdonald at 801 and Lord Young at 805.

12. See too Strachan v McDougle (1835)13 S 954. Scottish Provident v Cohen is discussed further in Chapter 6,C,6),b), where it is suggested that it probably supports the reference of asset ranking to the lex situs.

13. See Chapter 6,C,6).


15. See too Graham Stewart pp.742-743.

16. Perhaps because of the presence of an English insolvency process. See Chapter 6,C,6).

17. Reference in the first instance to the lex situs seems supported by the English decision in Norton v Florence Land and Public Works Company (1877)7 ChD 332, in which Italian law was considered applicable to the ranking of an Italian
mortgage over land in Italy with an English equitable charge relative thereto. The equitable charge was, however, also considered invalid. See too Le Feuvre v Sullivan (1855) 10 Moo PC 1 regarding probable proper law ranking relative to incorporeals.


20. See the general discussion of such issues by Ziegel (1967) 45 Can Bar Rev 284 at 315 & seq..

21. See too the pleadings in Inglis at 772-773, Lord Watson at 73-74 in the House of Lords in Inglis and at 12 in Poynter, Herschell LC at 6 in Poynter, the Lord Ordinary in Connal v Loder at 1099 and Lord Cunningham at 1018 in Robertson & Co.'s Tr. v Bairds (1852) 14 D 1010.

22. I have also discussed this aspect of these cases in 1986 SLT (News) 265 & 277 at 277-279.

23. Upon onus of proof of foreign law, see Thyssen at 457K.

24. Bearing a certain resemblance to some of the provisions of Article 9 of the US Uniform Commercial Code. It is interesting, in particular, to compare the new provisions relative to registered oversea companies with Article 9-103 (which is fully annotated in vol.3 of the Uniform Laws Annotated, West Publishing 1992).

25. Substituted ss.395(2) and 396 of the Companies Act.

26. These views have been established from professional correspondence with the Registrar of Companies. It is interesting that the general approach suggested in Chapter 3 to choice of law regarding real property rights appears to be adopted by the Registrar in the narrower field of the registration of charges. Palmer (para. 13.408) states the lex situs to be applicable.

27. Substituted s.414(3) of the 1985 Act.

28. Substituted s.414(2). The existing English provisions do not expressly address this issue.

29. Although it is presently optional to submit particulars of such charges prior to taking further proceedings under the law governing the essential validity of the security in question.

30. The apparent inconsistency between the present s.410(5) and s.411(2) would also be eliminated. This also seems to be a change in the law, as the present option to 'register early' in s.411(2) would become mandatory: see Palmer para.13.408.

31. See ss.691 and 744 of the Act.
32. See further Lord Advocate v Huron and Erie Loan and Savings Co. 1911 SC 612 regarding establishing a place of business in Scotland for the purposes of the predecessors of Part XXIII of the 1985 Act.

33. New s.703A(1).

34. At 966. See too Re Oriel at 219.

35. The express provisions relating to future property under the new systems are noted above. They appear to envisage the continuation of such a view of Lloyd J's remarks.

36. The position in relation to 'mobile' and future property is noted above.

37. In Luckins v Highway Hotel (Carnarvon) Pty Ltd. (1975)133 CLR 164, the Australian High Court appears to have considered equivalent provisions under the Companies Act of Western Australia to relate to the existence of a charge, perhaps extending the provisions in some situations as lois d'application immédiat. See Gibbs J at 175 & 179-181.


40. See the new ss.399-407.

41. See Chapter 6,(C,6) regarding insolvency ranking.

42. Although it was agreed that it should be assumed that English law was applicable: see p.961.
Footnotes:

Chapter 5.E: Equitable and functional securities.


3. See e.g. Re Courtney, ex parte Pollard (1840)Mont & Ch 239 and Paget v Ede (1874)LR 18 Eq 118. See too British South Africa Company v De Beers Consolidated Mines Ltd. (1910)2 Ch 502 and Re Anchor Line (Henderson Bros.) Ltd. (1937) Ch 483. The criticism of the Anchor Line case by Lord Keith in Carse v Coppen 1951 SC 233 (at 244 & 247-248) is thoroughly convincing. Collins (1976)27 ICLQ 691 does not recognise (see 699-701) the destructive effect of such English analysis, even if he accepts (at 705-707) that English courts should not seek to undermine foreign proceedings in this regard. The English courts adopted a slightly more civilised approach in Re Queensland Mercantile and Agency Company Ltd. (1891)11 Ch 536, (1892)31 Ch 219.

4. See too the Lord Chancellor at 220 & 223.

5. E.g. the Lord Chancellor at 220, 221 & 229.

6. E.g. the Lord Chancellor at 223.

7. It is not however clear whether the property in dispute was the Jamaican land itself or a fund comprising inter alia the proceeds thereof.


9. On the last point see Chapter 6,C,6).

10. And, perhaps, Robertson & Co.'s Tr. v Bairds (1852)14 D 1010. See Chapter 4,3,5).

11. It is probable that it was intended to obtain security over all of the company's assets.

12. And perhaps even other types of security as well: see p.236.


14. Lord President Cooper at 239, Lord Carmont at 243, Lord Keith at 244.

15. At 245 & 247. This point had been conceded in any event.

16. An issue arising again in Norfolk House Group plc v Repsol Petroleum Ltd. 1992 SLT 235, as discussed in section b) below. Lord President Cooper took a different view at p.242.

17. It does, however, seem peculiar to characterise the competence of a type of security in terms of capacity.

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18. At 243. See too Lord Russell at 244.

19. Though Lord Carmont adverts to this type of analysis at 244. Again this argument does not seem to have been made in the Salt Mines Syndicate case.

20. See Chapter 6, C, 6).

21. Lord Keith characterised the charge in the alternative as a right to levy distress by the appointment of a receiver. Such characterisation might limit the international effectiveness of floating charges.

22. Or, presumably, the law generally governing an item of incorporeal property.

23. On which see generally Collins (1978) 27 ICLQ 691. Some of Collins' views are rather too broadly stated to reflect the approach to floating charges of Scots international private law.


25. Or, it is suggested, the law generally governing individual items of incorporeal property.

26. By the Companies (Floating Charges and Receivers) (Scotland) Act 1972.


28. Indeed in the Australian decision Luckins v Highway Motel (Carnarvon) Pty Ltd. (1975) 133 CLR 164, Gibbs J made the obiter suggestion (at 175) that 'the validity of a floating charge should be determined by the laws of the place where the assets were situated when the charge crystallises'.

29. The present equivalent provisions in s. 463(1) & (2) of the 1985 Companies Act and s. 72 of the 1986 Insolvency Act are in broadly similar terms.

30. Now ss. 53(7) and 54(6) of the 1986 Insolvency Act.

31. See Lord President Emslie at 12, Lord Avonside at 16 and Sheriff Principal Sir Allan Walker at 9-10.

32. See too the relaxed approach taken to an English receiver by the High Court of Ontario in Re CA Kennedy Co. Ltd. and Stibbe-Monk Ltd. (1977) 74 DLR (3d) 87, in which the receiver prevailed over a later garnishee of an Ontario debt, though here too the continuing role of Ontario law was noted (at 92-93).

33. At first instance the Irish receiver had also sought appointment as receiver of assets in England under English law. He does not seem to have been so appointed, but the reasoning of Donaldson J in this regard appears unreported.

34. See Chapter 6, C, 4).

35. Such references may also suggest an analysis of floating charges analogous to that adopted in bankruptcy. As mentioned above, the Scots courts seem unlikely to adopt such an analysis of floating charges.
36. Though see Chapter 6,C,5),b) regarding the breadth of such jurisdiction.

37. See Chapter 6,C,5).

38. (1977)66 RCDIP 126.


40. See Collins (1978)27 ICLQ 691 at 707-710.

41. Luckins v Highway Motel (Carnarvon) Pty Ltd. (1975)133 CLR 164 suggests registration provisions may be so interpreted. See Collins' discussion of this case in (1978)27 ICLQ 691 at 703-704.

42. 1951 SC 233 at 239.

43. At 244 & 247-248.

44. Such a reform proposal was made regarding Scots law by a working party reporting to the Scottish Law Commission: The Report by the Working Party on Security over Moveable Property (1986) para.26(2).

45. Professor Drobnig mentions a decision of the Dutch courts in which an American security interest was given effect in the Netherlands: Hof s'Gravenhage 28 April 1978 (Drobnig, Budapest Report p.306). It is not clear whether the property was initially situated in the USA or the Netherlands, or what choice of law structure was adopted. The breadth of available securities under Dutch internal law may have facilitated the decision.
Footnotes:


1. Companies Act 1985 s.463(2), Insolvency Act 1986 ss.53(7) and 54(6) and Forth & Clyde Construction Ltd. v Trinity Timber & Plywood Ltd. 1984 SLT 94.


3. Or indeed its inclusion in a further fund.

4. See Anton Chap.26 and Dicey & Morris Chap.26 in relation to the administration of estates on death.
Footnotes:

Chapter 6.B: General approaches to international insolvency.

1. See e.g. Trochu pp.11-65; Safa Chap.1; Blom-Cooper Chap.3; J.A. Pastor Riduejo (1971)133 Rec des Cours 135 at 156-172.

2. See e.g. A. Hirsch (1970)6 CDE 50.

3. See e.g. Trochu pp.117-131 for a general discussion of exequatur theories and problems.


5. See e.g. J.D. Becker (1976)62 ABAJ 1290; K.H. Nadelmann (1977)52 NYULR 1; J.D. Becker (1977)52 NYULR 726. The progress of the more recent B.C.C.I. and Maxwell Communications insolvencies suggests that much will also be settled by negotiation in these cases too.


8. See e.g. Trochu pp.160-171 and section C,4) below.

9. See e.g. P.B. Carter (1983)54 BYBIL 207; Cook Chap. 6; Lemontey Report pp.51-52 & 90-98 and section C,5) below.

10. See generally Dalhuisen III.2.05[1].
Chapter 6.C.1.a): Early territorial cases.

1. After its introduction in 1772.

2. Italics added.

3. Although the longer report thereof suggests that the debts in medio in that case had in fact been assigned to the later arresters prior to the English commission by the protest of a bill of exchange which had not been accepted by the later arrestee.

4. Although this may have related to arguments relative to the effectiveness in Scotland of an English bankruptcy discharge.

5. Presumably corporeal.

6. As argued in Selkirk v Davis (1814)2 Dow 230 at 240.

7. The 1772 Act appears generally territorial. See s.30 in this context.

8. See e.g. I.M.O. Klöcker (1985)20 Tex Int LJ 55 at 76-82 & 91-93 for a more subtle German territorial limitation when insolvency jurisdiction derives from the existence of a branch of a business in Germany.

9. See e.g. ss.6 & 11 of the 1793 Act and section 5.B below.
Footnotes:

Chapter 6.C.1).b): *ius ad rem* cases.

1. Which Scots sequestrations did not at that time affect.

2. A creditor not participating in the English process may have been preferred to the English assignees, supporting the *ius ad rem* analysis. The report is not, however, clear in this regard.

3. It is not clear to what extent the reference to Scots creditors was a preference for local creditors, on which see Nadelmann (1943) UPaLR 601.

4. See GL Gretton 1986 JR 51 & 192 and section 3),a) below.

5. The court noted, in the alternative, that the bankrupt had been acting for his creditors and the English assignees when obtaining the adjudication and that the other creditors did not have title to object to the bankrupt's title to lead the adjudication. These comments do not appear to detract from the main *ius ad rem* analysis adopted.

Footnotes:


1. Bradshaw and Ross v Fairholm and Others 1755 Mor 4556; 5 Bro Supp 280 (Kilkerran); 5 Bro Supp 821, 938 (Monboddo). The report in Morison is by Kames, who was on the bench, as, possibly, was Kilkerran. The views of Kames expressed here do not appear consistent with his other writings. See Principles of Equity III.8.6.


3. Mor 4559; Kilkerran pp.281-283; Monboddo pp.821-823 & 938-940.


7. Mor 4557. See too Lord Coalston: Monboddo p.939!

8. Apparently all of the other judges also took this view initially; Kilkerran p.284. The statutory nature of English relation back was also stressed. See too Monboddo p.939 and Kames' commentary at Mor 4557.

9. Particularly as Kilkerran may have been on the bench!

10. As argued by the assignees: Mor 4558.


12. The arresters laid more stress on the debtor's residence: Monboddo p.822, as did the Lord President when discussing the Irish bonds: Monboddo p.939. See too Kilkerran p.821n.

13. Monboddo p.822n. See too Mor 4559.

14. This reference to the lex situs can of course be reconciled with the Lord President's earlier indication that prospective effect could be given to the English bankruptcy in Scotland from the date of the commission.

15. It is slightly odd that Lord Prestongrange considered the arrestments of the Irish bonds to be valid: Monboddo p.939.

16. This view is perhaps supported in the case of Lord Prestongrange by his support for the mobilia sequuntur personam maxim in relation to the Irish bonds (Monboddo p.939).

17. Mor 4557. Kames' commentary strongly supports the voluntary transfer analogy and is adamant that no retrospective effect can be given in Scotland to the English bankruptcy. See too Kilkerran p.282.


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21. This is not wholly consistent with his Lordship's ascription of an English lex situs to the English bonds largely as the lex loci solutionis. See above; Kilkerran p.281n; Monboddo pp.822 & 824.

22. Monboddo p.940. See too the arresters' arguments: Mor 4558.

23. Which had been obtained in relation to some of the arrestments prior to the commission.


25. If he had such a domicile. It is also odd that Lord Prestongrange thought the arrestments of the English bonds void: Monboddo p.823.


27. Mor 4557.


29. Mor 4557.


Footnotes:

Chapter 6.C.1 d: Strother v Read.

1. Apparently corporeal.

2. Probably also of an English debt.

3. It is arguable that jurisdiction for such an action should have been refused in the presence of an appropriate foreign insolvency process. See section 5) below.

4. See W. Raeburn (1949)26 BYBIL 177; Voulgaris Chap. 1.

5. Formal reciprocity requirements have sometimes been set out by the statute. See K.H. Nadelmann (1944)5 U Toronto LJ 324 at 329 in relation to Austrian law.

6. By the lex loci actus?

7. Which was probably that in Solomons v Ross (1764)1 H.B1. 131n and Jollet v Deponthieu (1769)1 H.B1. 132n. See K.H. Nadelmann (1946)9 MLR 154.

8. See further section 5) below.

9. The analogy to s.72 of the Insolvency Act 1986 is interesting. See chapter 5 E,2) above. Section 23 of the 1793 Bankruptcy Act may, as referred to above, have influenced this approach.

10. See section 2),d) below.
Footnotes:

Chapter 6.C.2.a): The Stein cases.

1. The reports are not entirely consistent about the structure of the distillery businesses. These inconsistencies do not appear material.

2. Robert Stein had been resident in England for a short time prior thereto.

3. Although payments may have been suspended: Rose p.463.

4. Or perhaps separate assignations relative to property in different countries: Rose p.464. The reports are not completely clear and consistent about the parties to the various deeds granted or the property to which such deeds related.

5. The bank also seems to have suggested that the actions of John and Robert Stein, and perhaps even those of their partners, the Scots firm and even the English commission itself were contrary to the Bankruptcy Act 1696 c.5: Rose p.466. See section 4),c) below.

6. FC Lord Bannantyne p.82, Lord Craigie p.82, Lord Justice-Clerk Boyle pp.83-85, if changing his tune at p.89.

7. FC Lord Robertson p.76, Lord Meadowbank pp.78 & 80, Lord Justice-Clerk Boyle p.84.

8. Lord Justice-Clerk Boyle FC p.89.

9. FC p.80. See too Lord Justice-Clerk Boyle pp.84-85.

10. And assignments?

11. E.g. Lord Meadowbank FC p.86.

12. E.g. Lord Justice-Clerk Boyle FC p.89.

13. E.g. FC Lord Robertson p.77. No clear distinction was made between corporeal and incorporeal moveables.

14. FC p.79. His Lordship referred to Scott v Leslie 1767 Mor 4562, in which he acted as counsel, for the ius ad rem approach.

15. As did the assignees: FC p.75.

16. FC p.82, from which he may have departed: p.86.

17. See section 5) below.

18. FC Lord Bannantyne p.81, Lord Robertson p.77 and Rose p.478.

19. See e.g. K.H. Nadelmann (1943)91 U Pa LR 601.

20. FC p.74. See too Rose pp.466-468.

22. FC: Lord Robertson p.76, Lord Justice-Clerk Boyle p.84.

23. E.g. Lord Justice-Clerk Boyle FC p.89.

24. FC: Lord Bannatyne p.88; Lord Justice-Clerk Boyle p.89.


26. Whether his Lordship meant by business connection or domicile is not clear.

27. Rose p.475. See section 5),d) below.

28. Rose pp.472-473. In Weston v Falconer 17 December 1817 FC at p.443 Lord Craigie suggested that the conveyances to the assignees in Stein were reducible under Scots law, perhaps inferring that sequestration should have been awarded in Stein.

29. The Bank's views were similar: Rose pp.468-469.

30. FC p.74, Rose pp.468 & 470.

31. It is surprising that counsel did not thereupon amend the petition at the bar.

32. See e.g. Lindley and Banks on Partnership (16th ed. R.C. l'Anson Banks, London 1990) Chap.3.

33. The reports do not disclose what ultimately became of this consignment or its proceeds.

34. The law determining this preference does not appear to have been discussed. See section 6) below.

35. W&S p.56; 7 S 689-690.


37. One of whom was domiciled in Scotland.

38. Lord Balgray 10 S 651. Prior to the decision of the House of Lords on the homologation point his Lordship had looked rather more favourably on the Scottish trustees: W&S p.52n!

39. See the worries expressed by C. Connerton in relation to this point in an EC context: [1977] JBL 8.

40. Nor presumably other effects of such process.

41. The possibility that a foreign bankruptcy may not proceed on the basis of property transfer was apparently not discussed.
Footnotes:


2. It is not clear whether or not it was argued in that case that the action was incompetent in Scotland and should have taken the form only of proof in the English process. Certainly this argument does not appear to have been made in the multiplepinding as a reason for the invalidity of the 1798 arrestment on the dependence. See section 5 below.


6. Under reference to the first Stein case.

7. See e.g. Blom-Cooper pp.91-100.

8. Perhaps unintentionally inferring that creditors elsewhere were not affected?


10. Rose pp.309-313. The Lord Chancellor also made the bizarre suggestion, relative to Stein, that all partnership property should be considered personal for the purposes of international insolvency: Dow p.242.


12. It may be wondered to what extent the Lord Chancellor considered registration of property relevant in this context. C.f. Morrison v Harrison (1876)3 R 406.

13. 20 Jan 1813 FC p.79. As indicated above, this was not a major element of Lord Meadowbank's reasoning in Stein. Lord Meadowbank, in the brief report of the Inner House judgements in Selkirk, does however appear to have favoured the analogy of the legal assignment on bankruptcy to that arising on marriage.


17. Rose pp.296, 299, 311 & 317. This was probably because sequestration took place under the 1772 Bankruptcy Act. Compare Cole v Flammare 1772 Mor 4620 and s.30 of the 1772 Act with the dicta in the first Stein case and Goetze v Aders (1874)2 R 150.
18. Rose pp.311-314, Dow p.247. Such difficulties, and in particular ranking difficulties, were also noted by Selkirk, even if he came to different conclusions: Rose p.304.

19. See Salaman v Earl of Rosslyn's Trs. (1900)3 F 298 and, more generally, section 5) below.


21. See section 5) below. Rather oddly, Selkirk is considered a major English authority on this point! See e.g. Dicey & Morris p.1110. Smart also suggests at pp.154-155 that Selkirk is authority for a court to undermine diligence executed under its own system if the creditor in question has participated in a foreign insolvency process which purports to undermine such diligence. This somewhat stretches the ratio of Selkirk.
Footnotes:

Chapter 6.C.2.c): The Falconer cases

1. Falconer v Weston 18 Nov 1814 FC pp.32 & 41.

2. Weston v Falconer 17 Dec 1817 FC.

3. The reports do not disclose whether or not commissions of bankruptcy were issued in England against Hunter's partners.

4. Or perhaps in relation to sums owed to Hunter by this corporation. The report is not clear.

5. It may be wondered, by analogy to Lord Meadowbank's dicta in the first Falconer heritage case noted below, whether or not any reversion to Hunter from the English process might have been sequestrated. Falconer does not appear to have intrmitted with these moveables. His actions may have been protected had he done so. See section 5) below.

6. (1814)2 Dow 230 at 245-246, Falconer 1814 FC pp.35-36.

7. See section 5),e) below. This approach of the English assignees is similar to the concept of the masse of creditors in French international private law (see Trochu Chap.3) and may also be linked to the suspension of individual actions by creditors which the commission doubtless imposed.


9. Lord Meadowbank 1814 FC p.35.

10. And, it would appear, to Falconer: 1814 FC p.33. See Nadelmann (1946)59 HarvLR 1025 at 1046-1049. Indeed in many legal systems the avoidance of preferences may in effect create estate for an insolvency process where there was none before.

11. 1814 FC pp.35-37, 39 & 40. As, apparently, did Lord Robertson, if briefly (1814 FC p.37), and inconsistently with his Lordship's views in the second Falconer heritage case noted below.

12. Lord Meadowbank's flexible structure shows interesting parallels to the 'turnover order' introduced by the reforms introduced 150 years later in the US 1978 legislation. See section D below.


14. 1814 FC: Lord Justice-Clerk Boyle p.40, Lord Glenlee p.39. Lord Meadowbank seems to have taken this view largely on jurisdictional grounds, and, to a lesser extent, on grounds of convenience: p.36.

15. See Lord Justice-Clerk Boyle 1817 FC p.449.

16. Later amended to the sale proceeds net of heritably secured debts.

18. This point was raised by the English assignees and rejected by Lord Justice-Clerk Boyle in the first Falconer heritage case: 1814 FC p.40.


20. His Lordship appeared to suggest that sequestration would have been awarded even if opposed, distinguishing Stein:1817 FC p.446. Lord Bannatyne was less convinced at p.447.

21. See too Lord Justice-Clerk Boyle 1817 FC p.450.

22. Lord Craigie had changed his view of Stein, now considering the dispositions there reducible under Scots law. Lord Craigie's judgement is also interesting for his Lordship's explicit rejection of analogy in moveables to succession, the re-affirmation of his Lordship's view in Stein that sequestration may be awarded notwithstanding an existing foreign process and the favour shown to sequestration as a method by which to attach Scots heritage when such a foreign process exists.

23. 1817 FC pp.444-446. Lord Justice-Clerk Boyle may have supported this reasoning to some extent at p.450.


25. See section a) above and (1813)1 Rose 462 at 466-468. Lord Justice-Clerk Boyle in Falconer (1817 FC p.449) also alluded to reliance on local funds of credit.


27. See e.g. Nadelmann (1946)59 HarvLR 1025 at 1041-1046.
Footnotes:


None!

6. At 193 & 196. Lord Ardwall, as indicated below, used the vague concept of 'attachment'.

7. At 193 & 196. Lord Ardwall appears to have been particularly influenced by the views of Professor Sokoloff, the expert witness, on choice of law issues. These were clearly out with his result, although they may have influenced his views on other law. The Bar (see Book III) would probably have produced a rather different opinion. In Frontispiece George Company v Leanne &Anna Ltd. (1930) R 1189 at 1142, Lord Denning approved Professor Sokoloff's opinion in Solution without reservation, and indeed criticised the limited nature of the report thereon.

4. The Royal Bank of Scotland v The Assignees of Stein, Smith and Company 26 Jan 1819 PC.

5. For Lord President Ingles at 127.

6. As discussed in section c) above, this emphasis on representation of creditors by an involuntary administrator was largely rejected in the Salomon case.

7. Salomon v Salomon 1914 PC 254 at 261.

4. At 262 & 263 later appeared to exclude this possibility. Geddes v Verieside (1932) 269 2122 at 1228 may suggest that a strict construction may be used in the absence of a foreign process to 'create' Scots assets by the reduction of preference. See section d) below.

8. Notes of Lord Young in Olsson v Allen (1804) 31 R 848 at 849 suggest a more discretionary approach in this regard.

1. The latter point is considered more fully in section 4) below. It may also be wondered whether or not jurisdiction in the action raised against the bankrupts should have been channelled to the Saxon process. See section 5) below.

2. At 153 & 155. Lord Ardmillan, as indicated below, used the vaguer concept of 'attachment'.

3. At 153 & 156. Lord Ardmillan appears to have been particularly influenced by the views of Professor Endemann, the expert witness, on choice of law issues. These were clearly outwith his remit, although they may have influenced his views on Saxon law. Von Bar (see Book XII) would probably have produced a rather different opinion. In Phosphate Sewage Company v Lawson & Sons' Tr. (1878)5 R 1125 at 1142, Lord Deas approved Professor Endemann's opinion in Goetze without reservation, and indeed criticised the limited nature of the report thereof.

4. The Royal Bank of Scotland v The Assignees of Stein, Smith and Company 20 Jan 1813 FC.

5. Per Lord President Inglis at 152.

6. As discussed in section c) above, this emphasis on representation of creditors by an insolvency administrator was largely rejected in the Falconer cases.

7. Falconer v Weston 16 Nov 1814 FC p.41.

8. Araya v Coghill 1921 SC 462 later appeared to exclude this possibility. Gardner v Woodside (1862)24 D 1133 may suggest that a Scots sequestration may be used in the absence of a foreign process to 'create' Scots assets by the reduction of preferences. See section 5) below.

9. Dicta of Lord Young in Gibson v Munro (1894)21 R 840 at 847 suggest a more discretionary approach in this regard.
Footnotes:


1. (1878)5 R 1125. See too (1879)6 R(HL) 113, (1874)1 R 840, (1876)3 R(HL) 77 & (1877) ChD 394.

2. See e.g. Wilsons <Glasgow & Trinidad) Ltd. v Dresdner Bank (1913)2 SLT 437.

3. The Royal Bank of Scotland v The Assignees of Stein, Smith and Company 20 Jan 1813 FC.

4. In s.102 of the Bankruptcy (Scotland) Act 1856.

5. Referring to Roy v Campbell's Assignees (1849)12 D 1028 and (1853)16 D 51.

6. Although the composition of the bench in Goetze and the Phosphate Sewage case was almost identical.

7. See generally Anton Chap.7.

8. Trading domicile rather than personal domicile was very much emphasised in Obers v Paton's Tr. (1897)24 R 719 at 732 and 733.


10. Falconer v Weston 18 Nov 1814 FC and Weston v Falconer 17 Dec 1817 FC.
Footnotes:

Chapter 6.C.3: Vesting of property and the *lex situs*.


2. At 318-319 *per* Lord Moncreiff, who quoted with approval Bell Comm. ii.390.

3. The Royal Bank of Scotland *v* The Assignees of Stein, Smith and Company 20 Jan 1813 FC, Falconer *v* Weston 18 Nov 1814 FC and Weston *v* Falconer 17 Dec 1817 FC. See sections 2), a) and c) above.

4. See Graham Stewart, A Treatise on the Law of Diligence (Edinburgh 1898) pp.636 and 637, GL Gretton, The Law of Inhibition and Adjudication (Edinburgh 1987) Chap.13. If the analysis of the English process had proceeded in Rattray *v* White, as in Murphy's Tr. *v* Aitken 1983 SLT 78 and Salaman *v* Tod 1911 SC 1214 below, in terms of voluntary asset transfer by the bankrupt, the precise date at which the right *in re* of the English assignees accrued in Rattray *v* White may have been more important. However, even a *ius ad rem* prior to commencement of the adjudication actions would probably have allowed their defeat as a matter of Scots law, provided a *ius in re* was acquired by the English assignee prior to the adjudger.

5. Although s.64 of the 1825 Act did contain such a provision relative to the plantations and colonies.

6. Although not explicitly discussed, the ranking of the adjudications with the English process appears to have been determined in accordance with Scots law. See section 6) below.

7. See section 4) below.

8. See sections 1) and 2) above.


10. The requirement for a subsequent French or Scots court order to vest the *legitim* claim in the syndic was not discussed. The issue was not perhaps contentious after the discharge of the claim had been reduced. As a court order under s.103 of the 1856 Bankruptcy (Scotland) Act was necessary at the time fully to vest such acquirenda in a Scots trustee in sequestration (Grant *v* Green's Tr. (1901)4 F 1016.), it may be suggested that an order of the French or Scots court would have been strictly necessary in Obers to vest the *legitim* claim in the syndic, if the approach apparently taken by Lord Kyllachy were to be followed.

Despite the favour shown by the First Division in Obers to the syndic as regards the reduction of gratuitous alienations, it is suggested that s.103 was framed with only Scots sequestrations in mind and that only limited further assistance would have been available from the Scots court (see section 5) below. In particular, Araya *v* Coghill 1921 SC 462 suggests an unwillingness outwith statute to vest Scots heritable property in foreign insolvency administrators.)
An appropriate order by the French court might have been allowed effect in Scotland on the basis of the main line of authority from Strother v Read 1 July 1803 FC discussed in sections 1) and 2) above (In Mein v Turner and Andrew (1855)17 D 435 Lord Cowan certainly envisaged a Scots court order being obtained to vest English acquirenda in a Scots trustee in sequestration. Smart however suggests at pp.142-144 that the English bankruptcy in that case would have been considered by the English court to prevail.). Lord Kyllachy did, however, state in Obers (at 725) that the syndic would be 'vested with ... all acquisitions during the bankruptcy as the same fall in'. Despite the above argument, a court order may not therefore have been considered necessary to vest acquirenda in the syndic if not required by French law.

11. Lord Kinnear at 1220, Lord Mackenzie at 1223-1224.

12. In Colville v James (1862)1 M 41 a Scots fund over which a power of appointment was held may have been considered to have passed to the assignee under an English bankruptcy of the holder of the power, on the basis of opinions as to English and Indian law. However the dispute was compromised, the Indian statute was considered 'imperial' and there was no indication that Scots law was considered different from Indian law in this regard.

13. Similar arguments in the Stein cases that property owned by the Scots distillery partnerships had vested under English law in the English bankruptcy assignees of partners thereof were not fully pursued. See section 2),a) above.

14. Little else can really be drawn from this case, except that analysis of the English process in terms of a voluntary transfer under Scots law of the trust funds by the bankrupt would probably not have vested them in the English assignees. The trust was in part for creditors, in part a refinancing exercise and in part for the truster's family. It appears to have been designed mainly to restrain the truster's profligacy.

15. See section 5) below.

16. There were no arguments relating to the 'imperial' nature of the English statute or any potential conflict with the Scots statute.

17. And perhaps even Irish debts! See section 1),c) above. In addition see the English case Re Tuticorin Cotton Press Company Ltd. (1895)71 LT 723 in which reference is made to a decision of the Court of Session in which a bankruptcy in Ceylon was given effect relative to shares in an English company.

18. See section 4) below.

19. See section 5) below.

20. The Lord Justice-Clerk at 186, 187 and 188. It was not suggested that the Scots statute took effect in England as an 'imperial' statute.

21. These were bills accepted by Steins in Scotland and may therefore have been considered Scots property.

23. Accordingly the automatic vesting of future property which English law apparently provided (see pp.426-427.) might, for example, have been considered to transfer Russian property to an English bankruptcy assignee the instant it was acquired, irrespective of the effects of Russian law.

24. Italics added. Section 31 of the Bankruptcy (Scotland) Act 1985 contains no such proviso.

25. It should be noted that this is not an exclusion of foreign law on policy grounds but rather one aspect of a choice of law rule under which the lex situs may allow a further system to take certain effects. This was described in Chapter 3,C,2) as a permissive renvoi.
Footnotes:


1. Now set out in para.24 of Sch.7 to the Bankruptcy (Scotland) Act 1985.

2. Nadelmann was particularly critical of this situation throughout his writing. See e.g. (1946)11 Law & Contemporary Problems 696 at 698-701, (1974)30 Ann. Suisse de Droit Int. 57 at 73-76 & 87 & seq and (1984)33 ICLQ 431.

3. Cole v Flammare 1772 Mor 4820 suggests the earlier, more territorial, approach of the Scots courts to general insolvency issues was preferable in this regard.

4. Muir Hunter considered this (see (1972)21 ICLQ 552 at 596) a significant problem in relation to the then current draft of the proposed EC bankruptcy convention. The general problem of differences in substantive suspect period rules did not disappear in later drafts: see the Lemontey Report p.82.
Footnotes:


2. Such reasoning from the 1696 Bankruptcy Act may not be tenable in the light of its later interpretation, as discussed below.

3. Bradshaw and Ross v Fairholm and Others 1755 Mor 4556, 5 Bro Supp 280, 821 & 938.

4. It is interesting to compare the decision in Stewart v North (1889)16 R 927, in which the First Division gave an English charging order over a debt for costs in an English court action retrospective effect so as to prevail over an intervening Scots arrestment of such debt.

5. See section 5) below.

6. 49 Geo.III c.121, by requiring knowledge by the affected creditor of acts of bankruptcy.

7. Particularly in the unfair preference cases discussed below. See too Bell Comm. ii.572 where Hunter is considered a reversal of dicta of Lord Hermand in Oswald's Trs. v Gibsons (1810), which appears otherwise unreported.

8. See section d) below. Lord Adam was the only judge sitting on both benches.

9. It may also be interesting to speculate whether or not the First Division would have taken the same view had the poinding occurred after the English bankruptcy had been awarded, as the restriction of the poinder's rights under the Scots statute would have been identical. A further explanation of this case is the characterisation of the Scots rule as a rule of ranking, as to which Scots law may have been considered irrelevant. See section 6) below. Such characterisation does not appear to have been discussed.

10. As discussed below, such an insular approach was of course taken to the 1696 Bankruptcy Act by Lord Justice-Clerk Hope in White v Briggs (1843)5 D 1148.

11. Anton (at 734), for example, appears to accept a broad ratio for Grimshaw.

12. The presence of a separate English insolvency process in Re Sudair International Airways Ltd. [1950]2 All ER 920 did not seem to assist in addressing this evil, as the English rules were not interpreted broadly enough to assist a prior liquidation in South Africa, the place of incorporation of the company in question.

13. The meaning of his Lordship's second sentence is rather obscure. The point seems clear from the first sentence!

14. Bankruptcy Act 1883 s.117.
Section 221(1) of the Insolvency Act may allow these provisions to be invoked in relation to an 'unregistered' company being wound up under Part V of the Insolvency Act. As, however, all companies 'registered under the legislation relating to companies in Great Britain' are excluded from such a winding up by s.220(1)(b) of the Insolvency Act, the application of s.185 in respect of foreign companies may be limited.

16. This was, in effect, the situation in Goetze v Aders.

17. The execution in Scotland of diligence against an English registered company prior to its liquidation in England.

18. The final irony is contained in s.128(2) of the 1986 Act, which gives effect for the benefit of Scottish companies to English provisions avoiding attachments after liquidation!

19. Though arguably the general approach in Re Paramount Airways Ltd. (No.2) [1992] BCC 416, discussed below, may yet reverse the Scottish trend in this regard.
Footnotes:


2. It is not clear to what extent the trustee considered these choice of law criteria to be cumulative, or to what extent the domiciliary emphasis was a lex situs argument deriving from the mobilia sequuntur personam maxim. Neither is it clear that the English firm completely ignored the lex situs, as they may have considered English law, or at least a law other than Scots law, to have been the lex situs at the critical time.

3. Perhaps now the proper law of a contract challenged?

4. Further problems obviously arose from the determination of the lex loci actus and the law governing the transaction, and also from the determination, in the light of the limited continuing influence of the mobilia sequuntur personam maxim, of the lex situs of incorporeals and corporeals in transit, both represented by documents of title, when such documents themselves may have been the subject of a conflit mobile.

5. At 1175, though principally in rejecting the English firm's assessment of the lex loci actus. His Lordship also noted (at 1175) that the English bill and the goods were situated in Scotland at the time the bankrupts completed their part in the preference. It was also suggested, ambiguously, (at 1176; see too Lord Mackenzie at 1153-1154 and Lord Cuninghame at 1166) that Scotsmen would be treated no differently from Englishmen in relation to preferences granted over assets abroad.

6. Furthermore, his Lordship's view that the 1696 Act gave rise, in real time, to conditional nullity of the grant of a preference from its date is not tenable as a matter of internal Scots law, although this may not have been clearly established until after Briggs (See Goudy p.101 and Bell Comm. ii.193-194, 196 & 217). This internal analysis may have influenced his Lordship's views on choice of law.

7. At 1156-1157. See too the slightly different approach of Lord Cuninghame at 1168.

8. In the course of distinguishing Hunter v Palmer and reinforcing its analysis in strict territorial terms in relation to diligence.

9. At 1167. See too the reference at 1168 to English rules.

10. See 1158-1159. His Lordship's disability analysis is odd firstly because it is out of step with traditional capacity reasoning in international insolvency, as it refers in places to the lex loci actus rather than the personal law, and secondly because capacity reasoning itself is out of step with the main line of authority from Strother v Read. His Lordship does, however, also refer to divestiture in places.

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11. Which may of course have been linked necessarily to an English insolvency process (see Galbraith v Grimshaw above in relation to execution) and therefore inapplicable.

12. Or perhaps the lex loci actus, given his Lordship's version of disability analysis.

13. At 1158, although this point may not have been fully considered.

14. See Geddes v Mowat, section 2)(d) above.

15. And was indeed the normal precursor to formal sequestration of the estates of a debtor by the court: see Goudy Chap.VII, Bell Comm. ii.156-166 & 286 and s.11 of the Bankruptcy (Scotland) Act 1913.

16. Relying, it would seem, to a substantial extent upon the judgement of the Lord Ordinary in Cowan v Dixon (1828)5 Fac 137, which is discussed below and which is not based clearly upon the application of the lex situs.

17. Who may in fact have been Scots.

18. See Chapter 3,E above.

19. The argument much rehearsed in Briggs regarding the possible distinction between the prospective and retrospective parts of the 1696 Act was also canvassed in Sym.

20. And indeed on the relative nature of such invalidity as regards non-acceding creditors.


22. And one of the other partners.

23. The difference between Scots and English law as to the separate personality of a partnership was a further complication.

24. In Blackburn Ptnr. 22 Feb 1810 FC the 1696 Act was applied in respect of securities granted over Scots land by an Englishman shortly after notour bankruptcy had been constituted by arrestment. The Englishman had also granted a trust deed for creditors, the law relevant to which was not elaborated. Cross-border issues do not appear to have been discussed.


26. The present Scots statutory rules may not be as receptive as the 1696 Act to a foreign trigger, given their apparent linkage to particular insolvency processes: Insolvency Act 1986 s.243(4) & Bankruptcy (Scotland) Act 1985 s.36(1). As discussed below, the situation regarding gratuitous alienations seems similar.

27. 20 Jan 1813 FC and (1813)1 Rose 462.
28. Rose pp.468 & 470. Reference was also made to the Bankruptcy Act 1621 relative to gratuitous alienations.

29. Perhaps the *lex loci actus*, given the later reference to *Sym v Thomson*: p.470.

30. Under reference to *Hunter v Palmer*.

31. See section 5) below.

32. See section 1), d) above, where it is suggested that *Strother v Read* is not based upon the *mobilia maxim*.

33. Which reformed the doctrine of relation back in English law. See section b) above.

34. Both with and without a reference to the *mobilia maxim*.

35. Whatever the *lex situs* may have been, given the nature of the property in question.

36. (1843)5 D 1148, by Lord Mackenzie at 1157. Lords Jeffrey (at 1160) and Moncreiff (at 1171) supported Cowan in their dissenting judgements.

37. Unfortunately the choice of law issue was not discussed in *Scottish Provident Institution v Cohen* (1888)16 R 112, in which it was argued that a security obtained in England over a Scots insurance policy could be reduced in Scotland under the 1696 Act. If solely the *lex loci actus* had been applicable it might have been argued that the 1696 Act was inapplicable as a matter of choice of law as well as on substantive interpretation.

38. See s.78(5) of the 1985 Act.


40. And s.61 of the Bankruptcy (Scotland) Act 1985.

41. And the English anti-fraud provisions contained in ss.423-425 of the Insolvency Act.

42. The likelihood of the invocation of the anti-diligence provisions of the Insolvency Act in the winding up of an unregistered company under Part V of the Insolvency Act is noted in section b) above. The position of such a company seems similar as regards the unfair preference and analogous provisions of the Insolvency Act.

43. Which may now, perhaps, be interpreted as the law under which a relevant insolvency process has been instituted.

44. This approach may also be inferred, as regards preferences, from the English decision in *Re Maxwell Communications plc (No.2)* [1992] BCC 757, The Times 13 October 1992.
Footnotes:


1. See now the Insolvency Act 1986 s.242 and the Bankruptcy (Scotland) Act 1985 s.31.

2. Lord President at 732, Lord McLaren at 733.

3. At 723. His Lordship also referred, rather inconclusively, to the father’s Scots domicile at 722.

4. The pursuers argued (at 721) for the application of Scots law esto Paton were a Scots rather than a French domiciliary, inferring the domiciliary system to be applicable in principle. However, they also argued (at 729) that French law incapacitated Paton, as the law governing the bankruptcy.

5. At 723, based largely upon the dictum in Goetze v Aders (1874)2 R 150 referred to above.

6. Lord President at 732, Lord McLaren at 733.

7. See too Salaman v Rosslyn’s Tre. (1900)3 F 298 in which, with little discussion of choice of law, an English bankruptcy superseded a Scots trust as if it had been a Scots sequestration.

8. The point may not be closed given the creative interpretation in Re International Bulk Commodities Ltd. [1992] BCC 463 of the word ‘company’ for the purposes of the status of administrative receiver under the Insolvency Act.

9. Analysis through jurisdiction in personam against recipients of benefits and analogies therefrom to coercive jurisdiction relative to foreign insolvency processes (see Paramount at 424 and section 5(d) below) seem particularly alien to Scots analysis in this context. The main interpretation point concerning the words ‘any person’ appears to derive from this analytical approach.

10. Indeed discretion in applying your own legal system sits more easily with ‘policy evaluation’ approaches to international private law in general than with traditional choice of law rules.
Footnotes:


1. Though Wilsons v Dresdner Bank may infer the rejection of such fragmentation.

2. As, perhaps, the law under which an insolvency process has been instituted.

3. In Re Maxwell Communications plc (No.2) [1992] BCC 757 at 765 Hoffmann J seemed to envisage concurrent application of English and US provisions. The Court of Appeal (The Times 13 October 1992) does not seem to have disagreed. It would be hoped that the provisions in question would be applied more subtly than in Re Sudair International Airways Ltd. [1950]2 All ER 920.

4. The list of systems designated in the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123) is relatively limited.

5. It is similarly obscure whether or not Scots provisions would remain considered tied to Scots insolvency processes. Re Dallhold Estates (UK) Pty Ltd. [1992] BCC 394 suggests an ancillary Scots process may be instituted for the purpose under s.426 in some situations. It may, however, be difficult, given decisions such as Goetze v Aders (1874)2 R 150, to institute ancillary Scots sequestrations for this purpose.

6. Or another law governing the property in question, such as the proper law of a debt.

7. Or, perhaps, the law under which an insolvency process has been instituted.

8. Or other law governing the property in question.

None!
Footnotes:

Chapter 6.C.5.b: Methods establishing unity and universality: initial jurisdiction.

1. Mercer v Tasker 29 May 1804 FC, Gaziot v His Creditors 1812 Hume 118, Kennedy v Ker (1838)16 S 990, Hossack v Laidlaw (1841)4 D 268.

2. Other assets could presumably have been conveyed, as appropriate, to a trustee: ss.11 & 30 of the 1772 Bankruptcy Act.

3. Cessio was also refused in Duncan v Slime (1821)1 S 61 as there was a subsisting English bankruptcy of the debtor.

4. Sections 6 & 11 of the 1783 Bankruptcy Act were substantially the same as ss.13 & 17 of the 1793 Act in this regard.

5. Which was effectively repeated as s.19 of the 1814 Act.

6. Which required at death both residence or the carrying on of business in Scotland and property situated in Scotland.

7. In Joel v Gill (1859)21 D 929 Lord Justice-Clerk Inglis tritely assumed (at 938) this requirement to relate only to the debtor.

8. It is indeed difficult to distinguish Joel v Gill from Keir v Dickey, which was not referred to in Joel. See too the discussion in the 1st ed. of Anton (1967) pp.432-433.

9. Both Lord Benholme and Lord Kinloch had recalled the sequestration on separate occasions.

10. The removal in the 1856 Bankruptcy Act of the previous restriction of sequestration to traders appears to have been considered important. This was of course the position under the 1772 Bankruptcy Act. It is interesting that the former broad jurisdiction under the 1772 Act was restored without the territorial limitations thereof suggested by Cole v Flammare.

11. Arrestment of moveables to found jurisdiction would have been insufficient, being an exceptional ground of personal jurisdiction. See Wylie at 670.

12. A slightly more sensible approach is evident in Gairdner v MacArthur (1918)56 SLR 20, in which a serviceman was sequestrated in Scotland even though there was strictly no ordinary personal jurisdiction against him, as a result of his absence from Scotland on military service.


14. The dicta in Gardner v Woodside (1862)24 D 1133 to the effect that a Scots sequestration is competent in the absence of assets to sequestrate may, however, cast doubt on this simple analysis of Stein and Goetze. Alternative analyses of
these cases do not appear to have influenced the literal interpretation of the former Scots Bankruptcy Acts.


16. A sequestration was recalled in Gardner v Woodside as an abuse of process. See too Spedl v Stirton (1850)12 D 985. It seems unlikely that this ground of recall will often be useful in this context.

17. See too Sim v Robinow (1892)19 R 665.

18. It would further seem, from Gibson v Munro (1894)21 R 340 and Central Motor Engineering Co. v Gibbs 1918 SC 755, that the Scots courts will not reduce a Scots sequestration, save in very exceptional circumstances, leaving such a process fully effective outwith the statutory criteria for recall. Section 15(4) of the Bankruptcy (Scotland) Act 1985 obscurely preserves 'any right to bring an action of reduction of an award of sequestration'.

19. Hopefully to be interpreted as 'one or more countries'? Cf Rischmann.

20. Sections 117 & 120 of the Insolvency Act 1986, or as regards liquidations under Part V of the Insolvency Act, deemed registration of unregistered companies: s.221(2).

21. It is interesting that Lord Shand was of the view (at 442) that the Scots liquidator would play a part in the appointment of any American receiver, as a representative of the company's creditors.

22. Oversea companies registered under Part XXIII of the Companies act 1985 appear in a similar position: s.696 of the 1985 Act and ss.117 & 120 of the 1986 Act. It would seem from ss.221(2) and 225 of the 1986 Act that certain companies registered in Northern Ireland may be wound up in Scotland under that Act.

23. Lord Greive found support for his views in the English cases Banque Des Marchands de Moscou v Kindersley (1950)12 All ER 549 and Re Compania Meraballo San Nicholas SA [1972]13 All ER 448, from which his Lordship would otherwise have been disinclined to differ.

24. See Smart Chap.3 for a discussion of the English authorities in this regard.


26. It may be suggested that institution of a separate insolvency process was a surprisingly broad interpretation of s.426 of the Insolvency Act. If a separate process is co-operative in outlook, such breadth of approach should probably be welcomed nevertheless. A similar procedure appears to have been adopted regarding the appointment of Scots liquidators to the Bank of Credit and Commerce International SA: see Drummond Young pp.395 & 409.
Footnotes:


1. Bradshaw and Ross v Fairholm and others 1755 Mor 4556.

2. Falconer v Weston 18 Nov 1814 FC, Weston v Falconer 17 Dec 1817 FC.

3. Arrestments executed by the pursuer in Roy v Campbell's Assignees were also recalled. The Scots court obviously felt it appropriate to exercise its jurisdiction in this regard.

4. Roy v Campbell (1850)12 D 1028. The court required a minute to be lodged concerning the English bankruptcy. It is not clear if the decision was affected by the minute lodged.

5. The convenience of continuing an English action in order to determine liability for calls and rescission of a related subscription contract for the purposes of a supervening Scots liquidation was also noted in The London & Scottish Banking and Discount Corporation Ltd. (1895)3 SLT 21, in which leave to continue the action was granted under s.87 of the 1867 Companies Act.

6. In addition to the cases discussed below, see too Colville v James (1862)1 K 41 at 45.

7. And see Lord Deas at 1142-1143.

8. Although it was ultimately considered indirectly applicable as part of the law governing the partnership contract relating to the company!

9. Lord President Boyle noted (at 553) the competency of winding the company up under the English Act. If the Act had been considered inapplicable or its application inappropriate his Lordship may have taken a different approach to the English process.

10. Section 23A of the Prescription and Limitation (Scotland) Act 1973, inserted by s.4 of the Prescription and Limitation (Scotland) Act 1984.

11. See too (1904)6 F 429.

12. Lord Murray commented in Port of Manchester Insurance (at 148) that without the statutory enforceability in Scotland of English bankruptcy judgements, s.177 of the 1929 Act, requiring leave to proceed, may have been interpreted restrictively to English actions. This statutory interpretation does not detract from the Edinburgh and Glasgow Bank case, which was not referred to.

13. (1874)1 R 840 and (1876)3 R(GL) 77, esp. Lord Selborne at 96-97. See too the later case, per Lord Shand: 5 R 1125 at 1146.

14. Falconer v Weston 18 Nov 1814 FC, Weston v Falconer 17 Dec 1817 FC.

15. Which were apparently Canadian.
16. Lord President Inglis and Lord Mure were on the bench in both Okell v Foden and the Phosphate Sewage case.

17. Smart suggests at pp.142-144 that the English trustee would have prevailed in the English courts. It is suggested in section 3) above that the Scots courts should not be so insular.

18. In Wilsoms (Glasgow & Trinidad) Ltd v Dresdner Bank (1913)2 SLT 435 a plea of forum non conveniens was even repelled relative to action taken by a Scots liquidator relative to securities over foreign land.

19. See too Wilmot v Wilson (1841)3 D 815, in which a Scots multiplepoinding relative to a Scots insurance policy was sisted pending the outcome of a pending English Chancery suit involving the English bankruptcy assignees of one of the claimants, and the relatively timid approach taken in the similar executry case Dawsons v Macleans (1860)22 D 685.


21. (1870)9 M 168. See too the dicta of Lord Shand (at 942) concerning the liquidation in the Queensland Mercantile case.

22. See section b) above.
Footnotes:


1. A pragmatic approach was certainly adopted by the English courts in Re Maxwell Communications Corporation plc (No.2) [1992] BCC 757 in refusing an injunction against English administrators attempting to strike down preferences under a concurrent, and largely co-operative, Chapter 11 process in New York under the US Bankruptcy Code.


3. California Redwood Company v The Merchant Banking Company of London (1886)13 R 1202; Liquidators of the California Redwood Company v Walker (1886)13 R 810 and Liquidators of the Pacific Coast Mining Company v Walker (1886)13 R 816.

4. The Court of Session was more timid in the executry case Dawsons v MacLeans (1860)22 D 685.

5. The Walker case also contains a rejection by the First Division, other than Lord Shand, of extending personal jurisdiction for these purposes to England and Ireland by means of the co-operation provision in s.122 of the 1862 Companies Act.

6. Unless perhaps the creditor over whom jurisdiction existed had undertaken to pass benefits received abroad to the Scots liquidator.

7. Effectiveness of an order of a Scots court for the liberation for the purposes of a Scots sequestration of a person imprisoned for debt in England doubtless influenced the reservations expressed in Robertson v De Salvi (1857)19 D 996 about the competency of such an order. The Court of Session was certainly unhelpful in the converse situation: Duncan v Rodanz & Irwin 25 June 1817 FC. See Gill v Cutler (1895)23 R 371 on general issues of the effectiveness of interdicts against foreigners.

8. The ratio of the decision was in fact that the Spanish courts had exclusive jurisdiction in this regard under the 1982 Civil Jurisdiction and Judgements Act. This decision seems slightly bizarre given the exclusion of matters relating to bankruptcy from the Brussels Convention by Article 1(2) thereof.

9. The present provisions seem broadly similar: Bankruptcy (Scotland) Act 1985 ss.33(3) and 51(6); Insolvency Act 1986 ss.15(4), 55(3) and 60(1). The 1986 Act contains no explicit provision relative to liquidations.

10. E.g. Lord Adam at 944.

11. Although it was found that the custom of Bordeaux could not be applied to prevent the action taking place nor to divide in Scotland the proceeds of such action.

12. The argument in Struther v Read 1 July 1803 FC that the English courts would in any event apply Sill v Worswick (1791)1 H 11 665 to enforce their process in Scotland did not appear to impress the bench.
13. And also Hunter v Potts (1791) 4 TR 182 and Phillips v Hunter (1795) 2 H B 402. See Dicey & Morris pp.1110-1111; Blom-Cooper pp.134 & seq and more generally Smart Chap. 9.

14. See (1824) 3 S 169 and (1826) 4 S 473.

15. See Bell Comm. ii.337. See too Bennet v Johnston (1819), which is reported in Bell Comm. ii.574n 2. The report is too brief to add much to the arguments in this regard.

16. It may be further speculated that the actual dividend to which the creditors would have been entitled may probably have been less than the value of the property reclaimed. The property apparently belonged to the partnership, which was sequestrated after the property was handed over, and the claim was made against the estate of the partner first sequestrated. This rather loose approach, if anything, broadens the scope of jurisdiction in this context.

17. While formally reserving his position, Lord Fullarton appeared to support such jurisdiction in his dissenting judgement in White v Briggs (1843) 5 D 1148 at 1157. Lord Newton had doubted jurisdiction on this ground alone at first instance in Cowan v Dixon (1828) 5 Fac 137 at 142.

18. The location and place of registration of the ship was not discussed. His Lordship appears, however, to have assumed the shares in the ship to have been irrecoverable.

19. Indeed jurisdiction in the leading case, White v Briggs (1843) 5 D 1148, was based upon arrestment to found jurisdiction.

20. Despite the supercession by s.51 of the 1814 Bankruptcy Act of part of the prospective element of the 1696 Act which Lord Newton apparently considered (at first instance in Cowan v Dixon (1828) 5 Fac 137 at 142) to have taken place.

21. Anton refers to it broadly to this effect: p.732.

22. Being the domicile of the trustor and most of the beneficiaries, the place of its execution and the situation of the trust assets. Reference was made to the general trust case Kennedy v Kennedy (1884) 12 R 275.

23. A pre-cursor of the 'diligence equalisation' provision now contained in para. 24 of Sch.7 to the Bankruptcy (Scotland) Act 1985. Possession of liquidated grounds of debt or a decree for payment were the bases for recovery under s.6 of the 1793 Act.

1. See too Ex parte McCulloch (1880)14 ChD 716.

2. Though see Marshall Ptnr. (1895)22 R 697, discussed below.

3. Although the figures involved may not have given rise to material differences depending on methods of calculation adopted, Clydesdale Bank v Anderson (1890)27 SLR 493 may suggest a slightly different approach from Stewart v Auld to foreign dividends. In this case a firm of Glasgow commission agents with branches in Manila and elsewhere abroad was sequestrated in Scotland. A separate liquidation took place in Manila in respect of the assets there and claims relating thereto. Scots payees of certain bills of exchange recovered dividends in the Manila process to the limited extent that their claims related to the Manila assets and passed these on to the Clydesdale Bank, to whom the bills had been discounted. The bank then attempted to rank in the Scots sequestration for the full amount of the bills. The Sheriff-substitute allowed the entire Manila dividend to be set against the dividend otherwise obtainable on the full debt in the Scots process, rather than a proportionate amount of it. The First Division considered the payees and the bank separate creditors and did not therefore impute the Manila dividend to the bank. Unfortunately the First Division gave no indication as to the method by which account should otherwise have been given to the Manila dividend in the Scots sequestration.

4. At 1343. See too Lord Cuninghame at 1344.

5. At 846 & 847. See too the judgement in that case of the Lord Ordinary, Lord Kincairney.

6. As was done in Young v Buckel (1864)2 M 1077.

7. Falconer v Weston 18 Nov 1814 FC, Weston v Falconer 17 Dec 1817.

8. 1916 SC 698. See too section 6) below.

9. (1855)27 J 185. See too section 3) above.

10. If the English courts took the view that the English process required to be completed once commenced or that vesting of acquirenda in the Scots trustee should not be given effect in England, the Scots trustee may well have been disappointed. It is suggested that the Scots courts would have determined the issue had the assets in question been in Scotland (see section c) above). The decision of the House of Lords in Geddes v Mowat (1824)2 Shaw 230 certainly suggests that the Scots courts will, in general, prefer an earlier Scots sequestration to a later English bankruptcy.

11. See Lord Kincairney at 844-845.

12. See the Sheriff-substitute at 1339-1340. The Falconer cases are ambiguous on such matters: see section 2),c) above.

13. See section 2)e) above.
14. And indeed in the Falconer cases: see section 2) above.

15. See now s.31(8) of the Bankruptcy (Scotland) Act 1985.

16. In Goetze a Scots sequestration was sought in order to nullify a prior Scots arrestment. The Saxon trustee was considered to own the property arrested, subject to the arrestment - which may or may not have given the arrester a preference in the absence of a Scots sequestration. The reduction of unfair preferences and gratuitous alienations adds assets to the insolvent estate and may therefore be distinguishable. See section 4) above however.

17. See section 2),a) above.

18. See section 2),b) above.


20. Presumably under the debenture and under English law. The report refers (at 696) to such a receiver not being appointed to assets 'in this country'. Such a receiver may have encountered difficulties in Scotland: see Chapter 5,E,2) above. The American receiver appears to have been more akin to a Scots liquidator. There is no indication that such consents to the petition were considered necessary.

21. See section b) above.

22. Given Lord Greive's approving reference to English authority in Inland Revenue v Highland Engineering Ltd., English cases concerning ancillary winding up processes will no doubt be of persuasive authority in Scotland. Smart discusses these at pp.240 & seq. The suggestion that an insolvency process instituted at the place of incorporation of a company will automatically be considered the primary insolvency process does, however, conflict with commercial reality. Thus, as mentioned in section b) above, in Re Harrods (Buenos Aires) Ltd. (No.2) [1991] 1 All ER 348, the English courts declined jurisdiction to wind up an English registered company which had almost no connection with England. If an English winding up would have performed a useful ancillary purpose relative to prospective proceedings in Argentina, jurisdiction would no doubt have been assumed. It is suggested that the Argentinian process should have been considered the primary process if such an English winding up were to have been instituted.

23. See section 2),a) above.

24. The decision of Hoffmann J was upheld on appeal: The Times 13 October 1992.

25. Hopefully the slightly unhelpful attitude taken by the English court in Re Sudair International Airways Ltd. [1950] 2 All ER 920 (in that case to striking down prior execution) towards a primary foreign insolvency process will no longer be followed.

26. Authority to uplift proceeds of Scots insurance policies was refused as unnecessary. It appears to have been assumed that the Chilean process purported to transfer the policies to the receiver.

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27. See Anton pp.655-658.

28. Rather, presumably, than the Falconer cases.

29. See section 1),b) above. There were, of course, suggestions in Selkirk v Davis (1814)2 Rose 291 and the Falconer cases (see sections 2),b) and c) above) that English bankruptcy law did not afford assignees even a *ius ad rem* in relation to Scots heritage. This was probably because it did not purport to do so. The law of Chile was perhaps more assertive.


31. The heir-at-law also wished security in respect of any reversion after payment of creditors. The court did not comment upon this request.

32. See section 1) above.

33. In Scott v Leslie the property in question had in fact been transferred to the assignee by his obtaining a decree, equivalent to intimation of the English bankruptcy judgement.

34. It was also noted that objection to the bankrupt's representative title was *ius tertii* to the other competitors in the ranking and sale, perhaps inferring that objections by creditors not participating in a foreign insolvency process might be upheld. This *dictum* does, however, appear designed to show quite how hopeless the position of the other competitors was.

35. In which the imprisoning creditor had claimed, but not proved.

36. Though see Thomas v Pellatt, Muspratt and Stephens (1861)23 D 1349, discussed below, in which an English bankrupt was imprisoned in Scotland despite being granted personal protection under English law.

37. See Re Sudair International Airways Ltd. [1950]2 All ER 920 regarding the potential use of ancillary liquidations for this purpose. The narrow and uncooperative interpretation of the relevant English provisions was, however, regrettable.

38. See section 1),b) above.

39. Although given theories of 'voluntary transfer' current at the time, it is possible that a voluntary trust deed stood more chance than a compulsory court process of being allowed effect in Scotland as a transfer of assets: see section 1) above.

40. Particularly by the then Lord Justice-Clerk Inglis at 1352-1353.

41. Indeed in Thomas v Pellatt Lord Cowan's approach may have relied in part upon the apparent incompetence in English law of any personal diligence executed by a creditor proving in an English bankruptcy.

42. Now s.185 of the 1986 Insolvency Act.
43. A similar argument had been raised in *Royal Bank of Scotland v Securities Insurance Co. Ltd.* (1897)4 SLT 232, to the effect that the English courts had considered the same sections applicable to nullify diligence in relation to a voluntary winding up under the Companies Act as under a compulsory winding up. Similarly Lord Kyllachy preferred to interpret the statute for himself, allowing full effect to a Scots arrestment relative to the voluntary winding up of an English company.

44. The decision of the English court in *Felixstowe Dock & Railway Co. v United States Lines Inc.* [1988]2 All ER 77 not to discharge English mareva injunctions for the benefit of a New York process under Chapter 11 of the US Code seems persuasive in this regard.

45. Which was not relevant on the facts of the case.

46. (1897)24 R 719. See section 4) above.

47. Sections 10 and 17 of the Bankruptcy (Scotland) Act 1985 and s.426 of the Insolvency Act 1986 may, as discussed above, provide further assistance in this regard.
Footnotes:

Chapter 6.C.6) a): Ranking; introduction.

None!

2. See sections 1) and 2) above. Even Ogilvie v The other Creditors of Absurdly 1765, Nor 43565 is expressed in terms of 'preference'.

3. See section 4) above.


5. See section 5) above. Securities constitutted under a South African deed were also preserved in Salmon v Bank of Bannatyne Ltd. [1900] 2 F. 268, when it was superseded by an English bankruptcy.

6. See sections 7) and 8) above.

7. See section 9) above.

8. Which may have been the reason for fort so the law governing the liquidations.

9. See Chapters 2, 5 and 6, 11 and 21.

10. See section 13) above.

11. Counsel v Loder [1986] 1 L.C. also supports this general approach. As discussed in section 6) below, the ranking of the English insolvency in bankruptcy case was straightforward in Counsel v Loder.

12. Minutes at 113, Lord President Legitima at 116.

13. Despite some references by the Lord Ordinary, Lord Mclaren, to the principles of the creditor of an obligation and to the law of the country in which a competition arises, Lord Mclaren also appears to have taken this view.

14. In Thames v The North British and Mercantile Insurance Co. [1901] 1 C. 310, English law was probably considered applicable to the ranking relative to an English insurance policy of an English assignment and a South concentration.


16. At 15, Lord Aronson was more equitable at 10.
Footnotes:


1. See too Chapter 5.D.3) above.

2. See sections 1) and 2) above. Even Ogilvie v The other Creditors of Aberdeen 1747 Mor 4556 is expressed in terms of 'preference'.

3. See section 4) above.

4. See too the English cases reported at [1891]11 Ch 536 and [1892]11 Ch 219.

5. See section 5) above. Securities constituted under a Scots trust deed were also preserved in Salaman v Earl of Rosslyn's Trs. (1900)3 F 298, when it was superseded by an English bankruptcy.

6. See sections 2),c) and 5) above.

7. See section 5),c) above.

8. Which may have been the Scots lex fori as the law governing the liquidation.

9. See Chapters 2,E and 3,B,1) and 2).

10. See section 1),c) above.

11. Connal v Loder (1868)6 M 1095 also supports this general approach. As discussed in section e) below, the ranking of the English inspectors in bankruptcy was not straightforward in Connal v Loder.

12. Minute at 115, Lord President Inglis at 116.

13. Despite some reference by the Lord Ordinary, Lord McLaren, to the domicile of the creditor of an obligation and to the law of the country in which a competition arises, Lord McLaren also appears to have taken this view.

14. In Thomson v The North British and Mercantile Insurance Co. (1868)6 M 310, English law was probably considered applicable to the ranking relative to an English insurance policy of an English assignment and a Scots sequestration.


16. At 13. Lord Avonside was more equivocal at 16.
Footnotes:


1. See section 5),c) above.

2. See section 5),c) above.

3. See section 3),d) above.

4. See Drummond Young Chap.15.

5. Lord President Boyle also appears to have considered it relevant that the firm of solicitors engaged to manage the Insolvency Act 1986 was not the same as that employed by the liquidator to manage the Liquidators' Account (Scotland) Act 1986 and annex and. The relevance of this point was not elaborated and is difficult to assess.

6. Though Lord Keith of Wingham noted, obliquely, whether the Scottish rule was intended to protect creditors internal to Scotland.

7. It is of further interest that the Lord Ordinary in Ross v Sinclair, Lord Finlaison, was prepared to exercise his own discretion outwith English categories to ignore the restrictions of the panel rule in the Scottish bank as it was possible under the law governing the bond for a bank to exceed the panel size. Lord Justice Clark in the English was rather more hesitant (see 35) regarding this point.

8. See sections 5),1) and 5),1) above.

9. See section 17 and 27 above.

10. See section 34 above.

11. See the Lancashire Report pp.96 & seq, for example, p.103-105, Birkett v Peter (1994) 126; and Brinley v Pennal (1993) 126 476.

12. See section 11),c) above. Avoidance of a foreign decision perceived as unfair certainly influenced the court in law v law (1995) 146: 43.

13. Canadian courts have been prepared to give effect to foreign revenue claims in relation to assets transferred to Canada from the appropriate foreign jurisdiction. See Mondeberger, Abergavenny Insolvency Ppt.4, p.21.

14. See the Lancashire Report pp.96 & seq. The multiple territorial asset rules suggested in the Lancashire report appear unreasonably complex unless there is a particular reason to provide security within a certain legal system with the preferences of that system. Use of service and operating companies incorporated in different jurisdictions may often prevent such problems arising.

15. See ss.147 & 3566 and para.3 of Sch.6 to the Insolvency Act 1986. Employed In Germany might then attempt to institute a competing German insolvency process if their entitlements under German law were greater. Hopefully the German courts would then agree that such process was ancillary to the other and determine wages preferences in accordance with the law governing the principal process. Characterisation of such preferences in a matter of social security law would, of course, spot matters such characterisation may have prompted the multiple pool systems described in the Lancashire Report.
Footnotes:


1. See s.51 of the Bankruptcy (Scotland) Act 1985 and ss.60 and 175 of the Insolvency Act 1986.

2. See section 5),e) above.

3. Lord President Boyle also appears to have considered it relevant that the firm itself had not been bankrupted. The relevance of this point was not elaborated and is difficult to discern.

4. Though Lord Cockburn did wonder, obscurely, whether the English rule was intended to protect creditors outwith England.

5. It is of further interest that the Lord Ordinary in Scott v Sinclair, Lord Kinloch, was prepared to exercise his own discretion, outwith English categories, to ignore the restrictions of the penal sum in the English bond as it was possible under the law governing the bond for a claim to exceed the penal sum. Lord Justice-Clerk Inglis was rather more hesitant (at 925) regarding this point.

6. See sections 2),c) and 5),e) above.

7. See sections 1) and 2) above.

8. See section 5) above.


10. See section 5),c) above. Avoidance of a foreign decision perceived as unfair certainly influenced the court in Low v Low (1893)1 SLT 43.

11. Canadian courts have been prepared to give effect to foreign revenue claims in relation to assets transmitted to Canada from the appropriate foreign jurisdiction. See Honsberger, Aberystwyth Insolvency Papers p.31.

12. See the Lemontey Report pp.90 & seq. The multiple territorial asset pools suggested in the Lemontey report appear needlessly complex unless there is a particular reason to provide creditors within a certain legal system with the preferences of that system. Use of service and operating companies incorporated in different jurisdictions may often prevent such problems arising.

13. See ss.175 & 386 of and para.9 of Sch.6 to the Insolvency Act 1986. Employees in Germany might then attempt to institute a competing German insolvency process if their entitlements under German law were greater. Hopefully the Scots and German courts could then agree that one process was ancillary to the other and determine wages preferences in accordance with the law governing the principal process. Characterisation of such preferences as a matter of social security law could, of course, upset matters! Such characterisation may have prompted the multiple pool system described in the Lemontey Report.
Footnotes:

Chapter C.5.6.7: Alterations to rankings.

1. See too the further subsidiary ranking rules discussed in Chapters 4 and 5.

2. Lord Justice-Clerk Patton felt the property in medio to have been the right to demand a quantity of iron, rather than the iron itself. This right would probably have been governed by Scots law.

3. See Chapter 5.1.1.3 and E.2).

4. As Lord Keith noted in Carse v Coppen 1951 SC 233 at 244 & 247-248.

5. Lord Keith favoured such tactics in Carse v Coppen at 247.
Footnotes:

Chapter 6.D: Prospects for coherent solutions in international insolvency?

1. See the surveys of bankruptcy treaties by Nadelmann (1944)93 UPaLR 58 and Lipstein, Aberystwyth Insolvency Papers, Chap.14. Nadelmann refers (p.303 n.22) to the inclusion of bankruptcy provisions in a treaty of 1676 between Scotland and Campvere.


3. See Nadelmann (note 1) and Lipstein (note 1).

4. European Convention on Certain International Aspects of Bankruptcy, the text of which is set out in Appendix II to the Aberystwyth Insolvency Papers.

5. Article 4.


7. Gitlin lists examples of such relief (Aberystwyth Insolvency Papers p.80), which include the attachment of assets and the challenge of preferences.


9. It is suggested that s.426(2) does not detract from the common law effects allowed in Scotland to foreign insolvency processes.

10. Section 426(6) is discussed below and s.426(7) relates to criminal warrants.

11. The Channel Islands and the Isle of Man under s.426(11)(a) and a variety of largely Commonwealth countries under the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123).

12. It is likely, however, that the relatively broad approach taken by Goulding J in Re a Debtor, ex parte the Viscount of the Royal Court of Jersey (1981) Ch 384 to the previous provisions will also be applied, as possible, to s.426.

13. Although even here the limitation to property claims seems needlessly restrictive.

14. The possibilities for a co-operative territorial approach, similar to that envisaged under s.426(3) are interesting.
15. Perhaps on a model basis, as suggested by Peter Totty in Chap.17 of the Aberystwyth Insolvency Papers, using the analogy of taxation treaties.