THE COURT'S *IN PERSONAM* JURISDICTION IN CASES INVOLVING FOREIGN LAND

JACK WASS*

Abstract The *Moçambique* rule provides that an English court may not adjudicate on title to foreign immovable property. This article considers the primary exception to that rule: where the court assumes jurisdiction *in personam* to enforce a contractual or equitable claim concerning foreign immovable property against a defendant subject to the court's personal jurisdiction. It addresses two questions: how should the English court decide whether to assume jurisdiction in relation to foreign land, and if the positions are reversed, should an English court recognize or enforce the order of a foreign court affecting English land? As to the first question, this article argues that the orthodox English approach is anachronistic. English law applies the *lex fori* exclusively to determine whether an obligation exists which the court has jurisdiction to enforce. Instead, modern conflict of laws principles demand that the court should apply the proper law of the substantive claim in determining whether a sufficient equitable or contractual obligation exists. As to the second question, this article argues that despite the prevailing view that foreign non-money judgments are not enforceable in England, foreign orders in relation to English land are in principle entitled to recognition in a subsequent action in England by the successful claimant.

Keywords: enforcement of judgments, equity, estoppel, immovable property, jurisdiction.

I. INTRODUCTION

Imagine that a claimant commences proceedings in England, seeking a declaration that land situated in India is held on constructive trust on her behalf, or that the disposition of Malaysian land by the defendant was a fraud on the defendant's creditors in violation of English law.[1] How should the English

* Barrister, Stout Street Chambers, Wellington, New Zealand, jack.wass@stoutstreet.co.nz. I would like to thank Maria Hook for her insightful comments and suggestions. All errors remain my own.

[1] These examples are based on *Schumacher v Summergrove Estates Ltd* [2013] NZHC 1387 (leave to appeal to the Court of Appeal has been granted: [2013] NZHC 2221) and *Singh v Singh* [2009] WASCA 53, (2009) 253 ALR 575 respectively. Although this article focuses on English law, it also considers the position in Commonwealth jurisdictions that have inherited English rules, including Australia, Canada, New Zealand and Singapore.

[*ICLQ* vol 63, January 2014 pp 103–135] doi:10.1017/S0020589313000468

court determine whether it has jurisdiction in respect of such a claim?[2] To reverse the position, say that a claimant obtains, in Israeli divorce proceedings, a declaration that she enjoys a 50 per cent interest in a property in England. Should that order be recognized or enforced by the English court in subsequent proceedings?[3] This article examines these two questions: in what circumstances may the English court assume jurisdiction in relation to foreign land, and in what circumstances should the court recognize or enforce the order of a foreign court in relation to English land?

In an increasingly globalized world, land is one of the few subjects of the conflict of laws process that remains stationary. Yet the individuals and corporations that claim interests in land are increasingly mobile; the result is an increased risk that a claimant may wish to sue in one country to vindicate rights in land located in another country. While private international law has always accorded significant deference to the right of a country's courts to determine issues relating to land within its borders—in respect of both choice of law and jurisdiction—that deference is put under real strain whenever a court is asked to assume jurisdiction in relation to foreign land. This article will argue that the orthodox English approach to both of the questions with which this article is concerned—the assumption of jurisdiction and the recognition of foreign decrees—must be re-examined. Quite apart from ensuring that the courts' approach achieves a fair, rational and just result in cases involving foreign land, that re-examination sheds valuable light on the roles of jurisdiction, choice of law and recognition of foreign judgments in the conflict of laws generally.

As to the first question, an English court does not have jurisdiction to adjudicate on title to foreign land: the so-called '*Moçambique* rule'.[4] But the court does have jurisdiction to enforce a personal obligation owed to the claimant by the defendant, arising from contract or equity, notwithstanding that the subject matter of the claim is foreign land: *Penn v Lord Baltimore*.[5] The Court acts on the conscience of the defendant subject to its jurisdiction. While the rule in *Penn v Lord Baltimore* is ancient, it retains real contemporary relevance, as the examples given at the start of this article demonstrate. The first example represents the simplest scenario: the claimant (C) asserts an equitable interest in foreign land legally owned by the defendant (D). But in a

[2] This article is not concerned with the position within Europe, as to which see Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, to be replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.

[3] See *Shami v Shami* [2012] EWHC 664 (Ch), upheld on appeal [2013] EWCA Civ 227.

[4] Named after *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (HL).

[5] *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, 27 ER 1132. See for different formulations of the principle JJ Fawcett, JM Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th edn, Oxford University Press 2008) at 484 and Lord Collins of Mapesbury (gen ed), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) at [23–046]–[23–050].

number of the reported cases, C alleges a beneficial interest in foreign land (originally) owned by D1, and must compete with either the acquirer of a subsequent legal interest (D2)[6] or unsecured creditors of D1 in bankruptcy.[7]

There is an inevitable risk of conflict with the *situs* whenever a court is asked to assume jurisdiction in relation to foreign land. This article argues that the orthodox English rules fail to address that risk properly. The basic problem is that English courts are required to apply English law (as the *lex fori*) in determining whether a sufficient equitable or contractual obligation exists, on the basis that equitable jurisdiction depends on the court acting on the conscience of the defendant. That can produce irrational results where, for example, the English court is prepared to decree the existence of a mortgage over foreign land where the law of the place where the land is situated (the *lex situs*) does not recognize a valid encumbrance,[8] and is increasingly out of step with the modern recognition that the ordinary choice of law process should apply to equitable claims.

The law has then attempted to temper the parochialism of that approach in two ways: by holding that certain matters—most notably notice of an equitable interest by a subsequent owner—are not sufficient to create the necessary privity of obligation,[9] and by holding that the court will not have jurisdiction where the claimant's interest has been 'destroyed' by the *lex situs*. But that only creates further difficulties: in determining when a matter is governed by the *lex situs* and not the *lex fori*, and distinguishing between situations where the *lex situs* merely does not recognize the obligation and where it has destroyed the interest.

It will be argued that this approach is irrational and unsustainable. It derives from a time in the development of English law when the separate functions of jurisdiction and choice of law were not fully realized: when rules of jurisdiction acted as a proxy for the application of the correct law, and when choice of law was used to ensure that disputes were determined in the appropriate court. The question of whether there exists sufficient privity of obligation should simply be assessed according to the proper law of the alleged equitable obligation, which will very often be the *lex situs*.

By a 'convergence' in focus on the *lex situs* in relation to questions of both title and personal obligation,[10] we largely obviate the need for the traditional distinction between situations where the *lex situs* merely does not recognize the equitable interest in question and where it destroys the interest. The result is that where the proper law does not recognize an equitable obligation or right,

[6] Eg *Norris v Chambres* (1861) 29 Beav 246, 54 ER 621; *Deschamps v Miller* [1908] 1 Ch 856 (Ch); *Hicks v Powell* (1869) 4 Ch App 741.

[7] *Re Courtney, ex p Pollard* (1840) Mont & Ch 239; *Waterhouse v Stansfield* (1852) 10 Hare 254, 68 ER 921.

[8] *Re Smith, Lawrence v Kitson* [1916] 2 Ch 206 (Ch).

[9] *Norris* (n 6) as applied in *Deschamps* (n 6).

[10] The term used by TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press 2004) at [5.38].

C will have nothing on which to base his claim in the English court. This respects the prima facie right of the *situs* to govern matters relating to immovable property within its jurisdiction, while recognizing that it is nevertheless sometimes appropriate for a foreign court to assume jurisdiction in relation to such land. To the extent that the restrictions on the rule in *Penn v Lord Baltimore* were historically used as a means of ensuring that the English courts did not inappropriately assume jurisdiction in relation to foreign land, that function is better performed today by the modern doctrine of *forum non conveniens*.

The second purpose of this article is to consider the 'converse' of the rule in *Penn v Lord Baltimore*:[11] when will an English court recognize or enforce the order of a foreign court affecting English land?[12] A number of writers are sceptical about the likelihood of the court doing so, despite the fact that the English court might well assume jurisdiction if the facts were reversed. The 'leading' authority remains a 1932 decision of the Supreme Court of Canada, *Duke v Andler*.[13] This decision has recently been criticized by the English High Court,[14] and in Part IV, this article will argue that it is incoherent and should not be followed. The English court can, and should, recognize a foreign court's jurisdiction in cases where it would itself assume jurisdiction if the facts were reversed. Contrary to the prevailing view that only money judgments are enforceable under English national rules, this article will argue that there is no reason for the English court to deny recognition—and effectively enforcement—to *in personam* decrees of foreign courts in relation to English land. In the process, the article will shed light on the Commonwealth approach to the recognition and enforcement of foreign judgments generally.

II. PRIVITY OF OBLIGATION

There are two limitations on the rule in *Penn v Lord Baltimore*: there must be 'privity of obligation' and the *lex situs* must not prohibit the claim.[15] This Part examines the first of these requirements; Part III examines the second.

A. Jurisdiction and Choice of Law in Cases Involving Foreign Land

If jurisdiction depends on the existence of a personal obligation, then naturally the claimant must be able to establish the existence of such an obligation owed by the defendant; otherwise the claimant would be simply asserting an interest in land contrary to the *Moçambique* rule. So the requirement for 'privity of

[11] DM Gordon, 'The Converse of *Penn v Lord Baltimore*' (1933) 49 LQR 547.
[12] This article proceeds on the assumption that both courts are applying English common law rules.
[13] *Duke v Andler* [1932] SCR 734 (SCC) and see Gordon (n 11).
[14] *Shami v Shami* (n 3) at [34].
[15] See n 5.

obligation' serves an essential function in keeping *in personam* jurisdiction within its proper limits.

The modern conflict of laws process involves separate consideration of jurisdiction (whether the court can, and perhaps should, hear the claim) and choice of law (determining what system of law applies to the substance of the claim). Suits involving foreign land are anomalous in the sense that the existence of jurisdiction (ordinarily a *procedural* question) depends on the existence of a *substantive* obligation.[16] That is not in itself a problem; the courts frequently have to undertake a preliminary examination of the merits of a case at the jurisdictional stage.[17]

But this begs the question: what law applies to determine whether a sufficient equitable or contractual obligation exists to justify the court assuming jurisdiction? Three alternatives are possible: the law of the forum (the *lex fori*); the proper law of the substantive obligation (the *lex causae*); and the law of the place where the property is situated (the *lex situs*). English courts have historically held that the *lex fori* applies automatically, and exclusively. In other words, the choice of law process has no role to play in determining whether an obligation exists in respect of which the court can assume jurisdiction. This article criticizes that approach, arguing that it dates from a time in the development of English law when the separate functions of choice of law and jurisdiction were not properly delineated. Instead, the claimant should simply be required to establish, to the standard of a good arguable case, that the defendant owes a contractual or equitable obligation to the claimant under the proper law of the alleged obligation, which will usually be the *lex situs*.

B. The Law Applicable to Determining Whether a Sufficient Personal Obligation Exists

1. The basic rule

Orthodox authority is that the *lex fori* applies exclusively to determine whether a sufficient equitable or contractual obligation exists on the basis of which the court can assume jurisdiction.[18] In other words, the English court will not concern itself with whether the *lex situs* recognizes an obligation in the circumstances. *Penn v Lord Baltimore* itself concerned an agreement to arbitrate the demarcation of a boundary between Pennsylvania and Maryland in pre-independence North America. The suit was founded on 'articles

[16] Although on a jurisdictional challenge this will only need to be established to the standard of a 'good arguable case': *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1 (HL) at 13.

[17] For example in service out cases the claimant must establish that there is a serious issue to be tried on the merits: see eg *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [71].

[18] See *Dicey* (n 5) at [23–043] (citing *Deschamps* (n 6) at 863); PE Nygh & M Davies, *Conflict of Laws in Australia* (7th edn, LexisNexis Butterworths 2002) at [7.43].

executed in England under seal for mutual consideration' and that was sufficient to give the English Court of Chancery jurisdiction to enforce English equity on the parties, notwithstanding that the dispute concerned foreign land. So Lord Harwicke LC held that the 'conscience of the party was bound by this agreement; and being within the jurisdiction of this court …, which acts *in personam*, the court may properly decree it as an agreement'.[19] The classic case involving fraud is *Lord Cranstown v Johnston*, in which Lord Alvanley MR held that the defendant had by his fraud 'gained an advantage, which neither the law of this nor of any other country would permit'.[20]

In both of those cases it was taken for granted that the English court would apply its own conceptions of equity to the parties' conduct. Lord Cottenham LC made this explicit in *Re Courtney, ex p Pollard,* holding that:[21]

> the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

So Lord Cottenham suggested that the English court would apply English conceptions of what is unconscionable to the conduct of parties subject to its personal jurisdiction, and would not be swayed by the fact that the *lex situs* would not recognize an equitable interest in the same circumstances.[22]

2. The choice of law process in relation to equitable obligations

Early cases such as *Lord Cranstown v Johnston* appear to have proceeded on the premise that an English court can only apply English equity; they are also complicated by the fact that the court did not give separate consideration to the *procedural* question of whether there existed an obligation sufficient to justify the assumption of jurisdiction, and the *substantive* question of whether the plaintiff had made out that obligation on the merits.

More recently, a number of Australian decisions have held that because equity acts *in personam*, the court must necessarily apply the *lex fori* to equitable claims.[23] *Dicey* notes that this is 'tantamount to saying that there is

[19] *Penn v Lord Baltimore* (n 5) at 447.

[20] *Lord Cranstown v Johnston* (1796) 3 Ves Jun 169, 30 ER 952 at 182–3.

[21] *Re Courtney* (n 7) at 250. See also the early case of *Lord Cranstown v Johnston* (ibid) and *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502 (CA) at 513–14.

[22] Which gives rise to the difficult distinction between situations where the *lex situs* does not recognize the interest and positively excludes it: see Part IIIB below.

[23] See the cases cited in *Dicey* (n 5) at [34–084] and CA McLachlan, 'International Litigation and the Reworking of the Conflict of Laws' (2004) 120 LQR 580 at 601–2, doubting the wisdom of an apparent 'retreat from choice of law' in relation to equitable obligations. In hindsight this may not have been so much a retreat as a continuation of the practice dating back to the days of a separate Court of Chancery: see RW White, 'Equitable Obligations in Private International Law: the Choice of Law' (1986) 11 Syd LR 92 cited by McLachlan at n 120.

no choice of law applicable to equitable claims', and implies that all it *should* mean is that the question of equitable remedies is governed by the *lex fori* but the rights that give rise to them should be governed by the law identified by the applicable choice of law rules.[24] Garnett notes that there has been a recent trend in Common Law courts towards a recognition that equitable claims should be subject to the ordinary choice of law process.[25]

In this respect it is necessary to understand the English Court of Appeal's decision in *Lightning v Lightning Electrical Contractors Ltd.* The plaintiff claimed that the defendant had purchased land in Scotland entirely funded by the plaintiff, and that it was accordingly held on resulting trust in his favour.[26] The Court applied English law to the substance of the claim. Although the case may be read as authority for the proposition that the *lex fori* should automatically govern such a claim,[27] the better view is that the case was exceptional: the parties were both resident in England, their relationship was based there and (apparently) the only connection with Scotland was the fact that the land happened to be purchased there. In other words, the (implicit) choice of law process pointed to English law.[28]

In *Martin v Secretary of State for Work and Pensions*, the Court of Appeal noted that 'on the particular facts [of *Lightning*] … it was plain that English law was the law applicable to the relationship between the people concerned and their property arrangements'.[29] In *Martin* the Court concluded that the relationship between two English domiciliaries in relation to French land was governed by French law because the transaction in question was executed in contemplation of French succession law. The consequence was that because

[24] *Dicey* (ibid) at n 422 and [34–084]. See also A Chong, 'The Common Law Choice of Law Rules for Resulting and Constructive Trusts' (2005) 54 ICLQ 855 and Yeo (n 10) at [1.17] (endorsed in *Murakami v Wiryadi* [2008] SGCA 44, [2009] 1 SLR(R) 508 at [21]. Note that related proceedings under the same name have also occurred in Australia (see n 25)).

[25] R Garnett, *Substance and Procedure in Private International Law* (Oxford University Press 2012) at [3.26]. See eg *Attorney General for England and Wales v R* [2002] 2 NZLR 91 (NZCA) at [28]–[30] (but cf apparently *Birch v Birch* [2001] 3 NZLR 413 (HC) at [50] per Paterson J); *Rickshaw Investments Ltd v Nicolai Baron von Uexhull* [2006] SGCA 39, [2007] 1 SLR(R) 377 at [75]–[76], followed in *Murakami* (SGCA) (n 24) at [28]; *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [171]–[223]; *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [155]–[159]; *Murakami v Wiryadi* [2010] NSWCA 7, (2010) 268 ALR 377. See also *Schumacher v Summergrove Estates Ltd* (n 1).

[26] Reprinted in (2009) 23 Trust L Intl 35 (CA).

[27] See particularly ibid at 38, drawing support from Millett J's judgment in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 at 989 (Ch) (affirmed on other grounds [1996] 1 WLR 387 (CA)). However, in that passage Millett J appears to reject, rather than support, the suggestion that the *lex fori* should automatically govern an equitable claim in relation to foreign land.

[28] See *Murakami* (SGCA) (n 24) at [20]–[21] citing Yeo (n 10) at [1.17]. See also *Luxe Holding Ltd v Midland Resource Holding Ltd* [2010] EWHC 1908 (Ch) at [37] and following which concerned shares in foreign companies incorporated in countries that did not recognize an equitable interest, but where the relationship between the parties was governed by English law.

[29] [2009] EWCA Civ 1289 at [29], citing *Lightning* (n 26) and *Webb v Webb* [1991] 1 WLR 1410 (Ch).

French law did not recognize trusts, the Court would not impose a trust even though the parties were resident and domiciled in England and English equitable principles would recognize a trust in the circumstances.[30] This is clear authority that the *lex fori* does not automatically apply to equitable claims.[31]

It is beyond the scope of this article to examine the choice of law rules applicable to equitable claims, which remain uncertain.[32] Suffice to say that there is strong academic support for the proposition that a claim asserting the existence of a constructive or resulting trust over foreign immovable property should usually be characterized as proprietary, so that the *lex situs* should apply.[33]

3. Application of ordinary choice of law rules in the context of jurisdiction

In the author's submission, the exclusive application of the *lex fori* to the question of whether sufficient privity of obligation exists can no longer be justified. With courts increasingly recognizing that ordinary choice of law rules apply to equitable claims, it makes no sense for one system of law to be applied in determining whether a sufficient obligation exists for the purpose of assuming jurisdiction, only to potentially apply an entirely different system of law to the resolution of the merits of the dispute. Nor is there any justification for automatically applying the *lex fori* at the first stage, simply because equity acts on the conscience of the defendant. *Nygh* noted the 'ludicrous' result in *Re Smith*, where jurisdiction was assumed and an equitable mortgage imposed on Dominican land despite the fact that the *lex situs* did not recognize a valid encumbrance in the circumstances.[34] The *lex fori* approach inherently creates a risk of such results.

Despite the apparent parochialism of the traditional approach, the English courts have always recognized that some regard must be paid to the *lex situs*. This gives rise to the second principal problem with the orthodox approach: it

[30] *Martin* (ibid) at [34].

[31] Although in this case jurisdiction was not assumed pursuant to the rule in *Penn v Lord Baltimore*.

[32] See eg the comments in *Murakami v Wiryadi* in the New South Wales Court of Appeal (n 25) at [146]. For discussion of characterization (in the context of constructive trust claims) see *Grupo Torras SA v Al Sabah (No 5)* [2001] CLC 221 (CA) at [121]–[122].

[33] See J Harris, 'The Trust in Private International Law' in JJ Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press 2002) 187 at 213; Yeo (n 10) especially at [5.17], [5.29], [5.38]–[5.41], [5.50]–[5.52], [9.15]; Chong (n 24) at 877; J Harris, 'Constructive Trusts and Private International Law: Determining the Applicable Law' (2012) 18 T&T 965. For resulting trusts see Dicey (n 5) at [29–077]; Harris (2012) at 967; *Whung v Whung* [2011] FamCA 137, (2011) 258 FLR 452 at [198].

[34] *Re Smith* (n 8), cited in *Nygh* (n 18) at [7.43]. Although note that part of the problem with such a case is the court's application of the *lex fori* to the merits (not just for the purposes of determining whether to assume jurisdiction).

requires the courts to distinguish between cases where the *lex situs* has 'destroyed' the interest on which the claimant relies (in which case he has no interest on which to base his claim) and where it merely does not recognize the interest (in which case the English courts are content to proceed). In Part III, this article will explain how we can ameliorate the difficulties created by that distinction by applying the proper law of the alleged obligation at each stage.

Before doing so, however, it is necessary to deal with a difficult line of cases that have complicated the traditional position even further. In each case the claimant asserted a beneficial interest in foreign land, and had to compete with the acquirer of a subsequent legal interest. The issue was whether notice of the claimant's prior interest was sufficient to establish 'equitable privity' for the purpose of establishing jurisdiction.

4. Cases involving subsequent owner's notice of a prior equity

Dicey notes two related principles: the claimant must establish some personal equity running from the claimant to the defendant, and the jurisdiction cannot be exercised against a stranger to the equity 'unless they have become personally affected thereby'.[35] *Cheshire, North and Fawcett* observes that the court will not exercise jurisdiction against a third party who has acquired land from someone contractually or otherwise personally liable to the claimant, where no equitable obligation runs from that purchaser to the claimant.[36]

In *Deschamps v Miller*, Parker J held that the exceptions to the *Moçambique* rule depended on:[37]

> the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and *do not depend for their existence on the law of the locus of the immovable property*.

On this approach, the court does not merely ask whether the defendant's conduct is unconscionable according the *lex fori* and thus simply ignore the *lex situs*; it requires that the equity that is alleged to give rise to the court's jurisdiction must *arise under* the *lex fori*, so that where it is characterized as arising under the *lex situs* it will not qualify for the purposes of investing the English court with jurisdiction.

In *Norris v Chambres*, a company founded by Sadleir contracted to purchase a Prussian mine, and Sadleir paid one third of the purchase price out of his own money. After he committed suicide, the defendants (other members of the company) entered into a new contract with the vendor of the mine, under which they received credit for Sadleir's advance. Norris, the administrator of Sadleir's

[35] *Dicey* (n 5) at [23–050], [23–047].

[36] *Cheshire* (n 5), citing JH Beale, 'Equitable Interests in Foreign Property' (1906) 20 HLR 382 at 390.

[37] *Deschamps* (n 6) at 863 (emphasis added).

estate, commenced proceedings alleging that the vendor held the land on trust for Sadleir to the extent of the advance, and that the defendants had notice of Sadleir's interest and purchased the mine subject to it. Sir John Romilly MR held that jurisdiction depended on 'some contract or some personal obligation . . . moving directly from' the defendants to the plaintiffs.[38] Although the Judge assumed that notice would give rise to an enforceable obligation if the dispute had concerned English land, he held that:[39]

> this is purely a *lex loci* which attaches to persons resident here and dealing with land in England. . . . I have no evidence before me that this is the Prussian law on this subject, and if it be so, the Prussian Courts of Justice are the proper tribunals to enforce these rights.
>
> . . . The facts of the case either constitute a valid hypothecation on the mine of the Defendants in Prussia in favour of the Plaintiff, or they do not. If they do, it is in Prussia, and the Courts of law in that country, that this hypothecation is to be enforced . . . .

Parker J followed that decision in *Deschamps v Miller*. There it was alleged that the claimant's father had settled property in India on his (bigamously married) *de facto* wife in violation of his French marriage contract with his *de jure* wife. The claimant, the *de jure* wife's successor, sued the trustees of the Indian settlement, relying on the contract (which was governed by French law). If the land had been situate in England then the claim would have succeeded, provided that the de facto wife had notice of the *de jure* wife's equitable interest.[40] But the claim failed because the question of whether the de facto wife's title could be impugned had to be assessed according to the *lex situs*.[41] The first part of Parker J's reasoning has been quoted above. He held that the court would only entertain jurisdiction where the necessary personal obligation was recognized by English law to exist, but that:[42]

> [where] the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction . . . .

Those decisions may be contrasted with the *River Plate* case, where the subsequent owners took title expressly subject to a prior charge.[43] It is difficult

[38] *Norris* (n 6) at 254.

[39] ibid at 255. Lord Campbell LC dismissed the appeal: *Norris v Chambres* (1861) 3 De GF & J 583, 45 ER 1004 at 584–5. Unless otherwise noted subsequent references in this article are to the first instance decision.

[40] *R Griggs Group Ltd v Evans (No 2)* [2004] EWHC 1088, [2005] Ch 153 at [102] citing *Deschamps* (n 6) at 862–3.

[41] See also *Re Hawthorne, Graham v Massey* (1883) LR 23 Ch D 743 where the question was not competition between a holder of a prior equitable interest and a third party purchaser, but simply a dispute between two parties as to title to foreign land.

[42] *Deschamps* (n 6) at 864.

[43] *Mercantile Investment & General Trust Co v River Plate Trust, Loan & Agency Co* [1892] 2 Ch 303 (Ch).

to draw a meaningful distinction between buying a mine with notice of a previous interest and taking property subject to a charge.[44]

Some authors explain *Norris* and *Deschamps* on the basis that they really concerned competing claims to title, over which the *situs* has exclusive jurisdiction.[45] They certainly demonstrate the significance of how an issue is characterized: where the issue was characterized as one of notice the English court would not assume jurisdiction, but where it was characterized in terms of the personal obligation owed by a transferee to the holder of an equitable interest governed by English law, then the English court would assume jurisdiction.

However, in the author's submission that does not tell the whole story. Sir John Romilly MR and Parker J appeared to have characterized the dispute in the way that they did as a means of depriving the English court of jurisdiction in circumstances where it was plainly inappropriate for the English court to exercise jurisdiction, but at a time when English law did not recognize a general doctrine of *forum non conveniens*.[46]

In a 1986 article, White explained that before the Judicature Acts the Court of Chancery followed a completely different approach to jurisdiction than that followed by the Common Law courts. Where service within the jurisdiction was sufficient at Common Law, Chancery required that a sufficient connection between the dispute and the forum be demonstrated before it would assume jurisdiction.[47] It thus applied jurisdiction rules as a proxy for choice of law rules which had not yet been (sufficiently) developed, at least in relation to equitable claims.[48] Yet in some respects the reverse process can also be seen: in both *Norris v Chambres* (a decision which predated the Judicature Acts) and *Deschamps v Miller* the characterization of the issue of notice as a matter governed by foreign law was used to deprive the court of jurisdiction.

In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*, Millett J observed that in such a case the only equity that the plaintiff could enforce is one arising from the transferee's notice, but 'the sufficiency of such notice to affect the transferee's title is a matter for the lex situs. If, by that law, the transfer to the defendant extinguished the plaintiff's interest notwithstanding the defendant's notice, the plaintiff no longer has any proprietary interest upon which he can base his suit in England.'[49]

[44] See PJ Rogerson, *Collier's Conflict of Laws* (4th edn, Cambridge University Press 2013) at 383–4; *Dicey* (n 5) at [23–047]. See also *Cheshire* (n 5) at 485, which attempts to explain the cases on the basis that in 'exceptional circumstances' the court might nevertheless enforce an equity against a third party, and that in the *River Plate* case it was justified because the third party's conduct was 'clearly unconscionable'.

[45] *Cheshire* (n 5) at 484; Yeo (n 10) at [5.20].

[46] *Griggs* (n 40) at [84].

[47] See White (n 23) at 104–5, endorsed in *Murakami* (SGCA) (n 24) at [15]. The author is now Justice White of the Supreme Court of New South Wales.

[48] See Yeo (n 10) at [1.23], [1.25], endorsed in *Murakami* (ibid) at [19].

[49] *Macmillan* (n 27) at 989.

His Honour thus concluded that *Norris* and *Deschamps* should be interpreted as cases on choice of law rather than jurisdiction.[50] In other words, once it was found that the question of notice was governed by the *lex situs*, it followed that only the courts of the *situs* had jurisdiction. But neither Sir John Romilly MR nor Parker J asked whether the *lex situs* had actually extinguished the plaintiff's interest in the land; the mere fact that the question of notice was governed by foreign law was sufficient to deprive the court of jurisdiction.[51] So *Collier* cites *Deschamps v Miller* as authority for the proposition that notice simply does not create an equitable obligation sufficient for the purposes of the rule in *Penn v Lord Baltimore*.[52]

C. A Modern Approach to Choice of Law and Jurisdiction

The requirement that the interest on which the claimant relies must be recognized by English law was not merely 'English insularity'[53] but an apparently deliberate attempt to ensure that the dispute was heard in the appropriate court applying the appropriate law. But private international law has moved on; Peter Prescott QC, sitting as a Deputy High Court Judge, has held that notice of a prior equity can now be sufficient to establish jurisdiction; the law should treat the fact that land was situate overseas as relevant to choice of law and not jurisdiction.[54] In this author's view, we should go further than that, and reject the requirement that the privity of obligation arise under the *lex fori*.[55] The courts can apply modern rules of jurisdiction (including the doctrine of *forum non conveniens*[56]) to control where the dispute is heard, and modern choice of law techniques to ensure that the appropriate law is applied.

This is consistent with the approach of the Singapore Court of Appeal in *Murakami v Wiryadi*.[57] The Court rejected the proposition that *in personam* jurisdiction in relation to foreign land depended on the existence of a 'sufficient connection between the dispute and the forum'.[58] Nothing more is required than that the court has personal jurisdiction in the ordinary fashion over the defendant in relation to an equitable or contractual claim.[59] The necessary consequence of this approach must be that, in Singaporean law, it is not necessary that the equitable or contractual obligation alleged to give rise to jurisdiction arise under the *lex fori*. Instead, the function performed by rules of

[50] ibid; *Griggs* (n 40) at [108]; supported by *Dicey* (n 5) at [23–048].
[51] *Norris* (n 6) at 254–5; *Deschamps* (n 6) at 864.
[52] *Collier* (n 44) at 382–3, citing *Re Hawthorne* (n 41) and *Deschamps* (n 6).
[53] *Nygh* (n 18) at [7.43].
[54] *Griggs* (n 40) at [110].
[55] The issue is acknowledged in *Griggs* (ibid) at [114].
[56] At least where it is not precluded by the European regime: see Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383.
[57] *Murakami v Wiryadi* (SGCA) (n 24).
[58] The judge at first instance had adopted this test, relying in particular on a (mis)reading of White's article: *Murakami v Wiryadi* [2008] SGHC 47, [2008] 3 SLR(R) 198 at [23].
[59] *Murakami v Wiryadi* (SGCA) (n 24) at [17], [22].

jurisdiction in those old cases is now supplied by a modern approach to choice of law.[60]

The requirement for privity of obligation performs the valuable function of ensuring that the claimant is not merely asserting title to land contrary to the *Moçambique* rule,[61] and accordingly ensures that the rule in *Penn v Lord Baltimore* stays within its proper limits. But ordinary choice of law rules should be applied to determine whether the necessary obligation exists. The separate question of whether it is *appropriate* for the English court, or another court, to exercise jurisdiction to enforce that obligation is best resolved by the application of the *forum non conveniens* principle.

A modern court faced with the facts of *Norris v Chambres* would inevitably have declined jurisdiction given that the dispute arose out of a contract to purchase a Prussian mine and there were parallel proceedings in Prussia.[62] So in *Deschamps v Miller*, although this article argues that the Court should have had jurisdiction to determine whether the *de facto* wife was bound by the *de jure* wife's equity, today the court would probably decline to exercise the jurisdiction given the lack of connection between the dispute and England.[63] The recent New Zealand case of *Schumacher v Summergrove Estates Ltd* illustrates this process. The High Court found that it had jurisdiction to consider the plaintiff's allegation that land in Ireland was held on constructive trust in her favour. But it nevertheless concluded that New Zealand was *forum non conveniens*; the Court was particularly swayed by the fact that Irish law applied to the claim.[64]

III. LIMITS ON THE RELIEF THAT THE COURT MAY GIVE

A. Introduction

As noted above, the English courts have been prepared to assume jurisdiction on the basis of obligations that are not recognized by the *lex situs.* But the courts have always recognized that *some* regard has to be given to the *lex situs* 'because it is essential to acknowledge the capacity of the *lex situs* to render

[60] *Murakami* (ibid) at [19], [22] doubting *Griggs* (n 40) at [110].

[61] See eg *Re Polly Peck International plc (in admin) (No 2)* [1998] 3 All ER 812 (CA) at 828. Indeed, this is how *Cheshire* and Yeo explain the results in *Norris* and *Deschamps* themselves: see n 45 above.

[62] *Griggs* (n 40) at [91]. Before 1873, Chancery had a doctrine equivalent to *forum non conveniens* (see *Doss v Secretary of State for India* (1874–75) LR 19 Eq 509 and White (n 23) 104–5).

[63] Indeed, when one reads up to the first sentence of the first full paragraph on page 843 of the report (n 6), it seems as if Parker J is about to conclude that England is *forum non conveniens*.

[64] *Schumacher* (n 1) at [35], [40]. See also *Murakami v Wiryadi* (SGCA) (n 24) at [37], in which the Court of Appeal found that it had jurisdiction pursuant to the rule in *Penn v Lord Baltimore* but declined to exercise it on *forum non conveniens* grounds, *inter alia* because Indonesian law applied.

futile any conflicting law with respect to title to … property' situated there.[65] This has led, in the context of *Penn v Lord Baltimore* jurisdiction, to a difficult distinction between cases where the *lex situs* merely does not 'recognize' the claimant's interest and where it has actively 'destroyed' it. This Part of the article will explain that distinction and demonstrate how a modern approach to choice of law can ameliorate it. *Penn v Lord Baltimore* jurisdiction involves an inevitable risk of conflict with the courts of the *situs*, and in those circumstances it is particularly important that the court refrain from a chauvinistic approach to choice of law and jurisdiction.

The concerns of this article are illustrated by a particularly tortuous dispute currently being played out in the Western Australian and Malaysian courts. *Singh v Singh* is a dispute between two brothers which has produced at least four sets of proceedings. The plaintiff, Sardul Singh, sued his brother in the Supreme Court of Western Australia, alleging that the brother transferred real estate in Malaysia to his wife and daughter with intent to defraud creditors including the plaintiff, contrary to section 89(1) of the Western Australian Property Law Act 1969.[66] The plaintiff claimed that the land was held on constructive trust.[67]

The Supreme Court dismissed the defendants' objection to jurisdiction, and that decision was upheld by the Court of Appeal in 2009.[68] Judgment was then given in default of defence in 2010.[69] Then matters became more complicated.

On 22 July 2011 the defendants commenced proceedings in the High Court of Malaysia seeking declarations that the Supreme Court of Western Australia acted without jurisdiction when it gave judgment in 2010, and essentially that the judgment should not be acted on.[70] The High Court granted an interim injunction on 10 August 2011 restraining the plaintiff from acting on the property or relying on the Western Australian judgment (except by recognition or enforcement proceedings under Malaysian law).[71] Finally, the plaintiff sought an order in Western Australia committing the defendants for contempt for failing to comply with the substantive judgment of 2010. That was refused, at which stage the Malaysian proceedings remained outstanding.[72]

[65] *Murakami v Wiryadi* (NSWCA) (n 25) at [93]; see also the risk that the decree will be a *brutum fulmen: Norris v Chambres* (1861) 3 De GF & J 583, 45 ER 1004 at 584–5 per Lord Campbell LC.

[66] This is proceeding CIV 1264 of 2006. The other two Australian proceedings involved an equivalent allegation in relation to an Australian property (CIV 1009 of 2005, judgment given in *Singh v Kaur Bal* [2011] WASC 303), and an allegation that another Malaysian property (apparently on the same street as the first Malaysian property) was held on express trust by the defendant (CIV 1677 of 2004, judgment given in *Singh v Singh (No 3)* [2010] WASC 64). The fourth proceeding is in Malaysia. For the avoidance of doubt cross-references are not used when referring to the cases in this dispute.

[67] This claim was added on 12 October 2009: *Singh v Kaur Bal (No 3)* [2012] WASC 243 at [21], after the jurisdiction appeal referred to below.

[68] [2008] WASC 62; [2009] WASCA 53, (2009) 253 ALR 575.

[69] *Singh v Kaur Bal (No 2)* [2010] WASC 69.

[70] [2012] WASC 243 at [28].

[71] [2012] WASC 243 at [29].

[72] [2012] WASC 243 at [32], [83].

On its face, this is precisely the kind of 'embarrassing conflicts' of which there is an inherent risk when the court exercises jurisdiction over foreign land.[73] The Malaysian Court has not yet even expressed a view on the merits of the Australian judgment, but has apparently objected (in a preliminary sense) to the fact that jurisdiction was exercised at all.

B. Prohibition of the Relief by the Lex Situs

Lord Cottenham LC observed in *Re Courtney* that if 'the law of the country where the land is situate should not permit, or not enable, the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act.'[74] *Dicey* notes that the scope of this principle is unclear, and is hard to reconcile with Lord Cottenham's assertion that the English court would apply its own rules of equity to the claim without regard for the *lex situs*.[75] Indeed it is unclear whether this limitation operates in a positive or negative fashion: *Cheshire* suggests that 'it must be possible for the decree issued by the English court to be carried into effect in the country where the land is situated' (perhaps optimistically declaring that this principle 'requires no elaboration')[76] but *Dicey* suggests that all that is required is that the *lex situs* does not 'prohibit' the enforcement of the decree.[77]

In *Re Courtney* the bankrupts purported to give the appellant a security over land owned by them in Scotland. Lord Cottenham recognized this as an equitable mortgage under English law, despite the fact that under Scottish law no such equitable mortgage was created. The creditor thus was entitled to priority, and Lord Cottenham expressly noted that the position under Scottish law was irrelevant.[78] Other cases are to similar effect,[79] including *Re Smith*.[80] In that case Eve J followed the Court of Appeal's decision in *British South Africa Co v De Beers Consolidated Mines*, in which Cozens-Hardy MR held that 'an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the *lex situs* … is subject to such rights of redemption and such equities' as English law provides.[81]

Compare *Waterhouse v Stansfield*. The plaintiffs advanced money to Moody which was to be secured by a mortgage on land to be purchased by him in Demerara. The *lex situs* provided that no right or interest in land could be created without judicial approval 'in the nature of a judgment'. The legal transfer of the land from the vendor to Moody was not effected before the latter became bankrupt, after which Demeraran law provided that the land vested in Moody's assignees in bankruptcy. Turner V-C proceeded on the basis that under English law the plaintiffs enjoyed a beneficial interest, but held that the

[73] The words of *Dicey* (n 5) at [23–051].
[74] *Re Courtney* (n 7) at 250.
[75] *Dicey* (n 5) at [23–046].
[76] *Cheshire* (n 5) at 484.
[77] *Dicey* (n 5) at [23–046].
[78] *Re Courtney* (n 7) at 250.
[79] See cases cited at n 88 below.
[80] *Re Smith* (n 8) at 210.
[81] (n 21) at 515.

plaintiffs could not thereby avoid the local requirements in demanding that the trustees transfer the land to them:[82]

> When the law of a foreign country places a restraint upon the alienation of the property of a debtor situated in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitae*.

The Court also refused relief in *Hicks v Powell*.[83] Clark executed a deed to transfer land in Madras to the plaintiffs, but the deed was not registered. Indian law provided that unless a deed was registered it could not be put in evidence in any court in India. Clark subsequently mortgaged the same land to the defendants, who had notice of the first (unregistered) deed. The second deed was duly registered. Lord Hatherley LC clearly had sympathy for the plaintiffs, but concluded that the Act had 'swept away' any equitable interest they had possessed.[84]

In theory the distinction that explains these cases is whether the *lex situs prohibits* or merely *does not recognize* the equitable interest in question.[85] In *Re Courtney*, Scottish law did not prohibit an equitable interest, but was simply silent on the subject 'inasmuch as it provide[d] no remedy for the equitable mortgagee'.[86] On the other hand, in *Waterhouse* Turner V-C appeared to be particularly impressed by evidence that under Demeraran law any general creditor could have objected to the transfer of the property.[87] But a distinction between silence and active prohibition is almost impossible, particularly where the *lex situs* may not even know the concept of an equitable interest to prohibit. Even if we accept this distinction it does not satisfactorily explain the difference between, for example, *Re Smith* and *Waterhouse*.[88]

It is the inconsistency between English law and the foreign law—or the potential for the English law to override the foreign law—that produces difficulties. While that risk is inherent in the exercise of *Penn v Lord Baltimore* jurisdiction it can be mitigated significantly by the application of the modern choice of law process. As argued above, for equitable claims in relation to

[82] (n 7) at 259. [83] (n 6). [84] ibid at 747.

[85] Megarry J applied the rather impressionistic alternative of asking whether the courts of the *situs* would 'stand aghast at the spectacle of a purchaser living within the English jurisdiction being ordered by an English court to carry out his agreement to purchase land' abroad: *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 (Ch) at 430. Cf *Duke v Andler* (n 13) at 742, relying on *Re Courtney* (n 7) at 250, where the Supreme Court suggested that the distinction was whether it would be *enforced* by the courts of the *situs*.

[86] *Re Courtney* (ibid) at 245.

[87] (n 7) at 259. One could also explain the cases in similar terms to *Deschamps*—the determinative issue being governed by the *lex situs* and thus outside the English court's jurisdiction.

[88] cf *Dicey* (n 5) at [23–046]. Note also that in *Re Courtney* no unsecured creditors who would be prejudiced by the order had been identified, whereas the position of such creditors was noted in *Waterhouse* (n 7) at 257. Yet several decisions have given priority for plaintiff security-holders in such circumstances: see eg *Ex p Holthausen, In Re Scheibler* (1874) 9 LR Ch App 722 (CA), *Re Smith* (n 8); *In re Anchor Line (Henderson Brothers) Ltd* [1937] 1 Ch 483 (Ch).

foreign land this will usually point to the *lex situs*; for claims based on contract it would presumptively be the *lex situs* under common law rules[89] and probably under the Rome I Regulation as well.[90]

This will not eliminate the difficulty in all cases; where the contract is expressly governed by English law,[91] for example, or where the nature of the relationship or the equitable claim in question is almost entirely connected with England. But for the reasons given above in relation to *Lightning*, the *lex fori* should only be applied where the choice of law process points to that law. We must doubt older English cases which appear to have assumed that English law applied to a contract made in England without analysing the point,[92] and care must be taken with older English cases that almost invariably concerned land within the Empire.[93]

What if we test the suggested approach against the old cases? In *Hicks v Powell* the deed had been executed in Madras in relation to land in Madras; a modern court would surely find that the deed (and equitable claims arising out of it) would be governed by Indian law. So the result would be the same but the impossible distinction between non-recognition and destruction of equitable interests would be avoided. So too in *Re Smith*, it makes perfect sense that the effect in equity of an unregistered charge over land in Dominica should be assessed according to Dominican law, and that is exactly the approach for which counsel for the creditors argued in that case.[94]

Returning to the *Singh v Singh* saga, the first question was whether the Western Australian Property Law Act applied at all to a disposition of land in Malaysia.[95] Section 89(1) provided that 'every alienation of property made … with intent to defraud creditors is voidable, at the instance of any person thereby prejudiced'. Pullin JA first observed that this power to set aside fraudulent dispositions predated statute,[96] and 'equity would have decreed in

[89] Note that this includes *renvoi*: A Briggs, *The Conflict of Laws* (2nd edn, Oxford University Press 2008) 224. But cf *Richard West & Partners* (n 85) at 429, in which Megarry J specifically noted that the purchaser had not taken the governing law point.

[90] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/6, art 4(1)(c) (but subject to art 3); alternatively a contract is likely to be 'manifestly more closely connected' with the *situs* than anywhere else: art 4(3).

[91] See *Dicey* (n 5) at [33–038].

[92] Again, this may be explained by the fact that the Court of Chancery required a connection between the subject matter of the dispute and England before taking jurisdiction, and the fact that the contract was made in the jurisdiction was a sufficient connection: see text to n 47 above. That requirement acted as a proxy for what would now be achieved by the choice of law process, but had the effect that when jurisdiction *was* assumed English law was usually applied.

[93] For example, the headnote of *Paget v Ede* (1872) LR 18 Eq 118 appears to confine the rule in that case to land in 'the colonies'; see also *Lord Cranstown v Johnston* (n 20) at 182 and *Dicey* (n 5) at [23–051], but cf *Ewing v Orr Ewing* (1883) LR 9 App Cas 34 (HL) at 40. *Dicey* (n 5) at [33–038] cites a number of the cases discussed above as authorities where the contract was more closely connected to England rather than the *situs*, but they must be read with caution now.

[94] (n 8) at 208 (on the authority of *Waterhouse v Stansfield*).

[95] The defendants did not plead foreign law.

[96] The power was first enacted in the Statute of Elizabeth 13 Eliz c 5.

personam remedies in support even if the property was out of the jurisdiction.'[97] The Court then considered whether 'property' should be interpreted to include property outside Western Australia. After noting that the definition of 'property' in the Act was not territorially limited, Pullin JA concluded that it applied to the disposition of land overseas. In his view this did not involve the Act being applied extraterritorially because section 89(1) rendered transactions merely voidable at the suit of the person prejudiced, and thus 'confer[red] a right on a person resident in Western Australia to avoid the disposition of property by acts performed in the State by a person resident in the State'.[98]

That conclusion is consistent with English authority,[99] but two points should be noted. First, Sir Donald Nicholls V-C has stressed the importance of exercising discretion.[100] Section 89(1) does not expressly include a discretion, but in the right case the court could decline jurisdiction on *forum non conveniens* grounds as a means of avoiding the extraterritorial application of the statute in circumstances where the court had concluded that the dispute did not have a sufficient connection with the forum.[101]

Second, Pullin JA adopted the usual approach of simply asking whether Parliament intended the statute to apply extraterritorially. But as *Dicey* points out, this is an artificial and potentially dangerous approach, because '*ex hypothesi* the legislature gave no thought to the matter' of whether a given provision should apply extraterritorially. The alternative method is to 'apply general principles derived from the conflict of laws—i.e. first characterise the question … and then apply the relevant conflict rule to the question so characterised'.[102] Where the plaintiff sought to impugn the transfer of the Malaysian land to the first and third defendants—and thus challenge their title—there is an argument that the result of this process should have been the application of the *lex situs*.[103]

[97] [2009] WASCA 53, (2009) 253 ALR 575 at [32].

[98] At [75]. His Honour distinguished section 120(1) of the Bankruptcy Act 1966 (Cth), which rendered transactions leading up to bankruptcy *void*.

[99] Which indeed goes further, providing that the only absolute requirement is that the court has jurisdiction: see *Re Paramount Airways Ltd* [1993] Ch 223 (CA) at 235; *Jyske Bank (Gilbraltar) Ltd v Spjeldnaes* [1999] 2 BCLC 101 (Ch).

[100] *Re Paramount Airways* (ibid) at 239.

[101] Pullin JA did not consider this aspect in his analysis of whether Western Australia was *forum non conveniens*. Compare *Dicey* (n 5) at [30–092], [30–093]. See also at [23–048] citing *Griggs* (n 40) at [112].

[102] *Dicey* (n 5) at [1–040]. See generally M Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 JPIL 1.

[103] Compare *Ludgater Holdings Ltd v Gerling Australia Insurance Company Pty Ltd* [2010] NZSC 49, [2010] 3 NZLR 713 at [33]. Although of course a statute may always apply extraterritorially if Parliament's intention is sufficiently clearly demonstrated: *Wanginui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601 per Dixon J.

That leads us to a related question: could the court have refused relief on the basis that it could not be implemented at the *situs* (for example because the *lex situs* had destroyed the equity)?

The defendants objected to the Court's jurisdiction on the basis, inter alia, that the Court's judgment would not be entitled to recognition and enforcement in Malaysia. In particular, they argued that the Torrens system in Malaysia meant that the wife and daughter's interest in the land was indefeasible except in the case of actual fraud, and mere knowledge of a prior interest would not suffice. The Court of Appeal accepted that proposition as correct in both Australian and Malaysian law, but held that it was arguable that there had been actual fraud sufficient to defeat title.[104]

The Court of Appeal appeared to accept that Malaysian law might have governed the question of indefeasibility of title to Malaysian land. However, this immediately created a disjunction, because (on the Court of Appeal's approach) the question of whether the disposition which gave rise to that title was a fraud on the second defendant's creditors was governed by Western Australian law.[105] The Court may be taken to have accepted that if the wife and daughter were *not* complicit in the fraud then their title would be indefeasible, whatever interest the plaintiff could establish under Western Australian equity or statute; but that was a matter for trial.[106] *Dicey* suggests that:[107]

> an English court may exercise *in personam* jurisdiction over a transferee of land to enforce an equity which, according to English law, binds the third party. If, however, according to the *lex situs*, that equity is extinguished upon transfer to the defendant, then there would be no right for the claimant to enforce in England.

This is consistent with *Hicks v Powell*, where the Lord Chancellor found that the Indian statute had 'swept away' the plaintiffs' equitable interest.

The Court of Appeal's approach may have been defensible on an interlocutory application, but Hasluck J's decision to grant summary judgment on the merits (in default of defence) is more troubling. The Judge concluded that 'the wife and daughter were aware . . . well before the transfer of the No 2 Malaysian property, that the second defendant had substantial debts, . . . [and thus] it is inconceivable that the wife and daughter were unaware of the second defendant's insolvency and his fraudulent intention'.[108] Thus order 2 specifically records that the first and third defendants had sufficient notice for the purpose of section 89(3). But Hasluck J appears to have proceeded on the assumption that only Australian law was relevant,[109] and appears not to have

[104] [2009] WASCA 53, (2009) 253 ALR 575 at [43]–[48].
[105] The defendants not having pleaded otherwise.
[106] [2009] WASCA 53, (2009) 253 ALR 575 at [47]–[49].
[107] (n 5) at [23–048] (citations omitted).
[108] [2010] WASC 69 at [61].
[109] Whether as a matter of substance or procedure. At [37]–[38] Hasluck J appears to suggest that the imposition of a constructive trust should follow the finding of a breach of section 89(1) as

given any consideration at all to the question of the effect of indefeasibility of title under Malaysian law. It may be that the wife and daughter's knowledge and participation was sufficient to constitute actual fraud or that the plaintiff's equity survived registration, but in circumstances where Hasluck J was essentially reversing a transfer of land executed according to the *lex situs*, the lack of analysis is problematic. The defendants had filed expert affidavit evidence on the content of the Malaysian indefeasibility rules, including extracts from the relevant legislation. But they did not appear at the hearing before Hasluck J, and so their expert did not give evidence at the hearing.[110] Although one might argue that this did not constitute sufficient proof of the content of Malaysian law,[111] that is an unattractive answer in circumstances where the Court of Appeal had already suggested that Malaysian law was the same as Australian law and the meaning of 'fraud' in terms of the relevant statutes appeared to be well settled.[112]

C. The Extent of the Relief

It is tautologous to say that the court acting *in personam* may only grant a remedy *in personam*. It may not adjudicate on the land's 'title or disposition as against the whole world'.[113] But of course an order *in personam* may well result in the conveyance of the land. So *Cheshire* observes that the English court cannot effect a direct transfer of land in New York from a mortgagee to mortgagor, but can 'indirectly produce the desired result by saying to the recalcitrant mortgagee: "… if you refuse to take the steps required … for a

'consequential relief', relying on *Muschinski v Dodds* (1985) 160 CLR 583 at 613 for the bare proposition that a constructive trust can be imposed to preclude retention of beneficial ownership where that would be inequitable.

[110] Hasluck J noted that the defendants may have declined to appear in order to avoid being held to have submitted to the jurisdiction for the purposes of subsequent enforcement proceedings: [2010] WASC 69 at [23].

[111] Fentiman notes that oral examination of witnesses may sometimes be dispensed with in favour of affidavit evidence; in other words, an expert's evidence is not automatically inadequate simply because it was given by affidavit: R Fentiman, *Foreign Law in English Courts* (Oxford University Press 1998) at 204. See generally on the adequacy of proof of foreign law *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, (2005) 223 CLR 331. Of course it is a matter of domestic civil procedure whether the court will take into account evidence already filed by a party in default of appearance, and it may not.

[112] [2009] WASCA 53, (2009) 253 ALR 575 at [43]. One could thus argue that the court should have applied the rule that, in the absence of proof of foreign law, the *lex fori* applies. This raises the difficult issue of whether that rule should have been excluded in circumstances where Western Australian law was statutory and inherently applicable only to Western Australian land, thus creating a 'special institution': see eg *Shaker v Al-Bedrawi* [2003] Ch 350 (CA) at [64] citing *Österreichische Länderbank v S'Elite Ltd* [1981] QB 565 (CA) at 569, but see the argument that the position may be different where the applicable foreign law may be expected to contain a provision equivalent to the *lex fori*: at [68]. See also *Schnaider v Jaffe* (1916) 7 CPD 696 (Cape of Good Hope Provincial Division) at 700–1, cited in *Damberg v Damberg* (2001) 52 NSWLR 492 (CA) at [140], and *Dicey* (n 5) at [9–025]–[9–029].

[113] *Cheshire* (n 5) at 480; *Pattni v Ali* [2007] 2 AC 85 at [21] (PC).

reconveyance of the property to the mortgagor, we shall imprison you or sequestrate your English property until you comply.'"[114]

Dicey addresses this principle in terms of whether the court will be able effectively to supervise the execution of its decree: so it will not order the sale of foreign land at the request of a mortgagee, but will order foreclosure on a mortgage of foreign land.[115]

The Privy Council's decision in *Pattni v Ali* is instructive.[116] The respondents had agreed to sell the appellant their shareholding in a Manx company, in a contract governed by Kenyan law. The appellant paid the purchase price and then successfully sued in Kenya for specific performance. The registrar of the Kenyan court ordered the respondents 'to transfer all the 100% shares' in the company to the appellants. The respondents commenced proceedings in the Isle of Man asserting a beneficial interest in the shares; in response the appellant relied on the Kenyan judgment as an estoppel and filed his own petition seeking rectification of the share register to effect the transfer.[117]

The respondents' primary argument was that the Kenyan registrar's order purported to act *in rem* on property outside Kenya and was thus unenforceable. Lord Mance (speaking for the Committee) was unimpressed by that submission. He acknowledged the general principle that the 'actual transfer or disposition of property' is a matter for the legislature and courts of the *situs*, and accordingly that 'in the unlikely event that the courts of state A were to purport actually to transfer or dispose of property in state B, the purported transfer or disposal should not be recognised as effective in courts outside state A.'[118] However he distinguished this from a judgment 'determining the contractual rights of parties to property'.[119] Far from 'purporting actually to . . . deal with the shares' or otherwise alter the register, the Kenyan order simply determined the parties' rights and responsibilities in relation to them, and in that sense was 'a classic order in personam for specific performance'.[120] Indeed, even if the order had purported to operate *in rem*, Lord Mance suggested that it might still have had *in personam* effect between the parties *inter se* even if was not effective against the whole world.[121] The implication of Lord Mance's speech is that a court should try to save the foreign court's judgment; it will only be refused enforcement if, and to the extent that, it purports to actually transfer land or determine title as against the whole world.

In *Singh v Singh*, the orders included the declaration of a constructive trust and consequential relief.[122] Most of that relief is unobjectionable, including the orders that the defendants take certain steps to enable the voidable transfer to be unwound (being the equivalent of the order for specific performance

[114] *Cheshire* (ibid) at 481.
[115] *Dicey* (n 5) at [23–049] and the cases there cited. This is really animated by the considerations that motivate the *Moçambique* rule in the first place.
[116] (n 113).
[117] ibid at [4], [5].
[118] ibid at [24].
[119] ibid at [25].
[120] ibid at [29]–[30], [35].
[121] ibid at [38].
[122] [2012] WASC 243 at [24].

in *Pattni*). Order 3 is slightly more problematic. It declares that the transfer of the land to the first and third defendants is 'void as against the plaintiff'. While that may be the effect of section 89(1), it is doubtful whether that is something that the Western Australian Court can properly order. The Court can require that the defendants do what is necessary to reverse the transfer, but it could be argued that to declare the transaction void purports to affect the effectiveness of the legal transfer itself. Unless and until the first and third defendants took the necessary steps to reverse the transfer, they remain the legal owners. In light of *Pattni*, however, it is likely that this order would have *in personam* effect even if it purports to act *in rem*.[123]

IV. ENFORCEMENT AT THE SITUS

This Part considers the second question introduced at the beginning of this article: will an English court recognize or enforce the order of a foreign court in relation to English land?

Foreign judgments and orders do not take direct effect in England. At common law, however, they may be recognized (and then potentially enforced) if they meet certain requirements.[124] One of these is that the court which gave the judgment had 'international jurisdiction'. This in essence requires that either the defendant submitted to the jurisdiction (in advance or by appearance) or was present or resident in the forum when proceedings were commenced.[125]

Will a court applying English rules recognize relief given by another court in the exercise of that other court's *Penn v Lord Baltimore* jurisdiction? We have already seen that the Malaysian High Court appears to have doubts about the Western Australian Supreme Court's exercise of its jurisdiction in *Singh*, and has injuncted the plaintiff from acting on his judgment except by applying to have the judgment recognized or enforced in Malaysia. Two issues arise. The first is whether the enforcing court is likely to regard the first court as having had jurisdiction (in the sense required for the recognition of a foreign judgment). The second raises wider issues about whether non-money judgments can be enforced at common law at all.

A. Does a Court Acting Pursuant to the Rule in Penn v Lord Baltimore *Enjoy 'International Jurisdiction'?*

The English common law has long rejected the proposition that there should be perfect reflexion generally between the rules for assuming and recognizing

[123] In *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433, a majority of the New Zealand Supreme Court found that the New Zealand equivalent to section 89(1) operated *in personam* only and thus (in a purely domestic context) did not conflict with the principle of indefeasibility of title.

[124] See *Dicey* (n 5) at [14R–020]. This article is not, in general, concerned with the position under statute or in the European context.

[125] See eg Briggs (n 89) at 137.

jurisdiction.[126] So there may be circumstances in which a court may properly assume jurisdiction pursuant to the rule in *Penn v Lord Baltimore* where it does not enjoy 'international jurisdiction'.[127] But where the court prima facie did have jurisdiction on a ground recognized by English rules on the enforcement of judgments (such as where the defendant submitted to the foreign court's jurisdiction), does it make a difference that the foreign proceedings concerned English land?

Dicey suggests that 'English courts sometimes claim for themselves a wider jurisdiction than they are prepared to concede to foreign courts as being sufficient for the judgment of that court to be recognized in England as *res judicata*.'[128] *Cheshire* notes that 'any attempt by a foreign court to regulate the disposition of land outside its jurisdiction not unnaturally provokes a certain animosity in the state where the property is situated and it is doubtful whether in this particular context the English judges would be imbued with any spirit of reciprocity.'[129] Is this assessment justified? This article will first introduce the 'leading' case of *Duke v Andler*.

1. Duke v Andler

This case concerned a contract for the sale of land in British Columbia made between residents of California. Duke (the purchaser) took title to the land and subsequently transferred it to his wife, without having fulfilled his obligations under the contract. The respondents obtained an order from the Superior Court of California requiring that Duke and his wife reconvey the land; in default a Commissioner appointed by the Superior Court effected the conveyance. The vendors sued in the Supreme Court of British Columbia for a declaration that by virtue of the conveyance and/or the judgment they were the owners of the land. The Supreme Court of Canada refused to enforce the Californian judgment. The judgment is difficult, however, because Smith J for the Court appeared to rely on three different theories in finding that the Californian judgment was unenforceable:

(a) His Honour noted that title to property (and thus the question of whether Duke's transfer to his wife could be set aside) could only be judged according to the *lex situs*. The California court must be presumed to have applied its own law, and not the law of British Columbia, to the question,

[126] See eg ibid at 138.

[127] For example, the court may give leave to serve a defendant outside the jurisdiction on the basis of a long-arm statute, which is sufficient for the purpose of *Penn v Lord Baltimore* jurisdiction (see *Re Liddell's Settlement Trusts* [1936] Ch 365 (CA) at 374) but under English rules does not suffice for the purpose of enforcement in the absence of submission.

[128] (n 5) at [14–114], commenting on Rule 47(2).

[129] (n 5) at 485, citing *Duke v Andler* (n 13); *Fall v Eastin* 215 US 1 (1909).

and its conclusion must accordingly be ignored even if the result may have been the same under British Columbian law.[130]

(b) His Honour held that a court exercising *Penn v Lord Baltimore* jurisdiction acts only *in personam* and therefore cannot expect its judgment to be enforceable in any other court.[131] The enforcing court should accordingly not give extraterritorial effect to the resulting judgment; in other words, it should not recognize the foreign court's jurisdiction to affect land overseas.

(c) Finally, he held that if the courts of British Columbia were obliged to enforce the Californian court's *in personam* judgment then 'there would be no practical difference, in effect, between such a judgment and a judgment for a debt' and it was established that only foreign money judgments were capable of enforcement.[132]

None of these theories is convincing.[133]

The first reason appears to owe something to the view (recognized in cases such as *Deschamps v Miller*) that the question of whether a third party purchaser was impressed with the plaintiff's equity had to be determined according to the *lex situs* and thus exclusively by the courts of the *situs*. For the reasons given above, this approach should be rejected. Indeed, Smith J's reasoning proceeds on the rather perverse assumption that the Californian court applied the *wrong* law. A modern court in the position of the Supreme Court should rather proceed on the basis that the first court applied the *proper* law (in this case presumably the law of British Columbia).[134] The Court's decision is not consistent with notions of comity, efficiency, or ensuring justice.

2. International jurisdiction

The second reason involves two propositions: a judgment *in personam* in relation to foreign land is not intended to operate extraterritorially (because otherwise it would be operating *in rem*), and the enforcing court should accordingly not recognize the foreign court's jurisdiction to affect land overseas.

This analysis is reminiscent of the approach adopted by the United States Supreme Court in a number of early cases. In *Fall v Eastin*, the Court found that *in personam* decrees do not operate extraterritorially, even though they may have extraterritorial effects.[135] The Court endorsed its earlier

[130] *Duke v Andler* (ibid) at 742. I have taken these arguments out of the order in which they appear in the judgment.

[131] ibid at 739, 741, relying particularly on *Henderson v Bank of Hamilton* (1894) 23 SCR 716.

[132] ibid at 744.

[133] cf Gordon (n 11), who generally endorses the result.

[134] Although Smith J's assumption may be justified in the case of a default judgment (unless the plaintiff itself pleaded and proved the content of foreign law), it is still unclear why it provides a basis for refusing to enforce a judgment; the English court will not re-examine the merits of the foreign judgment: *Dicey* (n 5) Rule 48 at [14R–118], citing (*inter alia*) *Godard v Grey* (1870) LR 6 QB 139.

[135] *Fall v Eastin* (n 129) at 11.

decision in *Carpenter v Strange*, arguing that to hold otherwise would give the *in personam* decree the 'force and effect of a judgment *in rem*' and the court has no power to annul a decree or establish a title in the foreign jurisdiction.[136]

But as *Pattni v Ali* demonstrates, the fact that an order requires a party to act in relation to foreign land does not mean that it is an order *in rem*. Nor does the recognition by the courts of the *situs* give the judgment that effect. It simply recognizes and enforces the personal obligation owed by the defendant, and can accordingly be enforced by *in personam* remedies such as sequestration of the defendant's assets within the jurisdiction. The Supreme Court of Canada (mis)characterized the Californian judgment as purporting to adjudicate on title itself. Once that characterization was adopted then the question of whether the Californian court's judgment should be enforced almost 'answers itself', but it is not at all clear that that was what the Californian court was doing.[137] Deputy Judge David Donaldson QC has thus suggested that *Dicey* does the decision 'far too much honour' and implies that it was either wrong or should be confined to its facts.[138]

Commenting on *Re Courtney*, Gordon suggested that it was 'almost incredible that English Courts could ever have expected their decrees *in personam* to receive extra-territorial recognition'.[139] But 'it is a curious thing to accept that a court which grants an order requiring a defendant to act in a certain way abroad does not expect or intend for that order to be given extraterritorial recognition. This comes perilously close to asserting that equity is willing to act in vain.'[140] In *Singh v Singh*, Pullin JA was unimpressed by the suggestion that the Western Australian court's decision would not be enforceable in Malaysia. He held that this argument proceeded on the premise that the defendants would not comply with the Western Australian order, because only then would it be necessary for an official of the Western Australian court to execute the conveyance.[141]

While that position is understandable, one might suggest that it was nevertheless relevant for Pullin JA to consider whether the Malaysian court

[136] *Carpenter v Strange* 141 US 87 (1890), cited in ibid at 10.

[137] E Edinger, 'Is *Duke v Andler* Still Good Law in Common Law Canada?' (2011) 51 CanBusLJ 52 at 62. In *Shami v Shami* (n 3) at [37] Deputy Judge David Donaldson QC suggests that the Supreme Court misinterpreted the Californian judgment and thus proceeded on a premise of 'dubious accuracy'. This confusion appears to have arisen because the Commissioner had effected a transfer of the land since the Californian judgment, and the plaintiffs asked the Canadian court (in the alternative) to effectively sanction that conveyance; the result was that the plaintiffs were in that sense seeking to enforce in the Canadian courts something other than the Californian court's order itself.

[138] ibid at [34]. Although it might be recalled that the rule predates *Duke v Andler* and the Supreme Court relied on its predecessor in that case at 739.

[139] Gordon (n 11) at 549.

[140] W Anderson, 'Foreign Orders and Local Land: the Caribbean Gets its Own Version of *Duke v Andler*' (1999) 48 ICLQ 167 at 174, commenting on *Raeburn v Raeburn*, unreported judgment of the High Court of Antigua and Barbuda (20 March 1997).

[141] [2009] WASC 53, (2009) 253 ALR 575 at [35]; see *Re Liddell's Settlement Trusts* (n 127) at 373.

would enforce the order (whatever the Australian court thought about whether it should be complied with). One cannot pretend that defendants always voluntarily comply, which is what motivates the long-standing concern that the court should not grant relief which will be a *brutum fulmen*.[142] In *Schumacher v Summergrove Estates Ltd*, the New Zealand High Court held that it was relevant to the *forum non conveniens* analysis that a New Zealand judgment in relation to Irish land might not be enforceable in Ireland.[143]

Having disposed of those arguments, is it nevertheless true that the foreign court ceases to possess 'international jurisdiction' merely because the subject matter of the dispute was foreign land?

Rule 47(2) of *Dicey* suggests that the 'court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that country',[144] but this Rule is a 'corollary' of the *Moçambique* principle, and does not tell us anything about a foreign judgment that merely relates to foreign land without determining title or possession. It is submitted that there is no basis for imposing a special restriction where the subject matter of a dispute is foreign land.

A word is necessary about the position under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the 1933 Act). Section 4(2)(b) provides that a foreign court has jurisdiction for the purposes of the Act 'in an action of which the subject matter was immovable property' situate in the country of the original court. This is reflected in section 4(3)(a) which provides that a foreign court shall be deemed *not* to have had jurisdiction 'if the subject matter of the proceedings was immovable property outside the country of the original court'. That rule prevails over the various kinds of *in personam* jurisdiction that ordinarily suffice for the purposes of the Act. The effect is that even if the foreign court has sufficient *in personam* jurisdiction (such as by submission), the judgment will not be registrable if the subject matter of the proceedings was immovable property outside its jurisdiction.[145]

It is unclear whether Parliament intended to limit these sections to cases where title or possession were in issue (like *Dicey* Rule 47(2)) or whether the language of 'subject matter' was intended to be broader. The *Greer Report* on

[142] See eg *Dicey* (n 5) at [4–025]; *Norris v Chambres* (1861) 3 De GF & J 583, 45 ER 1004 at 584–5 per Lord Campbell LC.

[143] *Schumacher* (n 1) at [36].

[144] *Dicey* (n 5) at [14R–108], [14–114]. Outside the context of wills, *Dicey* primarily relies on *Duke v Andler* and *Fall v Eastin*.

[145] *Shami v Shami* (n 3) at [29]. Cf eg the Convention between the United Kingdom of Great Britain and Northern Ireland and Canada providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (entered into force 1 January 1987) [1988] UKTS 74, art V(2), in which the equivalent exclusion in relation to immovable property only prevails over some of the heads of *in personam* jurisdiction, but does not prevail where the judgment debtor submitted by appearing or counterclaiming: see *Patterson v Vacation Brokers Inc* [1998] IL Pr 472 (Ont CA) at [7].

which the Act was based is Delphic in this respect. It appears to suggest that the drafters deliberately did not limit section 4(2)(b) to actions *in rem*:[146]

> [I]n so far as it deals with actions *in rem*, [section 4(2)(b)] is entirely in accordance with the Common Law Rule. With regard to actions in respect of immovable property, the paragraph may go a little beyond the existing law, but the extension is not an unreasonable one, having regard to the fact that, where the question of title is in question, the Common Law excludes the jurisdiction of English Courts themselves and does not recognize any other jurisdiction than that of the *lex situs*.

The last part of that explanation begs the question whether the Committee intended the section to apply beyond the situation where questions of title (or presumably possession) were at stake. The Committee is even less helpful in relation to section 4(3), simply observing that the exclusions in that subsection 'are in part a statement of the existing Common Law Rules and in part a rational interpretation of these rules on a point not at present covered by any precise authority'.[147]

It has been held in New Zealand that an action *in personam* to recover purchase money due under a contract for the sale of land falls outside the equivalent to section 4(2)(b);[148] in such a case the 'subject-matter is the contract for sale and purchase'.[149] So it was suggested that section 6(3)(b) (the equivalent New Zealand provision) was 'confined in its operation to actions where title to or possession of property is at issue'.[150] That language is reminiscent of the *Moçambique* rule (and thus its reflexion Rule 47(2)). But the Judge in the latter case immediately muddied the waters by expressly leaving open the question of whether a claim for *specific performance* of a contract to purchase land would be within the scope of section 6(3)(b). On the test his Honour had just propounded the answer would appear to be no: the subject matter of the claim would be the contract. These decisions were concerned with the positive ground of jurisdiction, but it seems clear from the *Greer Report*'s use of the same 'subject matter' language that sections 4(2)(b) and 4(3)(a) were intended to reflect each other.

In *Shami v Shami* Deputy Judge David Donaldson QC found that section 4(3)(a) was not limited to cases where only title or possession were in issue. That case concerned the breakdown of an Israeli marriage. In judgments of 1998 and 2003, a Tel Aviv court declared that the lease of a London flat (in the husband's name) was held by the parties in equal shares pursuant to Israeli matrimonial property law. The wife's central claim was that the English court should recognize the 1998 and 2003 judgments and thus her 50 per cent

[146] *Foreign Judgments (Reciprocal Enforcement) Committee Report* (Cmnd 4213, December 1932) (Greer Report) Annex V at 63.
[147] ibid.
[148] *Re a Judgment, McCormac v Gardner* [1937] NZLR 517 (SC).
[149] *Gordon Pacific Developments Pty Ltd v Conlon* [1993] 3 NZLR 760 (HC) at 766.
[150] ibid.

beneficial interest in the London flat.[151] The Judge observed that a 'paradigmatic example' of a claim the subject matter of which was immovable property was 'one based on the obligations of a trustee or otherwise imposed on the defendant by the foreign law *in a similar way to the rules of equity in England* [ie *Penn v Lord Baltimore* jurisdiction]'. He thus concluded that 'an Israeli judgment which declares the existence of a trust relating to land outside Israel is . . . not entitled to recognition' under the Act.[152]

That conclusion may well be correct, but it introduces an undesirable dissonance with the common law rules.[153] This is because the Judge went on to conclude that the judgments *were* entitled to recognition at common law. He explicitly chose not to follow *Duke v Andler*, and after noting the jurisdiction in *Penn v Lord Baltimore*, said that he could see 'no reason not to accord a similar width of jurisdiction to a foreign court'.[154] In other words, he concluded in favour of symmetry between the rules for assuming jurisdiction and recognizing a foreign court's jurisdiction at common law.

That leaves us with the final reason for which the Supreme Court of Canada refused enforcement in *Duke v Andler*, which of the three appears the most plausible to a modern reader. But is it correct that a court will not recognize or enforce a foreign non-money judgment?

B. The Enforcement of Non-Money Judgments in English Law

Strictly speaking it has never been possible to enforce a foreign judgment at common law. Instead, a foreign money judgment is recognized as giving rise to an immediate obligation to pay the stipulated sum, and the claimant may take fresh proceedings in England to convert that debt into an English judgment.[155] Some common law jurisdictions, including Canada, have expressly held that non-money judgments are also 'enforceable'[156]—prompting suggestions that *Duke v Andler* has effectively been overruled in Canada.[157]

Absent such a development, however, a non-money judgment may still be *recognized* where the necessary requirements of jurisdiction, finality and so on

[151] *Shami v Shami* (n 3). The wife's appeal focused on the enforceability of charges granted by the husband over the property in favour of his brother; no appeal was taken against the parts of the judgment that are relevant for this appeal: see [33]–[35]. In any case the Court of Appeal upheld what Mummery LJ described as an 'excellent' judgment: at [31]. Tomlinson and Davis LJJ concurred with Mummery LJ.

[152] ibid (Ch) at [28], [29] (emphasis added).

[153] The common law rules are preserved by section 8(3) of the Act where registration is not available.

[154] (n 3) at [33].

[155] See Briggs (n 89) at 149 and A Briggs, 'Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 LQR 87 at 89; *Dicey* (n 5) at [14–011].

[156] See *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612 (Canada); *Brunei Investment Agency and Bandone Sdn Bhd v Fidelis Nominees Ltd* [2008] JRC 152 (Jersey); *Bandone Sdn Bhd v Sol Properties Inc* [2008] CILR 301 (Cayman Islands).

[157] Edinger (n 137) 69 at 75; see also SGA Pitel, 'Enforcement of Foreign Non-monetary Judgments in Canada (and Beyond)' (2007) 3 JPIL 241.

are satisfied.[158] It may perform a defensive function as *res judicata*, cause of action estoppel or issue estoppel. A successful claimant may rely on the judgment as a defence in subsequent proceedings by the defendant who seeks to relitigate the dispute. So too a defendant may rely on the foreign judgment to prevent the claimant relitigating the dispute.[159]

On the basis of many of the leading texts, one might think that recognition can only perform a negative function,[160] but Professor Briggs has attacked this orthodoxy with characteristic vigour. Although *Dicey* generally observes the orthodox line, it suggests in a footnote that:[161]

> if the non-money judgment of the foreign court is entitled to recognition as *res judicata*, the fact that it cannot be enforced as a debt may be of limited practical significance, for if proceedings which have to be brought on the original cause of action can be cut short by showing the issues of substance to be *res judicata*, with only the question of remedy left for the original decision of the English court, the technical unenforceability of the foreign judgment is merely a detail.

Thus the successful claimant may use the foreign judgment as a 'short-cut' to bypass relitigation of the issues of substance.[162] How does this function operate where the foreign judgment concerns land in the forum of the enforcing court?

Again, *Pattni v Ali* is instructive. The appellant first deployed the Kenyan judgment in an orthodox defensive fashion in the Manx proceedings. However the appellant then sought to use the Kenyan judgment as the basis for his positive claim for rectification of the share register. Lord Mance had no difficulties with the judgment performing this positive function.[163] Briggs has explained the case on the premise that the parties' appearance in the Kenyan proceedings constituted a 'tacit agreement' that the resulting judgment was liable to be enforced. 'A mutual personal obligation to abide by the judgment

[158] Recognition is logically prior to enforcement: a judgment must be recognized before it can be enforced, but not all judgments which are recognized can be enforced: see *Clarke v Fennoscandia Ltd* [2007] UKHL 56, 2008 SC 122 at [21] per Lord Rodger.

[159] Either where the plaintiff lost entirely in the foreign proceedings or where the plaintiff seeks to 'top up' their damages award in subsequent English proceedings: Civil Jurisdiction and Judgments Act 1982, section 34; see *Republic of India v India Steamship Co Ltd* [1993] AC 410 and *(No 2)* [1998] AC 878.

[160] See *Cheshire* (n 5) at 538–51; *Collier* (n 44) at 236–7; D McClean & V Ruiz Abou-Nigm, *Morris' Conflict of Laws* (8th edn, Sweet & Maxwell 2012) at [7–048]; CMV Clarkson & J Hill, *The Conflict of Laws* (4th edn, Oxford University Press 2011) at 174–5; PR Barnett, *Res Judicata, Estoppel and Foreign Judgments: The Preclusive Effect of Foreign Judgments in Private International Law* (Oxford University Press 2001).

[161] *Dicey* (n 5) at [14R–020], 673 n 74. Professor Briggs is the specialist editor responsible for Chapter 14, along with Lord Collins as general editor.

[162] Briggs (2013) at (n 155) 89, arguing that section 34 Civil Jurisdiction and Judgments Act 1982 allows and requires this. But see below as to the apparent paradox created by that section: text to n 170 below.

[163] Lord Mance commented specifically on the position in relation to immovables, noting the observations in *Dicey* and *Cheshire* quoted above: (n 113) at [26].

resulted from the tacit agreement; that obligation was liable to be enforced by action brought in the Manx court'.[164] Be that as it may, the Privy Council was not called on to answer that question.[165]

There is positive authority that non-money judgments will not be enforced. In *Airbus Industrie GIE v Patel*, the Bangalore court had already granted an anti-suit injunction to the same effect as the injunction which the applicant sought in England. The applicant's first ground for seeking an injunction in England was that the Commercial Court should essentially replicate the Bangalore injunction. Counsel for the applicant argued, in terms reminiscent of Briggs' analysis of *Pattni*, that the order of the Bangalore court 'created an obligation on the English defendants not to litigate their claims against Airbus anywhere outside India'. That, he argued, was 'analogous to the creation of a judgment debt'.[166] Colman J disagreed. He noted that '[t]here has never been a general principle that any other orders of a foreign court can be enforced'. He cited the obligation theory of enforcement and noted that 'recognition *for the purposes of defence or estoppel* is based on the quite different principle of the discouragement in the interests of justice of relitigation'.[167] In the House of Lords, Lord Goff appeared to endorse Colman J's conclusion, noting that enforcement of the Indian order was 'not possible' and that Airbus had not appealed against Colman J's refusal to enforce or recognize the Indian order.[168]

Colman J drew support from section 8 of the 1933 Act. Section 8(1) addresses what Colman J describes as cause of action estoppel: it provides that 'a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder . . . shall be recognized in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied upon by

[164] A Briggs, 'Foreign Judgments: the Common Law Flexes its Muscles' (2011) 17 T&T 328 at 330.

[165] Its advice was limited to advising that the Kenyan judgment was *in personam* and the Kenyan court had jurisdiction: see [41]. It appears that the litigation is still ongoing in the Isle of Man.

[166] [1996] IL Pr 465 (QB) at [22].

[167] ibid at [26], [28] (emphasis added). One could potentially read Colman J's decision as concerned with injunctions only, although his Honour did not appear to regard the principle as confined to any subcategory of non-money orders.

[168] [1999] 1 AC 119 (HL) at 140. See also *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2009] SGCA 60, [2010] 1 SLR 1129 at [27], where the Singapore Court of Appeal found that a Californian judgment (which set aside the fraudulent transfer of Californian land and declared the existence of a constructive trust) did not order the payment of a sum of money, and was thus not capable of enforcement. However the Court did not express a view on whether non-money judgments could ever be enforced, because the plaintiff's claim was premised on its argument that the Californian judgment created an obligation to pay a sum of money; indeed, the Court noted that the California judgment had been executed and so there was nothing left to enforce: at [33].

way of defence or counter-claim in any such proceedings'.[169] The final clause suggests that such a judgment can only operate defensively.

Section 8(3), on the other hand, provides that a judgment may still be recognized 'as conclusive on any matter of law or fact decided therein if that judgment would have been so recognized before the passing' of the Act. That does not appear to be limited to defensive operation, and lends support to Briggs' 'short-cut' theory.

Shami v Shami is authority that the non-money judgment of a foreign court in relation to English land *can* be recognized and thus 'enforced' at common law.

The wife claimed that the judgments were entitled to recognition under section 8 of the 1933 Act. The Judge recognized the apparently paradoxical effect of section 34 of the Civil Jurisdiction and Judgments Act 1982, in that it appeared to *preclude* the commencement of fresh proceedings in England for the purpose of giving effect to the recognition of a foreign judgment. But the Judge explained away that concern on the basis that here the wife was seeking to rely on the judgment in a positive way, and the real dispute was whether it was entitled to recognition. He thus concluded that the effect of section 34 appeared to be that 'the court must couch its declaration in terms of whether the foreign judgment is entitled to recognition, rather than declaring the beneficial interest, but the difference appears to me without practical significance'.[170] That must be the right result. It was not the intention of the legislature in drafting section 34 to preclude successful claimants from obtaining recognition or enforcement, but to prevent relitigation.[171]

The Judge went on to conclude that the statutory regime did not apply, because the judgments concerned 'matrimonial matters'[172] and because the 'subject matter of the proceedings was immovable property'. But, as explained above, he concluded that the Israeli court had international jurisdiction under the common law rules.

This, of course, required the Judge to confront the decision in *Duke v Andler*. For the reasons given above, his Honour did not feel bound to follow that decision.[173] In any case, he did not regard the Supreme Court's distinction between money and non-money judgments as controlling. He thus found that he was 'bound to recognise and apply whatever points of law and fact were decided in the two Israeli judgments'.[174]

[169] *Dicey* (n 5) notes at [14–195] that the meaning of 'a judgment to which Part I of this Act applies or would have applied. . .' is 'obscure': see *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL).

[170] *Shami v Shami* (n 3) at [26].

[171] See eg *India v India Steamship Co Ltd* [1993] AC 410 (HL) at 415 per Lord Goff.

[172] Excluded by section 11(2). There is a little more to it than that. Section 11(2) excludes matrimonial causes from the definition of 'action *in personam*'. That means for the purpose of determining whether the Israeli court had jurisdiction the catch-all provision in section 4(3)(c) applies, which provides that where an action is neither *in rem* nor *in personam* the question is whether the foreign court had jurisdiction 'recognised by the law of the registering court'.

[173] See above at n 138.

[174] (n 3) at [35].

The Judge concluded that the 2003 judgment clearly determined that the wife was entitled to a 50 per cent beneficial interest in the London flat. What is particularly striking is the extent to which the Judge deferred to the Israeli court. He clearly held serious reservations about the adequacy of the reasoning behind the Israeli court's conclusion—indeed no substantive reasons had been given—and concluded (examining the question with reluctance) that he would not have found that such a beneficial interest existed if he had been required to decide the question himself. Yet he nevertheless stressed that it was irrelevant whether the reasons in the foreign judgment appeared 'comprehensible, adequate or justified' and it should not be questioned on the merits.[175] He was particularly influenced by the fact that this was a case in which it clearly *was* appropriate for the Israeli court to adjudicate in relation to foreign land, because juridically-speaking the case was almost entirely connected with Israel. His decision is a useful reminder that in a case involving foreign land, it will sometimes be appropriate for the *situs* to cede its prerogative.

V. CONCLUSION

The subject of this study has been curiously neglected by the common law. The *Moçambique* rule itself has limped along, curtailed by legislative reform but somehow surviving.[176] At least its effect is clear enough. The same cannot be said for the rule in *Penn v Lord Baltimore*; 250 years later we still are not even sure whether it represents an exception or a stand-alone principle.[177] More problematically, English law is still dependent on old cases decided in a very different context to answer an apparently simple question: in what circumstances can an English court enforce a contract or equity in relation to foreign land?

Complications will always arise when a court is asked to assume jurisdiction over a dispute involving foreign land. But it is the purpose of private international law to manage such difficulties. This article has argued that a modern approach to choice of law, coupled with judicious application of the *forum non conveniens* doctrine, will promote comity, consistency and the interests of justice. There is no basis for automatically applying the *lex fori* to equitable claims, less still for limiting jurisdiction to cases where the right in question arises under the *lex fori*. We have seen debate about whether these are questions of jurisdiction or choice of law; but the reality is that they are both—the English court should be applying the proper law to all of the issues arising in a dispute and giving serious consideration to whether it is appropriate to assume jurisdiction where the subject matter is land in another jurisdiction.

[175] ibid at [42], [44].

[176] See Civil Jurisdiction and Judgments Act 1982, section 30(1) (abolishing the rule in relation to torts affecting foreign immovable property) and see further *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [71]–[76].

[177] See eg *Shami v Shami* (n 3) at [32].

The question of what effect the courts of the *situs* should give to *in personam* orders has been similarly neglected. The 'leading' case remains an 80-year-old decision that appears to have been decided on a flawed premise, and is in any case incoherent and unpersuasive. There is no reason why the English courts should not, in principle, give effect to the judgment of a foreign court enforcing a personal obligation in relation to English land.

https://doi.org/10.1017/S0020589313000468 Published online by Cambridge University Press