

**The effect of the constitutional relations
between Scotland and England
on their conflict of laws relations:
a Scottish perspective**

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ABSTRACT

The purpose of this thesis is to explore the effect of the changing constitutional relationship between Scotland and England on the Scottish approach to conflicts of law with an English element (i.e., competitions of jurisdiction between Scots and English courts; cases in which both Scots and English law have a claim to application; and recognition and enforcement of English court orders in Scotland). Dewar Gibb once wrote a work entitled "Law from over the Border": although the conflicts relationship between Scotland and England may be viewed, to some extent, as interdependent, the exposition provided in this thesis is a view principally from north of the Tweed, though the English view is sometimes recorded.

A historical perspective is obtained by brief study of the period prior to parliamentary union. Once united in one political state, the constitutionalising of conflicts, the internalising of conflicts, and the use of international private law rules, are three ways in which conflicts of law within that state might be handled. The extent to which each of these methods has influenced the Scottish approach to intra-UK conflicts, and the effect of devolution on each, is examined. The availability to Scots courts of public policy objections in respect of English law is also investigated. The context of the Anglo-Scottish relationship changed with UK entry into the (now) European Union, and the effect of that on intra-UK conflict rules is considered.

The conclusion is that the nature of the constitutional relationship between Scotland and England impacts upon the handling in Scotland of conflicts of law with an English element. The parliamentary union may not have resulted in wide-spread constitutionalisation of conflicts, but there has been a degree of internalisation of conflicts. In general, however, the interaction of the constitutional relationship between Scotland and England and its private law consequences has permitted, indeed sometimes necessitated, the use (in certain areas) of Scottish international private law rules without differentiation between intra-UK, and international, conflicts. Public policy allows the exclusion of English law by Scots courts. Devolution might permit further constitutionalising of conflicts in Scotland, but this is neither appropriate nor desirable. Whilst devolution might not diminish the internalisation of conflicts, international private law rules may be of increased importance in the intra-UK context. It also presents an opportunity for reform of these rules. In the long term, however, the most significant constitutional event for intra-UK conflicts is likely to come to be regarded as entry into the EU.

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1 INTRODUCTION

The study of international private law involves exposure to the rules and norms of very different cultures. That the same rules as are utilised to solve international conflicts of laws, may also be relied upon as between the jurisdictions within the United Kingdom (UK), might often seem to merit no more than an aside. It is contended that, on the contrary, the handling in Scots law of issues of jurisdiction, choice of law, and the recognition and enforcement of judgments, arising in the context of the constitutional relationship between Scotland and England, deserves study in its own right.

How, for example, does one draw together all the different strands exemplified by the following statements: "the law of England and other foreign nations being matter of fact to us";¹ "nothing more anomalous or indecent than that any Court in Great Britain or Ireland should scrutinise the decrees of another Court of the United Kingdom, as if they were those of a foreign country";² "no greater deference was due to the law of England than that which was due to the laws of other civilized Countries";³ "the question of territorial limitation as between the different jurisdictions ... within the United Kingdom ... depends on constitutional practice, not on international comity";⁴ "it is said that the Scotch court is asked to enforce a law which is against the public policy of the law of Scotland"⁵ (the law in question being English law); "[a] receiver appointed under the law of either part of Great Britain ... may exercise his powers in the other part of Great Britain so far as their exercise is not inconsistent with the law applicable there";⁶ and

¹ Stair, *The Institutions of the Law of Scotland* 6th edn., (ed.) D.M. Walker (Edinburgh & Glasgow University Presses, 1981), I,i,16.

² *Wilkie v Cathcart* (1870) 9 M 168 per Lord President Inglis at 171.

³ Argument put forward in the 1812 case of *Pollock v Manners*, reproduced in L. Leneman, *Alienated Affections: The Scottish Experience of Divorce and Separation 1684-1830* (Edinburgh University Press, 1998), p224.

⁴ *R v Treacy* [1971] AC 537 per Lord Diplock at 564.

⁵ *Hamlyn & Co v Talisker Distillery* (1894) 21 R (HL) 21 per Lord Chancellor Herschell at 23.

⁶ Insolvency Act 1986, c.45, s72(1).

"Scotland has made history today, signing the Hague Convention for the first time".⁷

Purpose of thesis

This thesis sets out to explore the link between the constitutional relationship of Scotland to England, and the Scottish approach to the resolution of questions of conflict of laws arising between these two countries. The term conflict of laws encompasses three separate issues. Firstly, the subject treats the situation when there is a competition of jurisdiction between a Scottish and an English court, with each asserting that it could properly hear the case. Secondly, it must decide cases in which there are links with both Scotland and England, such that there is a dispute over whether it would be most appropriate for Scots or English law to be used to determine the issues of the case. Thirdly, it informs the Scottish attitude to judgments and orders pronounced by English courts: are such judgments afforded recognition in Scotland, and may they be enforced? Essentially then, what is being sought to be examined is the content and operation of rules to resolve such conflicts *within* a state, rather than those as between politically foreign jurisdictions. It is submitted that this is a matter which has not been adequately studied in the UK. In contrast, as will be seen, in Canada and Australia in recent years there has been discussion and debate on the interplay between the constitution and conflicts of law arising between the different Canadian provinces, and Australian states, respectively.

Indeed although both of these countries might often have looked, or look, to English Common Law for guidance, it was asserted that the English approach to conflict of laws was inappropriate for a quasi-federal state such as Canada,⁸ or a federation such as Australia.⁹ The UK, it seemed to be assumed, had nothing to contribute to a debate on the use of international private law for resolving conflicts within a country. In fact, it is submitted, the reverse is true. The constitutional relationship between Scotland and England is more subtle than a

⁷ "Scotland makes history at the Hague", Scottish Executive News Release (SEJD349/2003), 4 November 2003.

⁸ For example, see *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 *per* La Forest J at 1101-1102.

⁹ See, for example, *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36 *per* Kirby J at paras 119-124.

federal system, but is one in which the resolution of cross-border British conflicts has been of great importance. For almost three hundred years after the union of the Scottish and English Parliaments in 1707, a most unusual constitutional relationship prevailed: one Parliament served both countries, but the separate Scottish and English systems of private law were retained. Each legal system has distinct court hierarchies and, in terms of substantive law, each draws on different roots. Whereas England is the pre-eminent Common Law jurisdiction,¹⁰ the Scottish legal system has, at least in the past, been more open to civilian influences, and is now commonly described as a mixed legal system. Prior to the establishment of the Scottish Parliament in 1999, Scotland (and certain other components of the UK) were perhaps unique in each being a jurisdiction with its own legal system, but no legislature of its own.¹¹ The devolution settlement of the late twentieth century has created another interesting constitutional relationship between Scotland and England. Scotland now has its own Parliament with legislative (and limited tax-raising) powers, but certain matters are reserved to the UK Parliament at Westminster. Devolution for Scotland, however, has not been achieved by a federalisation of the UK. Primary legislation for England and Wales continues to be delivered by the UK Parliament, and there is no English equivalent of the National Assembly for Wales or the Northern Irish Assembly and Executive.

In this thesis will be examined the interplay between these permutations of the Anglo-Scottish constitutional relationship and the Scottish approach to resolving cross-border conflicts within Britain.

Schema

Before embarking upon the main focus of the study, it is first necessary to explore the development of Scottish international private law rules applying as between

¹⁰ Pre-eminent in the sense that it begat the systems of law prevailing in other Common Law jurisdictions, and that English law is still looked to by many members of the Commonwealth for guidance in difficult cases.

¹¹ In the White Paper preceding devolution, Scotland was described as "the only democratic country with its own legal system but no legislature of its own" ("Scotland's Parliament" (Cm 3658) (1997), Foreword, p.vii). Himsworth noted that Washington DC might be said to be in the same position (C. Himsworth, "Devolution and the mixed legal system of Scotland" 2002 *JR* 115 at 115). However, since the Parliament which sits at Westminster is a *UK* Parliament, England must theoretically have been in the same position.

Scotland and England before the union of their Parliaments in the eighteenth century. Prior to this, and from their inceptions as nation states, Scotland and England were independent countries, and politically foreign to each other. Therefore the aim of Chapter Two is to provide a historical perspective. The thesis will seek to identify the time at which it could be said that all of the conditions necessary for the development of Scottish international private law rules were satisfied in the Anglo-Scottish context. The occurrence of conflicts between Scots and English law in this period, and their resolution, will be studied. Events of the seventeenth century, such as the Union of the Crowns and the later Cromwellian occupation, had the potential to end altogether the occurrence of conflicts between the Scottish and English legal systems. The reasons for this potential not being realised will be investigated, and the consequences explained.

Once Scotland and England had joined to form the state of Great Britain in 1707, arguably three main methods were available for dealing with conflicts arising between the two countries: the constitutionalising of conflicts; the internalising of conflicts; and the use of rules of international private law. These are discussed in turn.

Chapter Three, therefore, is an examination of the constitutionalising of conflicts, whereby potential clashes of jurisdiction, or laws, and questions of recognition, are referred to constitutional rules rather than to rules of international private law. There will be an analysis of how far this took place in the context of the constitutional relationship obtaining between Scotland and England from 1707 to 1999. The question of whether there might be an increase in the constitutionalisation of conflicts following the devolution settlement, will then be addressed. In this connection the Canadian experience will be drawn upon: Canada does not have an orthodox written constitution, and encompasses the mixed legal system of Quebec. Are then the reasons given to justify the constitutionalisation of conflicts in Canada equally valid in a devolved Scotland? Finally, the important question of whether it would be desirable to handle intra-UK conflicts by this method will be discussed.

The putting in place of special rules which either remove an Anglo-Scottish conflict altogether, or which provide for specified consequences to follow in what would otherwise be a cross-border conflicts matter, is referred to in this thesis as the internalising of conflicts, and is discussed in Chapter Four. The areas in which the internalisation of conflicts within the UK has been most common are identified. It is also questioned whether the internalising of conflicts can, or has, been achieved by judge-made law. The impact of devolution upon this phenomenon is then examined.

In Chapter Five are studied those areas in which rules of Scottish international private law have been used to resolve intra-UK conflicts, just as they would be used in truly international conflicts. The reasons for the use of international private law in these areas are discussed, and the question of whether any of the rules would profit from reform is also considered. The extent to which Scottish and English conflict rules are the same, or similar, is briefly analysed. The establishment of the Scottish Parliament heralds a new constitutional arrangement, and the consequences of this both for the Scottish conflict rules themselves, and the use of international private law within the UK, is examined. The possibility of increased differences between the laws of Scotland and England in the wake of devolution also renders useful a discussion of what is often (critically) referred to as 'forum shopping' within the UK.

Based as it is on the relationship between conflicts of law and the constitution there is a further important constitutional change, which took place in the twentieth century, which must be examined in this thesis. The passing of the European Communities Act 1972¹² signalled the UK's entry into the then European Economic Community, now the European Union (EU). It must be recognised that it also wreaked an alteration in the relationship under discussion, namely that between the legal systems of Scotland and England, by interposing the power of the EU over the UK Parliament at Westminster, heretofore considered sovereign.¹³ The significance of UK membership of the EU for the subject-matter of this thesis is increased by the great interest shown by the EU in

¹² 1972, c.68.

¹³ *R v Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85.

harmonising conflict rules, possibly as a step towards harmonisation of substantive law itself. In Chapter Six, therefore, the impact of EU legislation on intra-UK conflict rules is analysed. Examination of the short-term consequences for intra-UK international private law encompasses questions such as whether EU measures on jurisdiction, choice of law, and recognition have applied automatically within the UK, with or without an opinion for special treatment being offered. What have been the factors behind such decisions? A study of the long-term impact raises even more fundamental questions: it is considered what Europeanisation of private law would mean for intra-UK conflict of laws.

One particularly delicate issue for the conflicts scholar is the use of public policy, usually as a device to exclude foreign laws or judgments. Chapter Seven is therefore devoted to an analysis of public policy, which is categorised as underlying public policy, internal public policy and external public policy. It is the last which is utilised in international private law. However, firstly, the similarities and differences between underlying, and internal, public policy in Scotland and England are examined. This leads to the discussion of how far external public policy objections may be relied upon in Scotland at common law in respect of English laws or judgments. Furthermore, has the legislator sought to restrict, or widen, the availability of external public policy objections when placing certain areas of intra-UK international private law on a statutory footing? Lastly, the impact of devolution upon the use of external public policy by Scots courts in an intra-UK case is examined.

Chapter Eight is the concluding chapter. In this, the matters discussed in the thesis are brought together. An opinion is expressed on the basic nature of the link between the constitution and international private law, as revealed by the study of the period prior to 1707. Upon the union of the Scottish and English Parliaments in 1707, and the establishment of a devolved Scottish Parliament in 1999, rests the constitutional relationship between Scotland and England, and conclusions as to the effect of this on the Scottish approach to the resolution of Anglo-Scottish conflicts of laws are reached. The effect of entry into the (then) EEC on the international private law rules applying to intra-UK conflicts is also summarised.

A note on the use of terminology and authorities

Terminology

As this thesis concerns the constitutional relationship of Scotland with England, and conflicts arising as between these two jurisdictions, I have not sought to discuss the Welsh position. Since Wales is subject to English Common Law, and is part of the same jurisdiction as England, no conflicts can arise between England and Wales. The new National Assembly for Wales, which was established as part of the same broad reforms which produced the setting up of the Scottish Parliament, was not given primary legislative powers.¹⁴ Strictly speaking, indeed, the English jurisdiction should properly be described as 'England and Wales'. Nairn is of the view that:

" 'England-and-Wales' ... conveys a bare modicum of recognition with an associated stress on functional unity. Whatever gestures may be needed elsewhere, here we have two who are truly as one".¹⁵

However, it is for the sake of convenience, rather than any other reason, that I have referred to 'England' throughout rather than 'England and Wales'. No slight is intended, and it is hoped that none will be perceived.

Similarly, although Ireland was for a time part of the United Kingdom, and the province of Northern Ireland remains so, I have not attempted to extend this examination to include conflict of laws relations with Ireland. The law applying in Ireland, and now in Northern Ireland, is clearly part of the Common Law family. Furthermore, since the subject of study of the thesis is Scotland and England, it is better to restrict comments to that subject, than to confuse matters by considering other constitutional links.

That being said, it is therefore necessary to say a few words about the use of the terms 'Britain' and 'United Kingdom' in this thesis. 'Britain' is sometimes used in the thesis in a general sense to refer to the main island comprising the territories

¹⁴ See Government of Wales Act 1998, c.38.

¹⁵ T. Nairn, *After Britain: New Labour and the Return of Scotland* (Granta, 2000), p81.

of Scotland and England and the principality of Wales. Generally, however, it is used in its technical sense of Great Britain, as created by the parliamentary union in 1707 between Scotland and England (or indeed 'England-and-Wales'). The addition of Ireland in 1801 established the United Kingdom of Great Britain and Ireland.¹⁶ Following the gaining of independence by the Irish Republic in the twentieth century, the proper term is now the United Kingdom of Great Britain and Northern Ireland. However, the terms 'UK' and 'intra-UK' are used somewhat more loosely in this thesis. Whereas 'British' may be more technically accurate for the period from 1707 to 1801, it is just as plainly incorrect for the period thereafter, up until the present day: the Parliament which sits at Westminster is a UK Parliament. I have taken the view that it would be clumsy, and potentially confusing, to refer always to 'intra-Britain and, after 1801, intra-UK'. Accordingly, in this thesis, 'UK' and 'intra-UK' are sometimes used as descriptive of the general sweep of time since 1707. Furthermore, the term 'intra-UK' is sometimes used, without listing minutely the slight modifications which may have been made for Northern Ireland. It is submitted that England and Scotland are the major partners in the United Kingdom. Besides which, as has already been explained, the situation of Ireland falls outwith the scope of the present work. The focus of this thesis is quite deliberately on Scotland and England, and therefore it is the changing constitutional relationship between these two countries which is of interest. 'Intra-UK', or 'within the UK' serves well as a convenient shorthand signifying the opposite of 'international', and is used in that sense.¹⁷

Authorities

Finally, some explanation is necessary regarding the use of authorities. Lord President Clyde once bemoaned that:

"we were referred to a number of English authorities. I do not think those authorities afford us any guidance, because we must decide this question according to the law of Scotland; and ... I cannot understand why the light

¹⁶ Welsh records a use of the even more descriptive: "The United Kingdom of Great Britain, Ireland, the Dominion of Wales and the Town of Berwick on Tweed" (F. Welsh, *The Four Nations: A History of the United Kingdom* (Harper Collins, 2002), p.xxvi).

¹⁷ The term 'politically foreign' is also used in the thesis to signify a foreign jurisdiction outwith the UK.

which the law of our own country sheds on a question ... should be deliberately hidden under a bushel of alien authority".¹⁸

For a variety of reasons, Scottish international private law texts often make reference to English, as well as Scottish, cases. I have tried not to do so without noting the English provenance of the case. Even then such cases are only referred to if it is clear that the principle has been accepted in Scots law, or if it is necessary for the purposes of the analysis to discuss the position in English law. Instead, I have attempted as far as possible to rely simply upon Scottish cases. This is because the thesis seeks to study the Scottish approach to conflicts of jurisdiction, or laws, with England, and also to the recognition of English judgments: it would therefore distort the analysis, it is submitted, if English cases were used as authority without murmur. Indeed, one of the subjects which merits examination is how far Scots and English international private law are the same.

¹⁸ *MacKintosh's Judicial Factor v Lord Advocate* 1935 SC 406 at 409.

2 HISTORICAL PERSPECTIVE

The constitutional relationship between Scotland and England has altered throughout Scottish history. A study of the effect of this constitutional situation on the Scottish rules of international private law which are applied when a factor, or factors, point to England, can only, it is argued, be valid if it contains some analysis of the historical interaction of constitution and international private law in Scotland. This chapter sets out to provide such an analysis.

Necessary conditions for the development of international private law

This raises a fundamental question: within which period of Scottish history can such an interaction between the Anglo-Scottish constitutional relationship and international private law meaningfully be said to start? It is contended that a certain factual, or factual-legal, matrix must be in existence before any link between constitution and international private law can be established. Thus, in the most basic and general terms, four distinct strands of history must come together. Firstly, there must be at least two geographical groupings which may be recognised as comprising what may be described as separate nations. There is, however, no need for the geographical boundaries between them to be finally determined in every particular. The nations should have some, at least rudimentary, form of government. Secondly, each of these nations must have some body of law, which is recognisable as being of application to that nation. This is not to insist upon a written constitutional document or code of laws. The third pre-requisite argued for, is that there must be some factual contact between the peoples of the two nations. The forms which this could take are as varied as the activities of human life itself. In earlier times, however, we might expect that such contact would take the form of trade, or of marriage, or perhaps of the ownership of property. The fourth historical fact contended for is less self-evident than the others. This is the existence of a central court. Whilst possibly not essential at the same fundamental level, it is still significant, particularly in questions of jurisdiction. For when jurisdiction is dispersed among a number of different courts, whether on a geographical, or hierarchical, basis, then it is

submitted that there will be less distinction between international, and internal, jurisdictional clashes: if a court has a limited jurisdiction within a country, it is of little consequence whether a person hails from another area of the nation, or from a different nation altogether, if both fall outwith the court's jurisdiction. Similarly, jurisdictional wrangles are just as likely to emerge between courts from different systems within the nation, than between courts from different nations. Conversely, once a central court is in existence, with a jurisdiction which is largely nationwide, it throws into much sharper relief the question of whether a court of that nation has jurisdiction when a case apparently contains some foreign element.

When do these historical facts, or legal facts, which will allow an interaction between the constitution and international private law, come into existence in terms of Scotland's relationship with England?

The establishment of early recognisable nations out of more diverse groupings of peoples often took place imperceptibly over time, and the development of Scotland was no different. In selecting one particular point in time in history, there is always an element of arbitrariness, often informed by retrospection. Thus an event which, with hindsight, proved decisive in national history, may at the time have been seen as having only uncertain or temporary effect. Subject to these caveats, however, it is submitted that it is defensible to select the early eleventh century as a time when a Scottish nation can be identified, for the purposes of this thesis. By 1018, the kingdoms of the Picts and the Scots had all become vested in a Scottish king, whilst that of Strathclyde had passed to the king's heir.¹ Equally important was the result of Malcolm II's victory at the Battle of Carham in 1018. This brought what is now South-East Scotland under his control, and settled the River Tweed as the boundary between Scotland and Northumbria. Whilst at the time, Scots viewed this as merely one further step in the effort to control the Northumbrian area,² they did not meet with any long-term success in pushing the border southwards. The Tweed now became a changeable

¹ M. Lynch, *Scotland: A New History* (Pimlico, 1992), ch 4; I.D. Whyte, *Scotland Before the Industrial Revolution: An Economic and Social History c1050-1750* (Longman, 1995), pp7-8; W. Ferguson, *Scotland's Relations with England: A Survey to 1707* (Saltire Society, 1994), p9.

² Lynch, *Scotland: A New History*, p47.

"frontier zone"³ between Scotland and her southern neighbour. Admittedly, the Scottish kingdom's northern and north-western boundaries were not definitively set until much later.⁴ However, since it is the Scottish legal attitude to England and her peoples which is key to this thesis, it is submitted that the fixing of an approximate southern boundary is of more significance for present purposes. South of this border, an English nation can also be identified by the eleventh century.⁵

When did this Scottish nation develop a recognisable body of law? It is clear that in the territorial area which would become Scotland, rules of Celtic law, and also Anglo-Saxon law, had relevance prior to Scoto-Norman times. Information on the detail of such rules is still relatively sparse, and often resort is had to the similar systems prevailing in Ireland and England respectively.⁶ The *Leges inter Brettos et Scotos*, a Scottish Celtic legal document, indicates that there was a recognition of status as shaped by rank. It has been argued that under Anglo-Saxon laws there was similar acceptance of rank as an important factor in determining compensation for injury.⁷ Under the Celtic law prevailing in Ireland there is some legal regulation of the "deorad" or "outsider".⁸ However, there is no strong proof in Scotland of Celtic or Anglo-Saxon laws distinguishing between peoples of different nations.

A body of law applicable throughout most of the Scottish kingdom can arguably be identified in Norman times, but there is disagreement as to how far this Norman law was simply rather neatly superimposed on the pre-existing systems of law.⁹ An important issue in the context of this thesis is how far this Scoto-

³ Ferguson, *Scotland's Relations with England*, p10.

⁴ These were settled by 1266, with the exception of Orkney and Shetland, which were acquired in 1472. For some discussion of the relationship between the udal tenure of Orkney and Shetland, and Scots Law see D. McGlashan, "Udal law and coastal land ownership" 2002 *JR* 251.

⁵ O.F. Robinson, *et al.*, *European Legal History*, 3rd edn. (Butterworths, 2000), paras 8.2.1-8.2.6.

⁶ *Ibid.*, para 9.1.2; J. Cameron, "Celtic law", in Various authors, *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society, Vol 1, 1936), p333 at 336; J.C. Gardner, "An historical survey of the law in Scotland prior to the reign of David I" 1945, 57 *JR* 34 at 65.

⁷ Gardner, "An historical survey of the law in Scotland prior to the reign of David I", 65-66.

⁸ F. Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies, 1988), pp5-6.

⁹ Gardner, "An historical survey of the law in Scotland prior to the reign of David I", 79; J. Girvan, "Feudal law", in Various authors, *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society, Vol 1, 1936), p193 at 194.

Norman law, established in the twelfth century, was markedly Scottish in comparison to Anglo-Norman law, with the consequent potential that this would have for legal clashes between the two systems. In fact, there are a number of similarities. The *Regiam Majestatem* of the fourteenth century is an adaptation of the English work *Glanvill*.¹⁰ In the late thirteenth century there are instances of Scots arguing that a Scots property law rule was the exact mirror of its English counterpart, and of a jury in Ireland finding in an action that a Scotsman was in the habit of relying upon English law.¹¹ Furthermore, Cairns has argued that:

"there can be little doubt that great landowning families, such as the Bruces and Balliols, saw their holdings north and south of the border as subject to much the same rules and their rights as enforced by a similar mechanism - the brieve or writ."¹²

This is not to suggest that Scoto-Norman law was merely a carbon copy of Anglo-Norman law in every particular: it was not.¹³ However, it is submitted that the result of a high degree of similarity between the two systems was that there was no pressing need for Scottish legal rules to deal with the conflict of laws at that time. When do Scottish and English law begin more sharply to diverge? There is a political break beginning with what are now generally referred to as the Wars of Independence, and continuing with intermittent outbreaks of open hostility in the centuries thereafter. It is arguably then that Scots law starts in earnest its long journey to the distinctive system of the present day. It eventually begins to be distinguished by the actors within it, as demonstrably different from the laws of other nations. Thus by the late sixteenth century the Scottish Mary Queen of Scots argued, in respect of her forthcoming trial in England, that "For myself I do

¹⁰ A. Harding, "Regiam Majestatem amongst medieval law-books" 1984 *JR* 97; H.L. MacQueen, "Glanvill resarcinate: Sir John Skene and *Regiam Majestatem*" in A.A. MacDonald, *et al.* (eds.), *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture Offered to John Durkan* (E.J. Brill, 1994), p385.

¹¹ G.W.S Barrow, *The Anglo-Norman Era in Scottish History* (Oxford University Press, 1980), p119.

¹² J.W. Cairns, "Historical introduction" in K. Reid, & R. Zimmermann, (eds), *A History of Private Law in Scotland* (Oxford University Press, 2000), Vol 1, p14 at 32.

¹³ *Ibid.*, p32; Lord Cooper, "David I to Bruce, 1124-1329: the Scoto-Norman law" in Various authors, *An Introduction to Scottish Legal History* (Stair Society, Vol 20, 1958), p3 at 12; Harding, "Regiam Majestatem amongst medieval law-books"; Robinson, *European Legal History*, para 9.2.2.

not recognize the Laws of England nor do I know or understand them".¹⁴ The "proper lawis of this kingdome" could, by 1611, be contrasted with the "foreyne lawis" which had pertained in Orkney and Shetland up until that point.¹⁵ Levack records that "the substantive laws of the two kingdoms has grown so far apart by the seventeenth century that the subjects of each could freely admit that they were ignorant of the law of the other".¹⁶

Of significance to both future constitutional law and international private law is the manner in which, as it develops, Scots law comes to be defined by reference to its sovereign ruler. In the mid-fifteenth century Scotland was said to "haif bot a king and a lawe universale throu out the Realme"¹⁷. The link between king and the kingdom's laws becomes more explicit in later legislation. Thus, an Act of Parliament of 1503 states:

"That all our soverane lords lieges beand under his obesance ... be Reulit be our soverane lords avne lawis and the comon lawis of the Realme And be nai other lawis".¹⁸

An Act of 1579 complains of Scots residing in the Staple but choosing to rely on their foreign residence as it suited them and "foirsaiking the obedience to the kingis majestie his lawis and officiar".¹⁹ By the turn of the seventeenth century, Stair explained the development of law in all nations (including Scotland) as a process whereby peoples begin to approach their sovereigns to decide their disputes, and defined civil law as "The law of each society of people under the same sovereign authority".²⁰ Thus sovereignty dictated that the King's laws ran in his kingdom: not to abide by Scots law was not to obey the Scottish sovereign. It is submitted that the key concept of status was not, therefore, nationality, but the fact of being a subject of a certain monarch.

¹⁴ A. Fraser, *Mary Queen of Scots* (Panther, 1970), p596.

¹⁵ Quoted in Cairns, "Historical introduction", p93.

¹⁶ B.P. Levack, *The Formation of the British State: England, Scotland, and the Union 1603-1707* (Oxford University Press, 1987), pp92-3.

¹⁷ APS, II, 50 (c.18)(1458) - the context is an introduction of uniform measures.

¹⁸ APS, II, 244 (c.27)(1503).

¹⁹ APS, III, 152 (c.34)(1579).

²⁰ Stair, *Inst.*, I,i,12; and see also *ibid.*, I,i,16.

It has been argued that the third strand of the matrix necessary for an interaction in Scotland between the constitution and international private law as regards England, is the existence of factual contact, with the consequent potential for legal contact, between the peoples of the two nations. The period of Norman influence in Scotland was characterised by high-level contacts, in terms of marriage and land-holding, to the extent that Lynch has posited the existence of an "Anglo-Scottish aristocracy".²¹ In the period leading up to the Wars of Independence these ties began to wane, in line with a greater assertion of a Scottish identity.²² The open hostilities of the years which follow, and their effect on popular feeling in both Scotland and England, are not conducive to contact between the two countries occurring on a large scale.²³ The fifteenth and sixteenth centuries saw numerous statutory attempts to prevent the import of certain goods from, or export of particular goods to, England.²⁴ However, even in the teeth of such measures trade between Scotland and England did take place: a statute of 1585 records that previous prohibitions on the export of certain animals and commodities to England "daylie ar Contravenit".²⁵ Indeed for Riley, "by the end of the seventeenth century the Scots, ... had drifted into a dangerous dependence on the English market".²⁶ Furthermore, it became increasingly clear that the language of lowland Scots was very similar to that of their southern neighbours. There were also some examples of regal inter-marriage, indeed the marriage of James IV to the daughter of Henry VII led to a Union of the Crowns one hundred years later in 1603.

²¹ Lynch, *Scotland: A New History*, p58.

²² *Ibid.*, p91.

²³ *Ibid.*, Chaps 9-10; Ferguson, *Scotland's Relations with England*, pp40-41 & 84; M. Prestwich, "Colonial Scotland: the English in Scotland under Edward I" in R.A. Mason, (ed.), *Scotland and England 1286-1815* (John Donald, 1987), p6 at 13.

²⁴ For example: APS, II, 24 (c.9)(1436); APS, II, 24 (c.10)(1436); APS, II, 105 (c.15)(1473); APS, II, 346 (c.25)(1535); APS, III, 426 (1585).

²⁵ APS, III, 426 (1585); and see too A. Stevenson, "Trade with the South, 1070-1513" in M. Lynch, *et al.* (eds), *The Scottish Medieval Town* (John Donald, 1988), p180 at 193.

²⁶ P.W.J. Riley, *The Union of England and Scotland: A study in Anglo-Scottish politics of the eighteenth century* (Manchester University Press, 1978), p201; and see also Whyte, *Scotland Before the Industrial Revolution: An Economic and Social History c1050-1750*, pp273 & 275; C. Rose, *England in the 1690s: Revolution, Religion and War* (Blackwell, 1999), pp233-234; T.C. Smout, *Scottish Trade on the Eve of Union 1660-1707* (Oliver & Boyd, 1963), pp26-27 & 148.

In order to gain some impression of the scale of the contact between the two nations, however, it is necessary to place it within the wider context of Scotland's foreign links between 1018 and 1707. Politically, the most significant bond was with France. This 'Auld Alliance' saw not just royal marriages, but also naturalisation of certain of the other country's subjects.²⁷ Trade forged strong links between Scotland and the Low Countries.²⁸ There was a Scottish Staple town at various towns in succession in the Low Countries from the fourteenth or fifteenth century until after the Union of the Scottish and English Parliaments in 1707. Substantial trade also flowed between Scotland and the Baltic, especially with the town of Danzig.²⁹ Mercantile links can also be traced between Scotland and Spain, France and Italy.³⁰ Interestingly, when trading in the Baltic, various currencies appear to have been used by Scots, including their own, but also English currency, or local currency.³¹ Scots also journeyed to the continent for their law studies, to towns such as Paris, Orléans and Cologne.³² Levack has argued that this was crucial in shaping the Scottish legal profession in a different mould from that of its southern neighbour.³³

The last, and most tentative, of the elements of the necessary factual, or factual-legal, matrix posited at the outset of this chapter was the existence of a central court. Legal cases could be taken to the Scottish Parliament or the King's Council, or groups of certain nominated members. By the beginning of the sixteenth century the emergence of a Scottish central civil court can be seen, and

²⁷ A.C. Evans, "Nationality law in pre-union Scotland" 1983 *JR* 36 at 41; APS, II, 507 (c.6)(1558); J. Davidson & A. Gray, *The Scottish Staple at Veere: A Study in the Economic History of Scotland* (Longmans, 1909), p103.

²⁸ Davidson & Gray, *The Scottish Staple at Veere: A Study in the Economic History of Scotland*; Stevenson, "Trade with the South, 1070-1513".

²⁹ D. Ditchburn, "Trade with Northern Europe, 1297-1540" in M. Lynch, *et al.* (eds), *The Scottish Medieval Town* (John Donald, 1988), p161 at pp166 & 169.

³⁰ Stevenson, "Trade with the South, 1070-1513".

³¹ Ditchburn, "Trade with Northern Europe, 1297-1540", p171. Earlier, in the thirteenth century, it seems that merchants in Scotland were reluctant to take currency from continental nations in payment, but would accept English money. By the fourteenth century, English, Flemish, French and León currency could be accepted in Scotland (Stevenson, "Trade with the South, 1070-1513", pp184 & 193).

³² Robinson, *European Legal History*, paras 14.1.7-14.1.8.

³³ Levack, *The Formation of the British State: England, Scotland, and the Union 1603-1707*, pp95-96.

the Court of Session duly was established: the traditional date of its founding is taken as 1532.³⁴

Supra-national law as a barrier to international private law

Even once the factual, or factual-legal, conditions existed which might allow the development of rules of what we now understand to be international private law, a significant barrier was raised by the nature of legal thinking: specifically, the existence of supra-national bodies of law.

By the late 1100s the disposal of certain legal matters fell uniquely to Officials in the Church Courts, or Archdeacons. In these years, and in the beginning of the following century, "the Scottish Church was fully integrated into the jurisdictional structure of Western Christendom".³⁵ The remit of the Church Courts was wide, including marriage, legitimacy, wills, moveable succession, defamation, and cases regarding contracts where an oath had been sworn.³⁶ Castel makes the basic, but crucial, point that the Church Courts applied a single standard which reflected the Christian position, and thus there was no room for a conflict of laws between Christian countries on, for example, marriage.³⁷ Mattingly goes so far as to state that "for medieval Europe canon law supplied, in large part, the need for a code of private international law".³⁸ This is true only insofar as it is understood that the existence of a body of law with such universalist claims acts to remove the need for conflict of laws rules in those subjects within its jurisdiction. Rules of canon law did not have the same aim as our modern rules of international private law.

It must be borne in mind too that the influence of canon law is only part of the phenomenon of the *ius commune*, that is to say, the reliance, to greater or lesser

³⁴ Robinson, *European Legal History*, paras 9.7.4-9.7.8; and for the consolidation of its jurisdiction see *ibid.*, para 14.3.7.

³⁵ Cairns, "Historical introduction", p29.

³⁶ *Ibid.*, p30; D.B. Smith, "Canon law", in Various authors, *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society, Vol 1, 1936), p183 at 185; *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 22, para 511; Stair, *Inst.*, I,i,14.

³⁷ J.-G. Castel, *Introduction to Conflict of Laws*, 4th edn. (Butterworths Canada, 2002), p132.

³⁸ G. Mattingly, *Renaissance Diplomacy* (Penguin, 1955), p20.

extent, by lawyers across Europe on a mixture of canon, roman, and feudal, law principles, which persisted in Scotland until the 1600s.³⁹

In the world of commerce too, supra-national rules of law played a part. Again it has been claimed that there were rules which dispensed with the requirement for any concept of international private law. Thus, Dewar Gibb notes that the "Law Merchant has been called, with some show of justification, the International Private Law of the Middle Ages".⁴⁰ As late as 1695 a Scottish Court refused to rely upon a Scottish prescription period to bar a claim by English merchants on the grounds that:

"what was furnished to gentlemen and others, that were not actual trafficking merchants, ... the prescription as to the manner of probation would meet these debts, if not insisted for within the three years; but as to merchants, it was against the faith and credit of the nation, to obtrude that particular law against strangers ignorant thereof; and so by a plurality, seven against six, they found the prescription could not be obtruded against these pursuers, it being *in re mercatoria*, and between merchants, and done in England".⁴¹

At sea, it seems that general rules of maritime law existed. The modern experience of this area of law as a topic of marginal importance, should not lead us to underestimate its significance in earlier times. Some Scots chose to travel by sea to England, and there was no choice in journeys to the continent and further afield.⁴² Even in the latter case, bad weather might cause Scottish ships to anchor temporarily at English ports: although Ditchburn describes one such fourteenth century visit which ended in the arrestment of a Scottish ship at Newcastle.⁴³ Finlay has argued that the significance of maritime trade in Scotland resulted in maritime law being of particular relevance. Indeed, he suggests that

³⁹ Robinson, *European Legal History*, paras 14.2.2-14.2.8; and see Cairns, "Historical introduction", pp46-47 & 71-74.

⁴⁰ A.D. Gibb, "International Private Law in Scotland in the Sixteenth and Seventeenth Centuries" 1927, 39 *JR* 369 at 380. See also L.E. Trakman, "From the medieval law merchant to e-merchant law" (2003) 53 *U Toronto LJ* 265 at 265-266 & 270-283.

⁴¹ *Philips & Short v Stamfield* (1695) Mor 4503.

⁴² D. Ditchburn, *Scotland and Europe: The Medieval Kingdom and its Contacts with Christendom, c.1215-1545* (Tuckwell Press, 2001), Vol 1, p2.

⁴³ *Ibid.*, pp15-16.

maritime trade disputes accounted for most of the sixteenth century cases before the College of Justice featuring foreigners.⁴⁴ Balfour includes in his *Practicks* a section on the "Sea lawis, betwixt Scotland and Ingland".⁴⁵ These included rules to prevent shipwrecked goods being arrested, or taken from their owners. In 1656, in the case of *Hog v Jack*⁴⁶ it was argued that maritime law only applied on voyages outwith Scotland. However, in *Mason v Fleming*,⁴⁷ it was argued for the defender that maritime law should apply in a dispute over the powers of an agent. The latter had entered into a complex agreement involving hypothec of a ship, with the pursuer, who was a factor from La Rochelle. Interestingly, the pursuer's claim was for "L.3600, at 24s. the livre".⁴⁸

With the works of the Institutional writers, a clearer picture of a distinctive body of Scots law began to emerge: a body of law which drew on, but was not part of, supra-national legal rules. However, crucially, particularly around the time of the early Institutional writers, disputes between the subjects of different nations were often still not seen as decided by Scots law, but rather to be decided in accordance with universal rules. Thus, Balfour cites the case of *Ane Frenchman v ane Englishman* as authority for the proposition that whilst the Court of Session judges may hear an action between foreigners, they "should decern and judge thairanent conform to the commoun law, and not efter the municipal law of this realme".⁴⁹ It is submitted that by the common law what is meant is the law of nations, or as it was also known the *ius gentium*.⁵⁰ For Craig, the law of nations determined domestic contract disputes, but also "applied without exception to all dealings with foreigners, no matter how little it may accord with the established

⁴⁴ J. Finlay, "Foreign litigants before the College of Justice in the Sixteenth Century" in Various authors, *Miscellany Four* (Stair Society, Vol 49, 2002), p37 at pp37 & 47.

⁴⁵ P.G.B. McNeill, (ed.) *The Practicks of Sir James Balfour of Pittendreich* (Stair Society, Vol 21, 1962 & Vol 22, 1963), 642-4.

⁴⁶ (1656) Dec Usurp 31.

⁴⁷ (1656) Dec Usurp 31.

⁴⁸ Ibid.

⁴⁹ Balfour, *Practicks*, 269, c.x.

⁵⁰ Stair, *Inst.*, I,i,11; see also E.B. Crawford, *International Private Law* (W. Green/Sweet & Maxwell, 1998), para 2.08, although cf Finlay, "Foreign litigants before the College of Justice in the Sixteenth Century", p43; Anton suggests this was a reference to the law merchant (A.E. Anton with P.R. Beaumont, *Private International Law: A Treatise from the Standpoint of Scots Law*, 2nd edn. (W. Green, 1990), p10.

law of the land".⁵¹ In a 1739 case, involving an English debt in a Scottish succession, it was averred that "we follow the law of nations".⁵² Bankton analyses the need for what we would now recognise as public international law, such as rules between nations as to wars and prisoners, and develops sound reasoning as to why these matters should be regulated by the law of nations.⁵³ He does not, however, analyse the more subtle question of the body of rules which should apply as between the private citizens of different nations. Kames does grapple with this problem. However, his reasoning is that in respect of the jurisdiction of the King and council, and subsequently the Court of Session, over foreigners:

"The ordinary courts are confined to common law but with respect to foreign matters this law can be no rule, for the reason above given, that it regulates nothing *extra territorium*. The King and council accordingly, judging of foreign matters, could not be governed by the common law of any country: the common law of *Britain* regulates not foreign matters; and the law of a foreign country hath no authority here. Whence it follows, that foreign matters must be governed by the rules of common justice, to which all men are subjected, or *iure gentium*, as commonly expressed".⁵⁴

He is witheringly scornful of the different, English, practice of proceeding upon a fiction that the matters giving rise to the action took place in England.⁵⁵ Mercantile matters between traders of different nations were still referred by Bell to the law merchant, which he regarded as merely a component of the law of nations.⁵⁶ For this reason W. Galbraith Miller concluded that the rules of what was, in his time, the newly designated university subject of International Private

⁵¹ J.A. Clyde, (transl.), *The Jus Feudale by Sir Thomas Craig of Riccarton* (William Hodge & Co., 1934), 1,8,8.

⁵² *Kinloch v Fullerton* (1739) Mor 4456.

⁵³ Bankton, *An Institute of the Laws of Scotland* (Kincaid & Donaldson, 1751), I,i,30.

⁵⁴ Kames, *Principles of Equity* 4th edn. (Bell & Bradfute & Creech, 1800), III,viii.

⁵⁵ *Ibid.*

⁵⁶ Bell, *Commentaries on the Laws of Scotland*, 3rd edn. (Archibald Constable & Co., 1816), Preface to 2nd edn., xi.

Law, had been treated as part of "the law of nature and nations" until the early 1800's.⁵⁷

Before passing from the subject of these general, supra-national laws, one related matter must also be discussed: the existence of any special rules or arrangements between Scotland and England solely, which transcended their general bodies of law. The only significant example of this is the March Laws.

Traditionally the Scottish Marches stretched from the border with England to just beyond Peebles, taking in towns such as Kelso, Roxburgh, Jedburgh, and in the west, Dumfries. The English Marches reached as far south as Kendal and Newcastle. Whilst the roots can be traced to earlier dates, it has been convincingly argued that by the mid-thirteenth century, something approaching a code of laws applicable only in the Marches had been established, and the separate nature of March jurisdiction confirmed.⁵⁸ In the early fourteenth century, Wardens were established in each country, and eventually, in each March. Whilst in place, the March Laws comprised three layers: agreed rules between Scotland and England; agreements between individual wardens; and laws applying only to the Scottish, or English, border lands. Pollock and Maitland described the system as "a true international law".⁵⁹ Dewar Gibb, however, dismisses them as "largely rules of war, and struck out under the severe stress of very peculiar circumstances",⁶⁰ and thus of little importance in a study of international private law. It is submitted that a brief examination of the March Laws is of relevance and interest in this thesis.

In the early times, when the movement of persons was more limited, the land border with England would be one of the few areas where there was regular

⁵⁷ W.G. Miller, *The Law of Nature and Nations in Scotland* (W. Green & Sons, 1896), p102. Miller lectured in *inter alia* international private law from 1878 to 1904 (D.M. Walker, *A History of the School of Law, the University of Glasgow* (University of Glasgow, 1990), pp64-66).

⁵⁸ W.W. Scott, "The March Laws reconsidered" in A. Grant, & K.J. Stringer, (eds), *Medieval Scotland, Crown, Lordship and Community: essays presented to G.W.S. Barrow* (Edinburgh University Press, 1993), p114 at 123; D.L.W. Tough, *The Last Years of a Frontier: A History of the Borders During the Reign of Elizabeth* (Oxford University Press, 1928), p97.

⁵⁹ Sir F. Pollock, & F.W. Maitland, *The History of English Law before the time of Edward*, 2nd edn. (Cambridge University Press, 1898), Vol I, p222.

⁶⁰ Gibb, "International Private Law in Scotland in the Sixteenth and Seventeenth Centuries", 372.

contact between the two countries. The March Laws demonstrates a recognition that cross-border difficulties in this area might best be resolved by special rules, which took into account the English elements in a Scottish case, and vice versa. Thus in 1248 it was decided that a question between Scots and English borderers must be tried at the March, and not in the ordinary English courts.⁶¹ For Balfour, jurisdiction generally fell to the Warden of the March where the pursuer resided.⁶² It seems also that certain crimes were punishable in Scotland although committed in England, and the reverse. Importantly, it is implicit in the March Laws that the outcome of March cases would be recognised on both sides of the border. Initially, it was possible to poind goods across the border.⁶³ In 1562 there is recorded a dispute as to whether damages should be payable in Scottish, or in English, currency,⁶⁴ and Rae has argued that an agreed exchange rate was in place.⁶⁵

The system of March Laws came to an end with the Union of the Crowns. The Laws were formally abolished in 1607, but Tough has bluntly stated that after 1603, "there is really no more Border history".⁶⁶

Effect of seventeenth century constitutional changes

Over the centuries, therefore, factual conditions, legal conditions and legal thinking, combined to create the conditions in which rules of Scots international private law might develop with regard to subjects of the English nation, but also to raise barriers to the development of such a legal concept. Before turning to the actual instances of conflict rules which eventually became accepted in Scotland in cases containing an English element, however, one final factor must be examined. This is the quite remarkable lack of impact upon the development of conflict

⁶¹ Scott, "The March Laws reconsidered", p121.

⁶² Balfour, *Practicks*, 602, c.xv.

⁶³ T.I. Rae, (ed.), "George Neilson: The March Laws; Part II: The March Laws", in Various authors, *Miscellany One* (Stair Society, Vol 26, 1971), p11 at 22.

⁶⁴ T.I. Rae, *The Administration of the Scottish Frontier 1513:1603* (Edinburgh University Press, 1966), p52.

⁶⁵ *Ibid.*, p53.

⁶⁶ Tough, *The Last Years of a Frontier: A History of the Borders During the Reign of Elizabeth*, p277. However, Morison's Dictionary contains references to seventeenth and eighteenth century cases of cross-border arrestments, and border warrants, for example: *Robertson v Bell* (1676) Mor 4827; *Potts & Hunter v Mitchelson & Robson* (1705) Mor 4828; *Hardie v Liddel* (1759) Mor 4830. See also on border warrants: Erskine, *An Institute of the Law of Scotland*, 1st edn., (ed.) D. Erskine (John Bell, 1773), I,ii,21.

rules, of the constitutional upheavals in the relationship between the two countries in the seventeenth century. Both the Union of the Crowns in 1603, and the Cromwellian occupation later in the century, had the potential to alter forever the legal relationship between subjects of Scotland and England: but, as will be explained, it was a potential largely unfulfilled.

Union of the Crowns, 1603

On 24 March 1603, Elizabeth I of England died, and the English laws of succession identified as her heir, James VI of Scotland, who became the monarch of the two kingdoms. In itself, this had no theoretical effect on Scottish, or English, independence. In theory, it did not signal the union of the separate bodies of law which had been developing in each nation over time. Indeed, different rules of royal succession north and south of the border did not even guarantee that the dynastic union would continue.⁶⁷

In practice, however, the potential consequences were great. It must be remembered that nationality was not at this time defined by allegiance to the Scottish country, but by a person's status as a subject of the monarch. The implications were not lost on James VI & I:

"In the royall persone of his maist excellent majestie ... the Inhabitantis of this haill Ile ar equally subiect to his sacred persone and lawes".⁶⁸

This was soon borne out by *Calvin's Case*,⁶⁹ an action essentially engineered by James to decide the rights of those born after 1603 (the *post-nati*). Land in London was acquired in the name of a two year old Scots boy. A case was then raised in the Kings Bench claiming that he had been ejected from the land and, it seems, a succession point was raised in Chancery. The defendants argued that the boy was born within the allegiance of King James of Scotland, but outwith the allegiance of King James of England, and thus was an alien in England, unable to avail himself of the rights contained in English law. However, the competing,

⁶⁷ See Ferguson, *Scotland's Relations with England*, p97.

⁶⁸ APS, IV, 285 (c.4)(1606).

⁶⁹ (1608) 7 Co Rep 1a.

and ultimately successful, argument was that allegiance to James could not be divided, and all Scots and English people were subject to him. Thus a Scottish subject of James could raise an action in respect of English land. It seems that English law and taxes, however, would apply in respect of that land.

For James then, there had been a "partition wall which ... in my blood is rent asunder".⁷⁰ He desired an even closer union: designs for a flag of the two nations united were produced, and new coins were issued with images of union, which were legal tender on both sides of the border.⁷¹ Perhaps most significant of all was James' perseverance in his desire to use the term Great Britain.⁷² Jonson picked up on the literary theme of union as marriage, and spoke of:

"... the priest a king,
The spoused pair two realms ...".⁷³

Open, parliamentary, moves were also made towards a closer union. As early as 1604 an Anglo-Scottish Union Conference was set up, although its recommendations ultimately foundered. There was, however, much concern and hostility in both countries as to the effects of the Union of the Crowns.⁷⁴

In these conditions, it is submitted that there were five possible approaches to the regulation of the interaction of the Scottish and English systems of law: legal union; anglicisation; scotticisation; harmonisation of substance; or the use of fledgling rules of international private law. Whilst there were supporters of, or attempts to create, each of the first four options, it will be seen from an examination of each in turn, that none succeeded.

⁷⁰ G.P.V. Akrigg, (ed.), *Letters of King James VI & I* (University of California Press, 1984), letter 104.

⁷¹ B. Galloway, *The Union of England and Scotland 1603-1608* (John Donald, 1986), pp82-83 & 60; M. Lee, *Government by Pen: Scotland under James VI and I* (University of Illinois Press, 1980), p30.

⁷² R. Lockyer, *James VI and I* (Longman, 1998), pp51, 54-55 & 58.

⁷³ G. Parfitt, (ed.), *Ben Jonson: The Complete Poems* (Penguin Education, 1975), p35; and see also S. Orgel, (ed.), *Ben Jonson: The Complete Masques* (Yale University Press, 1969), p142.

⁷⁴ Lee, *Government by Pen: Scotland under James VI and I*, p35; Lynch, *Scotland: A New History*, pp239-240; K.M. Brown, *Kingdom or Province? Scotland and the Regal Union, 1603-1715* (Macmillan, 1992), p87.

Firstly, a possible legal union. There were those, most notably Craig, who tried to stress what they saw as fundamental similarities between the Scottish and English systems of law.⁷⁵ James himself pressed this point on occasion,⁷⁶ but he acknowledged that there were differences between the Scottish and English legal systems.⁷⁷ James' goal, it seems was legal union: "one uniformity in laws".⁷⁸ Concrete steps were taken. Bacon drafted his *Preparation toward the Union of the Laws of England and Scotland*. Interestingly, however, both Bacon, and the subsequent Conference on the same subject, basically envisaged a union of the two nations' public laws, and not private laws. In any event the project failed, doomed by general hostility to union, and a feeling that the laws were too disparate to unite. One pamphleteer argued that:

"also the situation of the place is to be respected, for lawes are lyke to medecynes and must be quallefyed with sharpe or mylde inflictions as the conditions of the people and the situation of the place shall require and therefore yt is allmost impossible for the reasons aforesaide, to make one lawe to be hollsome for dyvers nations lyvinge in sundrye regions".⁷⁹

For those in Scotland, the line between legal union, and anglicisation may have been blurred: it was felt that, over time, the first would have led to the second.⁸⁰ There were those in England who argued that the English Common Law should simply be introduced into Scotland.⁸¹ Politically this had little chance of success, and was not supported by James.⁸² Whilst some English measures were introduced in Scotland during his reign, these suggest more the adoption of

⁷⁵ Most notably in *de Unione Regnorum Britanniae Tractatus*, published in 1604. See generally A. Wijffels, "A British *ius commune*? A Debate on the Union of the Laws of Scotland and England during the First Years of James VI/I's English Reign", (2002) 6 *EdinLR* 315 at 332-337.

⁷⁶ A.H. Williamson, *Scottish National Consciousness in the Age of James VI: the Apocalypse, the Union and the Shaping of Scotland's Public Culture* (John Donald, 1979), p149.

⁷⁷ Lockyer, *James VI and I*, p43.

⁷⁸ Quoted *ibid.*, p53.

⁷⁹ Quoted in Wijffels, "A British *ius commune*?", 325.

⁸⁰ B.P. Levack, "The proposed union of English law and Scots law in the seventeenth century", 1975 *JR* 97 at 110; B.P. Levack, "English law, Scots law and the Union, 1603-1707" in Harding, A. (ed.), *Law-Making and Law-Makers in British History* (Royal Historical Society, 1980), p105 at 110.

⁸¹ Levack, "English law, Scots law and the Union, 1603-1707", p106.

⁸² T.B. Smith, "British Justice: A Jacobean Phantasma" 1982 *SLT* 157 at 159.

similar solutions to comparable problems, rather than a deliberate policy of anglicisation.

To modern eyes the possibility of the reverse process occurring, i.e., scotticisation of English law, seems quite improbable. However, there was initial support for legal union from the minority group of English civil lawyers for the reason that, it was hoped, the civilian influence in English law would thereby be strengthened.⁸³ Common Lawyers feared the accession of James would mean the introduction of civil law, or at least the adulteration of the Common Law by civil law elements.⁸⁴ Although great concern was caused when a Court of Session judge was appointed Master of the Rolls by James,⁸⁵ in the long run the Common Lawyers fears were, unsurprisingly, unfounded.

There were a number of measures which can very loosely be classified as harmonising attempts. The so-called hostile laws were abolished: these were a number of Scottish and English Acts of Parliament which forbade contact between the subjects of the two countries, or were in some way discriminatory to subjects of the neighbouring country. Galloway has argued that these had, in any event, been largely disregarded except at times when the relationship between the nations had reached a particular nadir.⁸⁶ Thus their abolition in his view was mere gesture politics. Some more effective attempts at harmonisation can, however, be identified. Prior to 1603, a Scottish Act of Parliament had prohibited, under pain of conviction of theft, the fishing of particular types of fish, or fishing at particular times of year. However, the Rivers Tweed and Annan had been excepted, since unless fishing was similarly regulated on the English side, there would be no effect on the preservation of fish stocks. In 1606 this exception was repealed,⁸⁷ presumably since appropriate measures had now been, or could be, taken in England. Some attempt was also made at harmonisation in the

⁸³ Levack, "The proposed union of English law and Scots law in the seventeenth century", pp103-104; Levack, *The Formation of the British State: England, Scotland, and the Union 1603-1707*, pp81-82.

⁸⁴ Levack, "The proposed union of English law and Scots law in the seventeenth century", p101; Brown, *Kingdom or Province? Scotland and the Regal Union, 1603-1715*, p81; Lockyer, *James VI and I*, p43.

⁸⁵ Lee, *Government by Pen: Scotland under James VI and I*, p36.

⁸⁶ Galloway, *The Union of England and Scotland 1603-1608*, p65.

⁸⁷ APS, IV, 285 (c.4)(1606).

bringing in of navigation rules in England in 1615, and Scotland in 1616.⁸⁸ In the long term, however, they were not particularly well-used. Lastly, there were changes in certain rules on taxation and customs duties. By the middle of 1603, a Scottish court had found that an English merchant, as a subject of King James VI & I, was not liable to pay the export tax which foreigners were then required to pay.⁸⁹ A further 25 per cent tax applied in England to imports by foreigners, was lifted in respect of Scottish items by 1605.⁹⁰ On the King's authority, no customs were applied within Great Britain. This was on the condition, however, that duty free goods were not then exported out of the country: a stricture distinctly more unpopular with merchants than the previous arrangements.⁹¹ By the end of the first decade of the seventeenth century, Anglo-Scottish customs were regulated on the same basis as Anglo-Irish trade and, as the years progressed, any concessions merchants had enjoyed in Anglo-Scottish trading seem to have disappeared entirely.⁹²

The Cromwellian era

Fundamental constitutional change of a very different type came in the mid-seventeenth century. With the execution of Charles I in 1649, the regal union was abruptly severed. The defeat of Scottish royalist forces at Dunbar in 1650 and, one year later, at Worcester, plunged Scotland, constitutionally at least, into anarchy: from the summer of 1651 there was no central authority controlling events in Scotland.⁹³ The lack of an executive power was mirrored by the lack of a judicial body: the Court of Session rose on 28 February 1650, and would not sit again until after the Restoration.⁹⁴

Cromwell's control over Scotland, however, increased, although an intention to pass an Act declaring Scotland essentially to be an English possession came to

⁸⁸ Galloway, *The Union of England and Scotland 1603-1608*, p141.

⁸⁹ Lee, *Government by Pen: Scotland under James VI and I*, p31.

⁹⁰ Ibid.

⁹¹ Galloway, *The Union of England and Scotland 1603-1608*, p141.

⁹² Ibid.

⁹³ W.C. Dickinson, & G. Donaldson, (eds), *A Source Book of Scottish History*, 2nd edn. (Thomas Nelson & Sons, 1961), Vol 3, p146.

⁹⁴ G. Brunton, & D. Haig, *A Historical Account of the Senators of the College of Justice from its Institution in 1532* (Thomas Clark, 1832), pp345-346.

nothing.⁹⁵ Eventually, in April 1654 an Ordinance was passed establishing a legal union between Scotland and England. The establishment of this Commonwealth had in no way been an aim of the Civil War. Union was simply something which was dictated by events, and indeed was necessary to allow Cromwell's government in England to survive.⁹⁶ The terms of the Ordinance, *prima facie*, seem to represent Anglo-Scottish agreement. In reality, for Scotland it was an incorporating union only in the sense of "when the poor bird is embodied into the hawk that hath eaten it up".⁹⁷ There was now a common Parliament, which included *inter alia* English and Scottish members. Seven Commissioners for the Administration of Justice for Scotland were appointed in 1652, and initially Englishmen were in the majority of these appointments.⁹⁸ In the eyes of the republican authorities, harmonisation of the two legal systems, or anglicisation of the Scottish system, was desirable.

As early as 1651 the Commonwealth Parliament felt it could competently legislate regarding Scotland.⁹⁹ A Protectorate Act was applied by the Commissioners in the 1655 case of *Scot v Tenants*,¹⁰⁰ and the right of the Commonwealth to property was recognised a year later in *Carmichael v Muir & c.*¹⁰¹ However, the initial aims of the Commonwealth authorities were a great deal more far-reaching. An active desire to anglicise the Scottish legal system is clear from the Instructions given to the Executive Commissioners dispatched to Scotland to take up their posts. All statutes which did not accord with the policies of the Commonwealth were to be repealed, and "the Lawes of England as to matter of government be put in Execution in Scotland".¹⁰² It might, however, be questioned from the form of wording whether only what is now classed as public law, was to be affected.¹⁰³ Further instructions in 1655 were more blunt: the

⁹⁵ F.D. Dow, *Cromwellian Scotland 1651-1660* (John Donald, 1979), p30.

⁹⁶ Ferguson, *Scotland's Relations with England*, p137.

⁹⁷ Quoted *ibid.*, p137.

⁹⁸ And were paid more! See: Dow, *Cromwellian Scotland 1651-1660*, p55

⁹⁹ See the 1651 Declaration of the English Parliament concerning Scotland, and the 1652 Explanation and addition relating to the foregoing Declaration (reproduced in part in Dickinson & Donaldson, *A Source Book of Scottish History*, Vol 3, pp148-149).

¹⁰⁰ (1655) Dec Usurp 2.

¹⁰¹ (1656) Dec Usurp 36.

¹⁰² Quoted in Dow, *Cromwellian Scotland 1651-1660*, p33.

¹⁰³ See Levack, *The Formation of the British State: England, Scotland, and the Union 1603-1707*, p74.

Council was to "promote the union by having the proceedings in courts of judicature conducted agreeably to the laws of England, as far as the rules of the court will permit".¹⁰⁴ In addition, only English Justice Commissioners were allowed to sit on criminal cases, which no doubt were seen as more politically explosive.¹⁰⁵

English debt laws were enforced, although this was used to weaken enemies in Scotland.¹⁰⁶ It has also been suggested that English Justice Commissioners attempted to use equity in their decisions.¹⁰⁷ However, given that this is a concept woven into Scots law, it is perhaps difficult to see how this would lead to any different practical results. Decided cases from this period may, however, bear some traces of an anglicisation policy. Thus an allegedly established Scottish practice was not followed in the purely domestic case of *Lord Brechin v Tenants*.¹⁰⁸ This could, of course, have been due to the practice contended for being controversial. However, in *Rutherford v Master of Rollo*,¹⁰⁹ which again had no apparent foreign element, an Act of the Scottish Parliament seems to have been ignored. In *Hastie v Mariners*,¹¹⁰ an English advocate appeared, and a Scottish mode of proof was not allowed.

The mode of this anglicisation programme is perhaps unusual, in that it was not a product of parliamentary act, but was to be judicially driven. However, whatever the initial intentions of the Commonwealth, or the chosen means of implementation, it was a failure, with little impact in either the short-term or the long-term. Thus the case reports of the time contain terminology and references one would expect in Scots law.¹¹¹ Although in *Sydserv v. Adam & c*¹¹² the English judges heard argument on a point of English law as being within their field of expertise, in other respects the case proceeded as one might expect a modern

¹⁰⁴ Quoted in Dow, *Cromwellian Scotland 1651-1660*, p166.

¹⁰⁵ Ibid., p55.

¹⁰⁶ Ibid., pp57 & 61.

¹⁰⁷ Ibid., p177.

¹⁰⁸ (1655) Dec Usurp 8.

¹⁰⁹ (1655) Dec Usurp 7.

¹¹⁰ (1656) Dec Usurp 30. The pursuer, however, was described as an inn-dweller, and the action arose out of a theft which had occurred on an internal Scottish voyage.

¹¹¹ Thus they make reference, for example, to Craig and Skene, and discuss mails and duties, and terce: see generally *The Decisions of the English Judges During the Usurpation*.

¹¹² (1657) Dec Usurp 68.

international private law case: an argument was put forward that the granter of the bond at issue being Scottish, and the bond being capable of registration in Scotland, Scots law should apply, whilst the defender successfully founded on the granting of the bond in England, and the fact that the creditors were English, in arguing that English law was applicable. In fact, it is generally agreed that debt law was very much the exception, and that otherwise Scots law continued to be applied throughout the Commonwealth period.¹¹³

The survival of Scots law in the face of stated intentions to impose English law can be explained by a number of factors. Firstly, there was in reality little drive towards anglicisation from the central authorities.¹¹⁴ Indeed, latterly Broghil made it clear that Scots law should be respected.¹¹⁵ Secondly, Scottish legal personnel remained important in the operation of the justice system. The advocates appearing before the Commissioners were almost entirely Scots, used to presenting Scots legal arguments.¹¹⁶ Whilst the Scotsmen appointed as Justice Commissioners were those who marked themselves out as supporters of the Republic, it is remarkable how many of them had already held legal posts before the Cromwellian era, and were connected with prominent Scots lawyers. A number had been Lords Ordinary;¹¹⁷ and Johnstone of Warriston had also served as King's Advocate, and was a grandson of Craig.¹¹⁸ Later in the Cromwellian period, James Dalrymple, later Viscount Stair, was appointed a Justice Commissioner. There was, therefore, no real break from the established order. Thirdly, there appears to have been a feeling, as there had been after the Union of the Crowns, that the legal systems of Scotland and England were simply too different to be successfully united. Thus this seemed to cause initial problems in the Commonwealth's establishment of an Exchequer Court in Scotland.¹¹⁹

¹¹³ Levack, "The proposed union of English law and Scots law in the seventeenth century", pp112-113; T.M. Cooper, "Cromwell's judges and their influence on Scots law" 1946, 58 *JR* 20 at 22-23.

¹¹⁴ R. Hutton, *The British Republic 1649-1660* (Macmillan, 1990), p105; Dow, *Cromwellian Scotland 1651-1660*, p166.

¹¹⁵ Dow, *Cromwellian Scotland 1651-1660*, p175.

¹¹⁶ *Ibid.*, p55; Cooper, "Cromwell's judges and their influence on Scots law", 22.

¹¹⁷ Brunton & Haig, *A Historical Account of the Senators of the College of Justice from its Institution in 1532*, pp277, 289-290, 306-310, 338-339 & 343-344.

¹¹⁸ *Ibid.*, pp308 & 306-307.

¹¹⁹ Dow, *Cromwellian Scotland 1651-1660*, pp174-175.

After the Restoration, with the Court of Session sitting once more, provision was made for the decisions of the Cromwellian Justice Commissioners to be appealed, although they were not simply overturned by statute.¹²⁰ Cooper notes that none of their decisions appear in any of the Scottish Institutional works.¹²¹ In his eloquent phrase, the time under Cromwell, for Scots law, "were years which the locusts had eaten".¹²²

The development of Scottish international private law rules, particularly as regards England

From as early as Scoto-Norman times there was recognition within the Scots rules of law, of the existence of 'strangers'. For example, the *Leges Quatuor Burgorum* refer to ships "of athir strange kynrykis",¹²³ and a statute of William I speaks of "strangear merchand of quhatsumever nation".¹²⁴ Most of the provisions, however, were in reality attempts to control foreign merchants.¹²⁵ Interestingly, there is, however, an assertion of Scottish royal jurisdiction. Thus, if ships arrived in Scotland from foreign parts, and there were dealings with locals, then the "kyngis bailzeis sall halde rycht betuen thaim" in all complaints.¹²⁶ Furthermore, an Act of William I warned that any foreign merchant trading outwith the burghs was to be "apprehendit ... and ... punisshit as ane brekar of the Kingis protection".¹²⁷

Throughout the following centuries Scottish courts continued to be content to hear cases, even although there might be a foreign element. Thus a burgh court in Aberdeen entertained a claim for money by a Danzig sailor in 1475.¹²⁸ A case was heard in 1491 by the Lords of Council which concerned goods purchased by

¹²⁰ Cooper, "Cromwell's judges and their influence on Scots law", 23.

¹²¹ Ibid., 24.

¹²² Ibid., 25.

¹²³ c.xxv (APS, I, 25).

¹²⁴ APS, I, 61 (c.xli)(William).

¹²⁵ See Hudson's argument, in reference to Norman England, that "There was a considerable fear of outsiders, of those for whom no one would answer. They had either to be prevented from entering the community for any length of time, or to find people to answer for them" (J. Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to the Magna Carta* (Addison Wesley Longman, 1996), p62. An interesting modern parallel is the practice of sisting a mandatory, discussed at p93 below.

¹²⁶ *Leges Quatuor Burgorum*, c.xxv (APS, I, 25).

¹²⁷ APS, I, 61 (c.xli)(William).

¹²⁸ Ditchburn, "Trade with Northern Europe, 1297-1540", p173.

Scottish merchants in Danzig.¹²⁹ In *King v Moffat*,¹³⁰ on the pursuer's non-appearance, the Lord Conservator of Scottish privileges in the Low Countries (against whom the action had been raised), indicated that he now wished to proceed against the pursuer for injury caused by defamation in Scotland *and* in the Low Countries. In a passage from Balfour already cited, he asserted that the Lords of Council could hear all civil cases between foreigners, even although the actings took place outwith Scotland.¹³¹ What connection with Scotland was required? Balfour embarks on a discussion under the heading that a party should only "be "summundit ... within his awin jurisdiction".¹³² However, in the 1564 case of *An Englishman v Angelo an Italian*,¹³³ there is no indication that Angelo had any connection with Scotland other than his presence there. By 1657, however, in *Tackit and Mein v Gilchrist*,¹³⁴ it was a matter of concession that there was no jurisdiction over an Englishman, born and resident there, simply by virtue of his presence in Scotland. It was also accepted that a Scottish court had jurisdiction if the action impinged on Scots heritage, and possibly moveables in Scotland. In a case of 1624, a Scots court had been content to take jurisdiction over an English defender, because the heritable property which was the subject of the dispute was in Edinburgh.¹³⁵ The Court, however, clearly distinguished from such a case, personal actions, in which jurisdiction would not have been taken. By the later half of the eighteenth century, Erskine reasoned that in a dispute over immoveable property:

"the judge of the territory where it is situated is the sole judge competent, ... for things that are immoveable, are incapable of shifting places, and must therefore be restored in that place where they lie, and by the warrant of that judge whose jurisdiction reacheth over them".¹³⁶

¹²⁹ Ibid., p174.

¹³⁰ I.H. Shearer, (ed.), *Selected Cases from Acta Dominorum Concilii et Sessionis* (Stair Society, vol14, 1951), 170.

¹³¹ Balfour, *Practicks*, 269, c.x.

¹³² Ibid., 306, c.xvi.

¹³³ (1564) Mor 4825.

¹³⁴ (1657) Dec Usurp 90.

¹³⁵ *Lamb v Heath* (1624) Mor 4812.

¹³⁶ Erskine, *Inst.*, I,ii,17. He also notes that if the defender is foreign, the action must be raised in the Court of Session: Ibid., I,ii,18.

He was clear, however, that this did not entail acceptance of any idea that personal jurisdiction could be taken over a foreign defender by a Scots judge, simply because heritage was owned in Scotland.¹³⁷ Nor did the existence of moveables in Scotland in itself confer jurisdiction, unless the property had been attached.¹³⁸

Whilst Scottish courts would, then, take jurisdiction, Balfour states that the action of a foreign pursuer "sould be heard summarlie upon a simpill supplicatioun, without the rigorous observatioun of the form and ordour of uther process".¹³⁹ It is clear from the cases which he cites as authority for this proposition that English pursuers were also encompassed in this rule. At one time a special day was set aside for cases with a foreign element.¹⁴⁰ However, the authority cited by Balfour would seem to suggest that English and other foreign defenders were required to provide caution.¹⁴¹

The next question is, once a Scots court heard a case involving a foreigner, would Scots law always be applied, or was there recognition that another law might be applied to the case? The case of *De-La-Sause v Haddington*¹⁴² seems to indicate application of a territoriality principle. The defender sought to rely on a decision of the Paris Parlement which divorced the pursuer, and also dealt with consequent property ownership issues. The pursuer argued that "the acts of the parliament of Paris cannot reach beyond the limits of France, no more than our laws can reach to them".¹⁴³

There are instances, however, where it seems to have been accepted that foreign law had a rôle in the decision of a case. In the seventeenth century, there are recorded cases before Scottish courts where there was a dispute over whether

¹³⁷ Erskine, *Inst.*, I,ii,18.

¹³⁸ *Ibid.*, I,ii,19. Times change: by modern thinking this is an exorbitant jurisdiction.

¹³⁹ Balfour, *Practicks*, 292, c.xiv.

¹⁴⁰ *Ibid.*, 272, c.xvii; Finlay, "Foreign Litigants before the College of Justice in the Sixteenth Century", p42.

¹⁴¹ Balfour, *Practicks*, 192, c.iv. Finlay suggests that caution also had to be provided by foreign pursuers (Finlay, "Foreign Litigants before the College of Justice in the Sixteenth Century", p40).

¹⁴² (1657) Dec Usurp 54.

¹⁴³ *Ibid.*

Scots or English law should be applied to a bond, or bill of exchange.¹⁴⁴ As has been seen, it seems that the application of English law was countenanced, for example, where a bond was granted in England, in respect of English creditors.¹⁴⁵ In *Laird of Balbirnie v Laird of Arkhill and Relltrees*¹⁴⁶ it was held that an English bond, between English people, should be proved under an English mode of proof. Similarly, it was later held that the English method of proof on oath was sufficient to prove that a debt had been discharged, even when the debtor was a Scot who was merely resident in England.¹⁴⁷ This case, however, seems then to have run into practical problems, since the cedent was a Quaker "and would not swear at all!"¹⁴⁸ Stair felt confident enough to assert as a general principle that subscription, and the manner of proof, was a question for the law of the place, presumably meaning the place of subscription.¹⁴⁹ An attempt to argue that an exception should be made to the rule that form was governed by the place of contracting (meaning, it seems, the place where the bond was granted: in this case England), where the bond was to be executed (in the sense of registration of the bond) in Scotland, met with no success.¹⁵⁰ Similarly, the Court rejected the suggestion that an assignation between two Scotsmen regarding Scottish debts required to be formally valid by Scots law, rather than the law of England, which was where the assignation had been made.¹⁵¹ A somewhat unusual case is that of *Gib v Ballantyne*.¹⁵² The pursuer, an English soldier claimed that the defender had promised him £100 for "saving of his life at the battle of Worcester (*sic*)".¹⁵³ Under Scots law such a promise had to be proved by writ or oath, whereas in England promises up to £1000 sterling were provable by witnesses. It seems that the contract had been entered into in England, and English law was applied. Stair

¹⁴⁴ For example: *Sydsarf v Adam & c.*, (1657) Dec Usurp 68; *Craig v Traquair* (1656) Dec Usurp 33; *Tackit and Mein v Gilchrist*, (1657) Dec Usurp 90; *McMorland v Melvill* (1666) Mor 4447.

¹⁴⁵ *Sydsarf v Adam & c.*, *supra*, and see *Fortoun v Shewan* (1610) Mor 4429, in which it is stated that a bond will be valid if in accordance with the form of the place of granting.

¹⁴⁶ (1633) Mor 4446.

¹⁴⁷ *McMorland v Melvill*, *supra*.

¹⁴⁸ *Ibid.*

¹⁴⁹ Stair, *Inst.* I,i,16. Note, however, the case of *Chatto v Ord* (1702) Mor 4447, in which the Court allowed some flexibility as to the manner of proof of an English bond, for reasons of practicality.

¹⁵⁰ *Junquet La Pine v Creditors of Lord Semple* (1721) Mor 4451.

¹⁵¹ *Sinclair v Murray* (1636) Mor 4501. It was noted that the cedent was resident in England at the relevant time.

¹⁵² (1655) Dec Usurp 1.

¹⁵³ *Ibid.*

notes that "the law of England and other foreign nations being matter of fact to us ...".¹⁵⁴ Success of an argument that a claim had prescribed under English law is also recorded.¹⁵⁵ However, the English prescription period was ignored in respect of a bond in Scots form, where all parties were Scotsmen, even although certain of the parties had been resident in England at the time when the bond was granted.¹⁵⁶ The conflict rules in this area were thus beginning to emerge in a reasonably consistent, though fledgling, form.

In matters of succession Stair was plain that Scots law applied, even to Scotsmen who were resident abroad, and then died in that foreign country. A form of testament, valid in a country where a Scotsman is "residing *animo remanendi*" and later dies, but invalid in Scotland, would not regulate the Scottish succession.¹⁵⁷ His authority is the case of *Schaw v Lewens*, in which the deceased had made a nuncupative will in England. Stair also stresses that:

"The effect of testaments is no greater, though made in England, the testator residing there, and so extends not to an heritable sum due in Scotland, left in legacy by the testator, being a Scotsman, July 3, 1634, Melvil *contra* Drummond; Hope, Testaments, Purves *contra* Chisholm; Executors of Colonel Henrison, *ibid*".¹⁵⁸

From the context of this passage, it seems clear that Stair is discussing formal validity.¹⁵⁹ Conversely, a Scottish executor to the estate of a deceased who had died in Scotland did not need to confirm to debts in England or any other foreign

¹⁵⁴ Stair, *Inst.* I,i,16. For a view from the other side of the border, see the complaint from an English merchant (who was said, however, to be Scottish!) contesting Scottish jurisdiction, that "he can no more be supposed acquainted with the laws and customs of it, than of any other country in Europe" (*Anderson v Hodgson & Ormiston* (1747) Mor 4779).

¹⁵⁵ *Mosely v Harper* (1656) Dec Usurp 45; *Bichie v Harper* (1657) Dec Usurp 61.

¹⁵⁶ *Graden v Ramsay* (1664) Mor 4503.

¹⁵⁷ Stair, *Inst.*, I,i,16; III,viii,35.

¹⁵⁸ *Ibid.*, III,viii,35.

¹⁵⁹ Interestingly, however, an examination of the report in Morison's Dictionary suggests that one of the cases upon which Stair relies is perhaps more concerned with essential validity. In *Colonel Henderson's Children v Murray* (1623) Mor 4481, the deceased had attempted to dispose of heritage amongst his children, as was permitted in the Low Countries, where he died. In Scotland, however, heritage was not carried by will until the coming into force of the Titles to Land Consolidation (Scotland) Act 1868 (31 & 32 Vict), c.101.

countries.¹⁶⁰ An English pursuer was allowed to rely upon confirmation in an English form, in an action for payment under an English bond in *Lawson v Kello*.¹⁶¹ Legatars were not, however, allowed to proceed on the basis of an English confirmation of a Scottish will, where the deceased had died in England, but the (Scottish) executor was now wishing to renounce his office.¹⁶²

However, of particular interest in Stair's discussion of succession where the deceased died abroad, is his reference to the concept of residence abroad *animo remanendi*. Stair does not explicitly discuss domicile, but arguably the seeds of the concept are already there.¹⁶³ In 1711, an argument was advanced that a planter who had set out for Darien, but died in Scottish waters, should be held either to have a domicile in Darien, or to have had no domicile.¹⁶⁴ In reply, it was argued that, to acquire a domicile in Darien, the deceased would require to have "settled", and decided to stay, there. The Court ultimately found the deceased to be domiciled in Scotland. By the later Institutional works of Erskine and Kames, there is explicit reference to the rule that forty days residence leads to the acquisition of a domicile for the purposes of jurisdiction.¹⁶⁵ Erskine also states, rather strikingly:

"those who are born within the kingdom, though they should be afterwards settled abroad, without an intention of returning home, cannot shake themselves loose from the obligations naturally due by them, either to the laws or to the courts of their mother-country".¹⁶⁶

¹⁶⁰ *Archbishop of Glasgow v Bruntfield* (1683) Mor 4449. It was later suggested that an executor would usually only require to account to the court from which his powers were derived: *White v Skene* (1732) Mor 4844.

¹⁶¹ (1627) Mor 4497.

¹⁶² *Rob v French* (1637) Mor 4497. Interestingly, this case was not thought, in its circumstances, to establish a "consuetude" in the later case of *Brown & Duff v Bizet* (1666) Mor 4498.

¹⁶³ See the reference to "domicils" in *Brown & Duff v Bizet*, *supra*; and see also *Vernor v Elvies* (1610) Mor 4788; *Douglas v Cunninghame* (1642) Mor 4816; *McMorland v Melvill* (1666) Mor 4447.

¹⁶⁴ *Cordiner v Glassels* (1711) Mor 4852.

¹⁶⁵ Erskine, *Inst.*, I,ii,16; Kames, *Equity*, III,viii.

¹⁶⁶ Erskine, *Inst.*, I,ii,19.

Lastly, it is of interest to note that by 1745, a Scots court can be seen criticising an English court for lack of comity in not recognising a Scottish decree.¹⁶⁷

Conclusion

As the centuries progressed therefore, factual and legal conditions combined to bring the subjects of Scotland and England, into contact with each other. The development of different nations, each with its own body of law, on either side of the border meant that such contact also brought potential clashes between the two systems of law. Constitutional development therefore had a rôle in creating the setting in which conflict of laws could arise as between Scotland and England. Whilst there was eventually an appreciation that such cases were different from straight-forward domestic cases, resort was often had to special rules, or supra-national bodies of law, such as the *iure gentium*. Morison dedicated a section of his Dictionary to "Foreign" cases and, indeed, examination of case law eventually reveals (particularly in the seventeenth century) an increasingly sophisticated approach to questions of jurisdiction, together with a recognition that sometimes the law of another country, for example, England, ought more appropriately to be applied. Rules of what we would now class as international private law are dispersed through the Scottish Institutional writings, although generally not gathered together into a comprehensive analysis of the subject. Although constitutional changes in the seventeenth century could have removed altogether the need for rules to govern Anglo-Scottish conflicts of laws, for a variety of reasons these alterations in the two countries' constitutional relationship did not have this effect.

As a postscript, it should be noted that by 1832, an advocate editing a new edition of Stair had added a Notes section, which contains a section headed "International Law", with the sub-headings one would expect to find today in an international private law text.¹⁶⁸ In the late nineteenth century, however, as we have seen, international private law was still a relatively recent addition to the University of Glasgow's courses on Scottish law.¹⁶⁹

¹⁶⁷ *Dodds v Westcomb* (1745) Mor 4793.

¹⁶⁸ Stair, *Inst.*, 5th edn., (ed.) More, J.S. (Bell & Bradfute, 1832).

¹⁶⁹ Miller, *The Law of Nature and Nations in Scotland*, p102.

3 CONSTITUTIONALISING CONFLICTS

Defining the constitutionalising of conflicts

The phrase 'constitutionalising conflicts' is used as a shorthand description of a relatively recent phenomenon. It describes the view that, within a nation, the legal issues traditionally solved by the application of rules of jurisdiction, choice of law and recognition of judgments should, instead, be governed by constitutional rules. A brief foray into Canadian and Australian law provides some examples of this school of thought.¹

In the case of *Tolofson v Jensen*,² La Forest J referred to the "Canadian constitutional imperatives"³ which in his opinion had been left out of consideration in the application of an international private law rule to an interprovincial delictual matter. Earlier, in the case of *Morguard Investments Ltd v De Savoye*,⁴ he had argued that treating Canadian provinces as different countries in a conflict of laws context seemed "to fly in the face of the obvious intention of the Constitution to create a single country",⁵ and further that "the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution".⁶ Hogg has complained that:

"The conflicts law of each Canadian province has developed with little regard for the idea that there are constitutional limits on provincial extraterritorial

¹ Indeed, in terms of nomenclature, I am indebted to Castel, who uses the term "constitutionalization" (Castel, *Introduction to Conflict of Laws*, p21). See also its use in the title of a recent Scots article: Lord Reed, "The constitutionalisation of private law in Scotland" 2002 *JR* 65.

² (1994) 120 DLR (4th) 289.

³ *Ibid.* at 301; see also the reference by Kirby J to "constitutional imperatives" in the Australian case of *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36 at para 120.

⁴ [1990] 3 SCR 1077.

⁵ *Ibid.* at 1099.

⁶ *Ibid.* at 1101.

competence, or the idea that, within a federal state, conflicts law rules might require modification upon constitutional grounds".⁷

As Blom has observed "[i]f the solutions are constitutionally required, private international law becomes a branch of constitutional law".⁸ Indeed, taken to its extreme, this argument entails the jettisoning of rules of international private law within a sovereign state, even although it may comprise a number of jurisdictions (whether these be states, provinces, or separate legal jurisdictions). Such a radical approach is perhaps best demonstrated by the opinions rendered in interstate cases by a number of Australian judges, in particular Deane J. In *Breavington v Godleman*,⁹ Deane J expressed the view that:

"to apply private international law principles to resolve competition or inconsistency between the laws of the Australian States seems to me, however, to be objectionable on three overlapping grounds. It ignores the significance of the federation of the former Colonies into one nation. It frustrates the manifest intention of the Constitution to create a unitary national system of law. It discounts the completeness of the Constitution which, by the national legal structure which it establishes and by its own provisions, itself either precludes or provides the means of resolving competition and inconsistency between the laws of different States".¹⁰

Thus, for Deane J, if Australian states were to treat sister-states as if they were a foreign country in conflicts of law terms, then "the national law would provide for its own disunity".¹¹ Gaudron J was similarly blunt in *McKain v R.W. Miller and Company (South Australia) Pty Limited*:

"The constitutional solution operates at two stages. At the first stage, it eliminates 'conflict of laws'. More precisely, it brings about a situation such

⁷ P. W. Hogg, *Constitutional Law of Canada*, Student Edition 2002 (Carswell, 2002), para 13.5(a).

⁸ J. Blom, "Private international law in a globalizing age: the quiet Canadian revolution" (2002) 4 *YPIL* 83 at 115.

⁹ (1988) 169 CLR 41.

¹⁰ *Ibid.* at 124-125.

¹¹ *Ibid.* at 127.

that, as between the States, the Territories and the Commonwealth, there is only one body of law which applies to any given set of facts. ... The second stage of the constitutional solution eliminates 'choice of law'. The Constitution does not permit of the possibility that the legal consequences attaching to a set of facts occurring in Australia might be determined other than by application of the body of law governing those facts".¹²

Those attracted to such views have argued that a constitutional dimension informs all the main areas normally associated with international private law.¹³

In Canada this school of thought has had a practical impact. In Australia, it was the opinion of certain of the judges in *Breavington v Godleman*¹⁴ and *McKain v R.W. Miller and Company (South Australia) Pty Limited*,¹⁵ that the section of the Australian constitution¹⁶ which directed that "full faith and credit" be given to laws and judgments of other states operated so as to remove the need for rules of international private law. There is no such explicit clause in the Canadian constitution. However, an implicit concept of "full faith and credit" was, in effect, read into the constitution in *Morguard Investments Ltd v De Savoye*.¹⁷ Consequently it was held that Canadian provinces should recognise judgments emanating from sister-provinces provided that jurisdiction had been properly taken by the original court.¹⁸ The test for taking jurisdiction of "real and substantial connection", has also been said to have a constitutional basis.¹⁹ Courts

¹² (1992) 174 CLR 1 at 55.

¹³ J. Swan, "The Canadian Constitution, federalism and the conflict of laws" (1985) 63 *Can Bar Rev* 271.

¹⁴ (1988) 169 CLR 41.

¹⁵ (1992) 174 CLR 1.

¹⁶ s118.

¹⁷ [1990] 3 SCR 1077 *per* La Forest J at 1100. Tetley suggests that this concept has also now had some influence in international cases; however, it is difficult to see how the cases which he discusses bear this out: W. Tetley, "Current developments in Canadian private international law" (1999) 78 *Can Bar Rev* 152 at 198.

¹⁸ See also *Hunt v T&N plc* [1993] 4 SCR 289 *per* La Forest J at 321: "the courts must consider appropriate policy in relation to recognition and enforcement of judgments issued in other provinces in light of the legal interdependence under the scheme of confederation established in 1867".

¹⁹ *Spar Aerospace Ltd v American Mobile Satellite Corp.* 2002 SCC 78 *per* LeBel J at para 51; and see too *Muscutt v Courcelles* (2002) 213 DLR (4th) 577 *per* Sharpe JA at 608: "The decisions in *Morguard*, *Tolofson* and *Hunt* suggest that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases. The jurisdictional standards developed in *Morguard* and *Hunt* were strongly influenced by the need to adapt the rules of

in Canada can now determine that legislation from other provinces is unconstitutional, and thus should not be applied.²⁰ I will argue in a later chapter that this is tantamount to a constitutional substitute for a public policy exception.²¹ The application of different choice of law rules in an interprovincial context also sprang from the adoption of this constitutional perspective.²² For Tetley, there is now a preliminary classification issue arising in Canada, namely whether constitutional law or conflict of laws is to be applied.²³ Castel fears that before long there will be two different bodies of law dealing with interprovincial and international conflicts.²⁴

Interestingly, it is clear that the proponents of the constitutionalising of conflicts feel that, despite the existence of different legal jurisdictions within one political state, the experience of the UK had nothing to teach Canada or Australia.²⁵ But is this correct? Have traditional international private law problems between Scotland and England ever been subject instead to a constitutional analysis? Further, might the use of a constitutional, rather than a conflict of laws, approach increase with the advent of the Scottish Parliament?

private international law to the demands of the Canadian federation." But see Blom, "The quiet Canadian revolution", 94. He notes that although the "Supreme Court laid heavy emphasis on a constitutional rationale in interprovincial cases ... the non-constitutional side of its reasoning has proved sufficiently compelling on its own that lower courts, with surprisingly little qualification, have applied the same solutions to international as to interprovincial cases" (Blom, "The quiet Canadian revolution", 114).

²⁰ *Hunt v T&N plc* [1993] 4 SCR 289.

²¹ See pp202-205 below.

²² *Tolofson v Jensen*, (1994) 120 DLR (4th) 289; and see too *Leonard v Houle* (1997) 154 DLR (4th) 640; and *Michalski v Olson* (1997) 123 Man R (2d) 101, (1997) 32 MVR (3d) 9 (Man Ct App) discussed in Tetley, "Current developments", p160. Castel argues that the flexible exception disapproved of in the interprovincial context by the majority in *Tolofson* has in fact now been utilised by a provincial court in a case involving two provinces (Castel, *Introduction to Conflict of Laws*, p212). In Australia a different rule existed for interstate torts as a result of *Breavington v Godleman*, (1988) 169 CLR 41; *McKain v R.W. Miller and Company (South Australia) Pty Limited*, (1992) 174 CLR 1; and *John Pfeiffer Pty Limited v Rogerson*, [2000] HCA 36; cf P. Nygh, "Choice of law in torts in Australia" (2000) 2 YPIL 55. Eventually, however, the international rule was harmonised so that the *lex loci delicti* also applied in these situations, although opinion was reserved upon whether the boundary between substantive and procedural matters should be drawn differently in international cases: *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.

²³ W. Tetley, "The on-going saga of Canada's conflict of law revolution - theory and practice" <http://tetley.law.mcgill.ca/conflicts/confsaga.pdf> (1998-2001) p4.

²⁴ Castel, *Introduction to Conflict of Laws*, pp21-22.

²⁵ See, for example, *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 per La Forest J at 1101.

Constitutionalising conflicts in the period 1707 to 1999?

The constitutional status of the Acts of Union of 1707 & 1706

The creation of the kingdom of Great Britain, and the framework of the new state, are in fact to be found in legislation emanating from its predecessor Parliaments: the Scottish Parliament's Union with England Act 1707, and the English Parliament's Union with Scotland Act 1706.²⁶ In terms of Article III, one Parliament was to represent the new nation, and that was the Parliament of Great Britain. Two provisions of the Acts of Union are critical in the development of the legal relationship between Scotland and England within Great Britain. Article XVIII directed the harmonisation of "the Laws concerning Regulation of Trade, Customs and such Excises to which Scotland is by virtue of this Treaty to be lyable". However:

"all other Lawes in use within the Kingdom of Scotland do after the Union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain With this difference betwixt the Laws concerning publick Right Policy and Civil Government may be made the same throughout the whole United Kingdom but that no alteration be made in Laws which concern private Right except for evident utility of the subjects within Scotland".

By virtue of Article XIX, the existence of the Court of Session and the Court of Justiciary are protected. Furthermore:

"no Causes in Scotland be cognoscible by the Courts of Chancery, Queens-Bench, Common-Pleas or any other Court in Westminster-hall And that the said Courts or any other of the like nature after the Unions shall have no power to Cognosce Review or Alter the Acts or Sentences of the Judicatures within Scotland or stop the Execution of the same".

²⁶ 1707, c.7; (6 Anne), c.11; respectively. The apparent discrepancy in date is due to the continuing use of the Julian calendar in England at this date: *Lord Gray's Motion* 2000 SC (HL) 46 *per* Lord Hope of Craighead at 56.

Thus the Acts of Union preserve a separate body of Scots law, although allowing harmonisation in matters broadly coincident with modern-day public law. In also keeping clearly separate the jurisdictions of the Scottish and English courts, the Acts of Union created a legal landscape where clashes of jurisdiction, and of laws, could arise within one political country. There are no provisions setting out detailed guidance on the allocation of jurisdiction between Scotland and England, or laying down rules on the recognition of judgments. This is not to be critical. In the context of the Acts of Union, and given the stage of development which rules of international private law had reached at the beginning of the eighteenth century,²⁷ it would probably be surprising were it otherwise. However, are there areas where the effect of the Acts of Union is the imposition of a constitutional, rather than a conflicts, approach to such issues? Before exploring this, it is necessary to briefly examine the constitutional status of the Acts of Union themselves.

This has been a matter of great controversy over many years. It is an issue which has received greater attention in Scotland, than in England, however, this may not be particularly surprising. The in-built protections which the Acts of Union purport to contain are largely attempts to protect Scottish institutions, as the nation had entered into a union with a larger neighbour, of greater wealth and influence. It will clearly always be of more interest to the weaker party in such a relationship whether these protections can, in fact, be utilised.

At the most basic level, it seems intuitively correct that the two documents which set up a new nation, with a new Parliament, and contain certain protections for existing Scottish institutions for "all time coming",²⁸ should be regarded as the founding constitutional document of Great Britain.²⁹ Indeed, in the recent English case of *Thoburn v Sunderland City Council*,³⁰ Laws LJ compiled a list of constitutional statutes, and within this included the Union with Scotland Act

²⁷ See Chap. 2.

²⁸ Acts of Union, Art XIX (regarding the Court of Session).

²⁹ See C.M.G. Himsworth & C.M. O'Neill, *Scotland's Constitution: Law & Practice* (LexisNexisUK, 2003), pp152-153; C. Ashton & V. Finch, *Constitutional Law in Scotland* (W. Green/Sweet & Maxwell, 2000), para 4.34.

³⁰ [2003] QB 151.

1706.³¹ The normal corollary to this statement would be that the Acts of Union therefore limit the power of the (now) UK Parliament such that it may only act compatibly with the Acts of Union. However, such a theory has been thought to be incompatible with the doctrine of parliamentary sovereignty. Thus Laws LJ makes it plain that the only consequence of the Union with Scotland Act being a constitutional statute is that it may not be impliedly repealed: there is, for him, no question that Parliament may not expressly legislate in breach of the Acts of Union.³² Lord President Cooper spoke out strongly against the assumption that the British Parliament inherited from the old English Parliament a doctrine which was not a feature of the Scottish Parliament.³³ His opinion was that the UK Parliament could not pass legislation which breached the Acts of Union.³⁴ However, thus far no Scottish court has identified a method by which such a limit on parliamentary powers could be enforced by the courts, although unwilling to rule out that such a mechanism might exist. In *MacCormick v Lord Advocate* Lord President Cooper did not think the particular issue before him, as a matter of public right, was justiciable, but appeared to reserve his position insofar as private right was concerned.³⁵ In the Outer House case of *Gibson v Lord Advocate*³⁶ Lord Keith reserved his position on the ability of the Westminster Parliament to abolish the Court of Session, or indeed, Scots law itself, but expressed the *obiter* view that whether a measure was for the evident utility of the Scots was not justiciable.³⁷ This latter was not accepted by the sheriff in *Stewart v Henry*,³⁸ however, uncertainty over the ability successfully to challenge Acts of the UK Parliament continued unresolved in *Murray v Rogers*,³⁹ and *Fraser v MacCorquodale*.⁴⁰ The matter was recently canvassed once more in *Lord Gray's Motion*,⁴¹ in which Lord Hope reached the conclusion that "the argument that the

³¹ Ibid. at 186.

³² Ibid. at 186-187.

³³ *MacCormick v Lord Advocate* 1953 SC 396 at 411.

³⁴ Ibid. at 411-412.

³⁵ Ibid. at 412, although see the *dicta* at 413. Lord Russell clearly reserves his position on this issue (ibid. at 417).

³⁶ 1975 SC 136.

³⁷ Ibid. at 144.

³⁸ 1989 SLT (Sh Ct) 34 at 38.

³⁹ 1992 SLT 221 *per* Lord President Hope at 226; *per* Lord Kirkwood at 228.

⁴⁰ 1992 SLT 229 *per* Lord President Hope at 230. It was, however, clear that such a challenge could not be mounted by way of a petition to the *nobile officium*: *Pringle, Petitioner* 1991 SLT 330.

⁴¹ 2000 SC (HL) 46.

legislative powers of the new Parliament of Great Britain were subject to the restrictions expressed in the Union Agreement by which it was constituted cannot be dismissed as entirely fanciful".⁴² Whilst he did not consider that the House of Lords Committee for Privileges could advise that a government bill was *ultra vires* in that it breached the Acts of Union, he expressed no view on whether a court could do so.⁴³

It is submitted that the Acts of Union do have a special status within both Scots and English law. The precise consequences of that special status, however, remain unclear. Levack has argued that:

"The Treaty of Union of 1707 guaranteed that a union of English law and Scots law would not take place. It did not, however, fully protect the integrity of Scots law or the autonomy of the Scottish judicial system".⁴⁴

The existence of a single UK Parliament, and the powers invested in that Parliament to harmonise or reform, have had a significant impact on Scots law. However, the unwillingness of the Scottish courts to enforce that measure of protection which was inserted into the Acts of Union has prevented the latter from being successfully drawn upon by Scottish citizens in the manner that one might expect of a constitutional document. Despite this, it is submitted that there has been a constitutional impact, albeit limited, on the rules of international private law. This can be seen in two particular areas, which will be examined in turn.

The geographical reach of statutes within the United Kingdom

It is generally assumed that a country may not legislate extra-territorially. One consequence of this is the argument that foreign legislation generally cannot be relied upon in the Scottish courts. Thus, for example, the case of *Government of the Republic of Spain v National Bank of Scotland*⁴⁵ suggests that foreign

⁴² Ibid. at 59.

⁴³ Ibid. at 62 *cf* the opinions expressed by Lord Slynn of Hadley (ibid. at 49).

⁴⁴ Levack, *The Formation of the British State: England, Scotland and the Union 1603-1707*, p98.

⁴⁵ 1939 SC 413.

legislation will have no effect over property in Scotland.⁴⁶ Lord Wark quoted Dicey to the effect that:

"A State's authority in the eyes of other States and the Courts that represent them is speaking very generally coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory".⁴⁷

The last phrase in parenthesis indicates that there are some limited exceptions to the principle of extra-territoriality, such as legislation as to the status and capacity of a state's domiciliaries.⁴⁸

It is submitted, however, that the question of the application in Scotland of English legislation must be analysed, and answered, quite differently. The key lies in the political framework of the UK state and constitutional doctrines, rather than any concept of extra-territoriality. The UK Parliament has the power to legislate within its own territory. Indeed, it lays claim to the ability to legislate outwith its territory: in the oft-quoted example, Parliament could pass legislation to ban smoking in Paris.⁴⁹ Whilst French courts are clearly under no obligation to enforce such a statute,⁵⁰ it would be effective in respect of those offenders who were under the jurisdiction of a Scottish or English court, despite the extra-territorial nature of the legislation. When confining its legislative attention to the UK, the Westminster Parliament legislates in four modes: solely for the Scottish, English and Welsh, or Northern Irish legal systems, or for a combination of any of them. Whether a statute may be relied upon in Scotland is a question of

⁴⁶ Ibid. *per* Lord Justice-Clerk Aitchison at 426-427; *per* Lord Mackay at 434; *per* Lord Wark at 438.

⁴⁷ Ibid. at 438.

⁴⁸ Anton with Beaumont, *Private International Law*, p94. For a criticism of the territoriality approach see R.D. Leslie, "The applicability of domestic law in cases with a foreign element" in D.L.C. Miller & D.W. Meyers, *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (Butterworths/The Law Society of Scotland, 1992), p57; and see the English case of *Re Cohn* [1945] 1 Ch 5.

⁴⁹ Sir W.I. Jennings, *The Law and the Constitution*, 5th edn. (University of London Press, 1959), p170. The UK Parliament has passed extra-territorial legislation, e.g., War Crimes Act 1991, c.13.

⁵⁰ Indeed, this was Jennings' point (ibid., pp170-171).

statutory interpretation, not of territoriality. Thus in *R v Treacy*,⁵¹ in considering the reach of an English criminal statute, Lord Diplock remarked "I can leave aside the question of territorial limitation as between the different jurisdictions (England and Wales, Scotland and Northern Ireland, etc.) within the United Kingdom, for this depends on constitutional practice, not on international comity".⁵²

Accordingly, a Scottish court will only be bound by statutes which apply to Scotland alone, or Scotland together with other parts of the UK. This is a question of interpretation for the courts, although by no means always an easy one. Confusingly, the practice for long was that, whilst statutes applying only to Scotland would contain the word 'Scotland' in parenthesis in the short title of the Act, statutes applying only to England and Wales, as well as those applying to the whole of the UK, were not qualified in the short title.⁵³ Fortunately, the end of the twentieth century saw some erosion of this practice.⁵⁴ There is also a presumption that statutes of the Westminster Parliament extend to all parts of the UK.⁵⁵ In the past when construing statutes to discover their extent, Scottish courts gave great weight to the existence of express words including Scotland. Much significance was also attached to a lack of express words excluding Scotland in the legislation. A statute which contained words suggesting that it applied to the whole of the UK, has been held to cover Scotland, even although the earlier legislation which it was amending had applied only in England.⁵⁶ The use of an English term in a statutory provision did not prevent that section from being applied to Scotland by the court in *Murray v Comptroller-General of*

⁵¹ [1971] AC 537.

⁵² *Ibid.* at 564; endorsed in *Clements v HMA* 1991 JC 62 *per* Lord Justice-General Hope at 69. In the early case of *Grove v Gordon* (1740) Mor. 4510, although the *ratio* is unclear, there were arguments addressed to territoriality. However, it is not clear whether the English limitation statute in question pre-dated the Union of 1707 and, in any event, the case seems to be more concerned with the distinction between rules of substance and procedure, and the effects thereof.

⁵³ The rare exceptions are the Census (England and Wales) Act 1890 (53 & 54 Vict), c.61, and the Import of Live Fish (England and Wales) Act 1980, c.27.

⁵⁴ In 1986 the Pensions Appeal Tribunals (England and Wales) (Amendment) Rules 1986, SI 1986/366 were passed, and since then a number of statutory instruments applying to England and Wales only have been so qualified in the short title.

⁵⁵ Anton with Beaumont, *Private International Law*, p95.

⁵⁶ *Bridges v Fordyce* (1844) 6 D 968. This was an opinion of the Full Court (the original Bench being equally divided), with the issues clearly being ones of statutory construction rather than extra-territoriality.

Patents.⁵⁷ With more modern statutes it may only be necessary to make reference to the commencement and extent provisions of the statute. The important point, however, is that it is rules of statutory interpretation which are relevant, not any principles of international private law. This is well illustrated by the recent case of *Atlantic Computing Services (UK) Ltd v Burns Express Freight Ltd*.⁵⁸ The defenders had contracted with the pursuers to take goods from England to Glasgow. Whilst on the London Orbital, disaster struck: the lorry carrying the goods caught fire. In the subsequent action for the loss suffered by the pursuers due to the damage occasioned to the goods, the pursuers sought to rely upon the Mercantile Law Amendment (Scotland) Act 1856.⁵⁹ Section 17 imposed liability for accidental fire on "[a]ll carriers for hire of goods within Scotland". The 1856 Act was stated only to apply to Scotland. In the lower court, and in the Inner House, both parties largely approached the case as an international private law problem. However, the Division made it clear that this was a wholly incorrect approach. Rather, it was simply a matter of how section 17 was to be construed. The correct interpretation of the statute was that it only came into play if goods were damaged by fire whilst in carriage in Scotland, and thus it had no application to the facts of the case before them.

The revenue, penal and other public laws exception

Traditionally the Scottish courts will not enforce certain laws of other countries, such as revenue and penal laws. The scope of, and rationale for, this rule must be examined, before its applicability within the UK can be assessed.

It has often been said that the unwillingness to give effect to foreign revenue laws is simply part of a general rule against the enforcement of the penal laws of another country.⁶⁰ The penal and revenue law exceptions are either stated expressly, or can be inferred, to be driven by the same rationale. The roots of the rule that English and Scottish courts will not enforce the tax laws of another state

⁵⁷ 1932 SC 726. See also *Perth Water Commissioners v McDonald* (1879) 6 R 1050.

⁵⁸ 2004 SLT 132.

⁵⁹ 1856 (19 & 20 Vict), c.60.

⁶⁰ *The Attorney-General for Canada v William Schulze & Co.* (1901) 9 SLT 4; *Municipal Council of Sydney v Bull* [1909] 1 KB 7 per Grantham J at 12; *Government of India v Taylor* [1955] AC 491 per Viscount Simonds at 506-507; *Peter Buchanan Ltd and Macharg v McVey* [1955] AC 516 per Kingsmill Moore J in the High Court of Justice at 526.

are not clear.⁶¹ However, its existence was accepted in a case which is seminal in both countries: the decision of the House of Lords in *Government of India v Taylor*.⁶² There seem to be two bases for the rule, and both are set out in the judgment of Lord Keith of Avonholm. Firstly, it is argued that a foreign country's attempt at "enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes",⁶³ and so cannot be maintained in the UK. A contrast is drawn with actions between private persons which simply draw upon foreign laws. Another facet of this rationale is to view revenue laws as part of a foreign state's administration.⁶⁴ Secondly, it can be argued that public policy issues dictate the non-enforcement of revenue laws.⁶⁵ An example of this reasoning is found in the judgment of Kingsmill Moore J in the lower court, in the Irish case of *Peter Buchanan Ltd and Macharg v McVey*.⁶⁶ The defendant in that case was a director of a company registered in Scotland, who moved to Ireland as part of a scheme to avoid (retro-active) tax legislation which had been introduced in Scotland. Kingsmill Moore J was of the view that revenue laws did not measure against a moral standard, but were dictated by political expediency, and accordingly could be designed to help effect policies repugnant to Irish citizens. The Irish court therefore should not enforce any revenue laws, since to only enforce some would be "publicly to censure the behaviour of a foreign State, a procedure dangerous and possibly arrogant".⁶⁷ The difficulty with this reasoning is that many other rules, such as family and property laws, could be used to pursue government programmes. Refusing to recognise a foreign divorce may be equally offensive to the other nation involved, as would be non-enforcement of its revenue laws. It is therefore submitted that the first argument, as to sovereignty, is the more convincing of these analyses. It certainly seems to inform the reasoning of the modern cases of *Re State of Norway's Applications (Nos 1 and 2)*,⁶⁸ and *Lord Advocate v Tursi*,⁶⁹ and it appears to be preferred by the editors of

⁶¹ See the arguments put forward by the ultimately unsuccessful party (represented by, *inter alia*, J.H.C. Morris) in *Government of India v Taylor*, *supra*.

⁶² [1955] AC 491. This was an English House of Lords decision.

⁶³ *Ibid.* *per* Lord Keith of Avonholm at 511.

⁶⁴ *Ibid.* *per* Lord Somervell of Harrow at 514.

⁶⁵ *Ibid.* *per* Lord Keith of Avonholm at 511.

⁶⁶ [1955] AC 516 at 529.

⁶⁷ *Ibid.* at 530.

⁶⁸ [1989] 1 All ER 745.

⁶⁹ 1998 SLT 1035.

Dicey & Morris,⁷⁰ and by Anton.⁷¹ In sum, such rules are held to be internal and limited by the bounds of the state which enacted them. Consequently, it is contended that the exception can be said to be wider than penal and revenue laws, extending also to what Lord Denning described as "other public laws".⁷² If the rationale behind the rule is that foreign states cannot assert sovereign powers within the UK, then logically the rule must strike at all direct actions by a state against its citizens, such as administrative law provisions.⁷³

Are the Scottish courts bound by the revenue, penal and other public laws exception when confronted with an English revenue, penal or other public law? In *Government of India v Taylor* it was irrelevant in the question as to enforcement of an Indian revenue law, that India was still a member of the Commonwealth.⁷⁴ Earlier, at the turn of the century, it was held that Canadian revenue laws would not be enforced by a Scottish court, despite that fact that Canada was part of the British Empire.⁷⁵ Lord Stormonth-Darling remarked:

"It is no doubt rather anomalous that the King through his Courts in Scotland, should refuse to recognise a debt due to himself in Canada, merely because it arises out of the execution of a Revenue Statute. But it was not maintained, and I think is not maintainable, that in the sense of international law, the mother country and herself-governing (*sic*) colonies stand in different relationship from that which exists between two foreign states".⁷⁶

The key lies in the existence within the UK (prior to 1999) of one parliament. The ties binding the monarch to his subjects, be they ties of Empire or Commonwealth, were irrelevant in the face of the existence of separate law-making parliamentary bodies in Canada and India at the relevant times. In

⁷⁰ L. Collins (gen. ed.), *Dicey and Morris on the Conflict of Laws*, 13th edn. (Sweet & Maxwell, 2000), pp89-90 & 94-100.

⁷¹ Anton with Beaumont, *Private International Law*, pp103-105.

⁷² *Attorney General of New Zealand v Ortiz* [1982] 3 All ER 432, CA, *per* Lord Denning MR at 455-460, and see also Collins, *Dicey and Morris*, paras 5R-018 & 5-030 to 5-037; A. Briggs, *The Conflict of Laws* (Oxford University Press, 2002), pp43-44.

⁷³ *Cf* Anton with Beaumont, *Private International Law*, p106.

⁷⁴ [1955] AC 491, *per* Viscount Simonds at 507-508; *per* Lord Somervell of Harrow at 515.

⁷⁵ *The Attorney-General for Canada v William Schulze & Co.* (1901) 9 SLT 4.

⁷⁶ *Ibid.* at 5.

contrast (and despite Lord Cooper's criticisms), the sovereignty of the UK Parliament extends to the whole of the UK. In *Government of India v Taylor*, Viscount Simonds, and Lords Keith and Somervell observed that the situation may be different in a federal country,⁷⁷ a model which is more comparable to the political situation of the UK. It is submitted that this points towards the answer thrown up by the logical application of principle. Since the UK Parliament can legislate for, and thus its sovereignty extends over, the whole of the UK, it cannot be said to be an extra-territorial assertion of sovereignty to enforce the revenue laws of the UK state in Scotland, even if it concerns a tax-payer most closely connected with England.⁷⁸ Thus it is submitted that the UK government could, for example, make a claim in a Scottish multiple-pounding for contributions due by the owner under a provision confined solely in its application to England.⁷⁹ The same logic applies to statutes enacted by the UK Parliament which could be characterised as penal, or as falling under the heading of 'other public laws'.

Similarly, in Canada, it has become increasingly clear that the concept of sovereignty is the key to understanding the revenue law exception.⁸⁰ In the past, provinces have tended to be content to enforce, in effect, revenue laws of sister-provinces.⁸¹ The Quebec courts in theory will not enforce any rights arising from such rules of other provinces, but in reality, recognition and enforcement is afforded on a reciprocal basis.⁸² However, it has now been argued that the Canadian constitution might require interprovincial recognition and enforcement of revenue laws and judgments.⁸³

⁷⁷ [1955] AC 491 *per* Viscount Simonds at 507; *per* Lord Somervell of Harrow at 515; *per* Lord Keith of Avonholm at 511-512.

⁷⁸ This accords with Crawford's view (Crawford, *International Private Law in Scotland*, para 3.06 (footnote)); and see also *Lord Advocate v Tursi* 1998 SLT 1035 *per* Lord Penrose at 1044. Note too, the ability to take action in Scotland for duty owing elsewhere in the United Kingdom in terms of the Exchequer Court (Scotland) Act 1856 (19 & 20 Vict), c.56, s40.

⁷⁹ Such were the facts of *Metal Industries (Salvage) Ltd v Owners of the S.T. "Harle"* 1962 SLT 114, which involved a claim by the French Government in a Scottish multiple-pounding of a French ship.

⁸⁰ Castel, *Introduction to Conflict of Laws*, pp62-63.

⁸¹ *Ibid.*, p63.

⁸² *Civil Code of Quebec*, LQ 1991, c.64, arts 3155, 3162.

⁸³ Castel, *Introduction to Conflict of Laws*, p63; and see J. Blom, "Public policy in private international law and its evolution in time" 2003 *NILR* 373 at 379.

Constitutionalising conflicts in a devolved Scotland?

The Scotland Act 1998 as a constitution?

The Scotland Act 1998⁸⁴ which established a form of devolution for Scotland was not intended to form a new, and written, constitution for Scotland.⁸⁵ Initially, moreover, it was accepted that it did not do so. The Scotland Act was not itself, it must be remembered, even the product of a Scottish Parliament, but simply "a single piece of technical legislation emanating from a still-sovereign UK Parliament".⁸⁶ However, Canada, for example, has fashioned a concept of a 'Canadian constitution', from the starting-point of the British North America Act, which was passed by the Westminster Parliament in 1867,⁸⁷ and is: "a strictly business-like document. It contains no metaphysics, no political philosophy ..."⁸⁸

It is submitted that, in any event, the initial view of the Scotland Act is changing. Himsworth and O'Neill now take the approach that "although this terminology is not widely used, that Act [the Scotland Act] can quite reasonably be described as a constitution for Scotland".⁸⁹ Significantly, it sets justiciable limits on the Scottish Executive and on the Scottish Parliament. Neither can act incompatibly with European Convention rights, nor European Community law, and both are bound by the terms of the devolution settlement set out in the Act.⁹⁰ It is the method by which were incorporated in the devolution settlement the human rights guarantees, which have attracted most attention in the early years of the devolved

⁸⁴ 1998, c.46.

⁸⁵ Ashton & Finch, *Constitutional Law in Scotland*, para 8.05; S. Veitch, "Transitional jurisprudence in the UK: a very Scottish coup?" in L. Farmer & S. Veitch (eds), *The State of Scots Law: Law and Government after the Devolution Settlement* (Butterworths, 2001), p121 at 126-127.

⁸⁶ Veitch, "Transitional jurisprudence in the UK", p127.

⁸⁷ Now officially the Constitution Act 1867. The Act arose from confederation conferences between, and drafts by, representatives of the components of the then Province of Canada (J-F. Cardin, *A History of the Canadian Constitution from 1864 to the Present*, transl. D. Halfpenny (Global Vision, 1996), pp1-3). A comparison might be made with the influence of the Scottish Constitutional Convention on the Scotland Act (for which, see A. Myles, "Scotland's Parliament White Paper", and A. Myles, "The Scotland Bill and Act", both in G. Hassan (ed.), *A Guide to the Scottish Parliament: The Shape of Things to Come* (The Stationery Office, 1999) at p31 and p37 respectively). The Canadian Constitution is now also comprised of, *inter alia*, the Canada Act 1982, c.11 (also passed by the Westminster Parliament), and the Constitution Act 1982 (Hogg, *Constitutional Law of Canada*, paras 1.2-1.4).

⁸⁸ W.I. Jennings, "Constitutional interpretation: the experience of Canada" (1937) 51 *Harv LR* 1 at 1.

⁸⁹ Himsworth & O'Neill, *Scotland's Constitution*, p20.

⁹⁰ Scotland Act 1998, ss29, 57(2), 53-54 & 63.

settlement. In this field, the case of *R v HMA*⁹¹ pointed up most sharply the differing effect of human rights north and south of the border:

"The conclusion must therefore be that, whenever a member of the Scottish Executive does an act which is incompatible with Convention rights, the result produced by all the relevant legislation is not just that his act is unlawful under section 6(1) of the Human Rights Act. That would be the position if the Scotland Act did not apply. When section 57(2) is taken into account, however, the result is that, so far as his act is incompatible with Convention rights, the member of the Executive is doing something which he has no power to do: his "act" is, to that extent, merely a purported act and is invalid, a nullity. In this respect Parliament has quite deliberately treated the acts of members of the Scottish Executive differently from the acts of Ministers of the Crown".⁹²

Thus, in contrast to the uncertain possibilities of challenge to Westminster legislation under the Acts of Union, the Scottish courts clearly have the power to strike down Acts of the Scottish Parliament, and actions of the Scottish Executive, on a number of grounds, including contravention of human rights guarantees, and straying into powers reserved to Westminster.⁹³ It was argued that this was a rôle more appropriately filled by judges, rather than politicians.⁹⁴ However, even as the Scotland Bill was launched, it was reported that "Scottish judges are apparently concerned that ... the whole emphasis of the work of the courts will change so that, in reality, we will have a constitutional court interpreting a written

⁹¹ 2003 SC (PC) 21.

⁹² *Ibid.* per Lord Rodger of Earlsferry at 63-64. Interestingly, in this case the division of opinion was on somewhat national lines, with the three Scottish judges forming the majority, and Lords Walker of Gestingthorpe and Steyn dissenting.

⁹³ For Lord Reed, "this is the first time (other than in areas governed by European Community law) that we have had fundamental rights given a special status in our law" (Lord Reed, "The constitutionalisation of private law", 67).

⁹⁴ C. Boyd, "Parliaments and Courts: Powers and Dispute Resolution" in T.StJ.N. Bates (ed.), *Devolution to Scotland: The Legal Aspects: Contemplating the Imponderable* (T&T Clark, 1997), p21 at 25.

constitution".⁹⁵ Later, O'Neill foresaw a development along the lines of the United States' Supreme Court:

"Possible conflict between the Westminster Parliament and the Holyrood Parliament on claims that the new body is exceeding its limited powers is thus made into a juridical rather than a nakedly political matter. The danger is, of course, that in giving the task of policing the Scottish Parliament to the courts, the judges come to be seen or to be presented as acting in a broadly political role, holding the ring between the demands of the Westminster Parliament and the expectations of the Holyrood Parliament. The juridicalisation of what is essentially political conflict will, it is suggested, inevitably lead to a perception of the politicisation of the judiciary".⁹⁶

Whether it is to be welcomed, or feared, it is submitted that Scottish judges have indeed been entrusted by the Scotland Act with powers akin to those exercised by courts, such as the United States Supreme Court,⁹⁷ in the interpretation of written constitutions.

A review of the major cases since these powers were bestowed on the courts reveals a similar shift of opinion as to the constitutional nature, or otherwise, of the Scotland Act. Initially, it was stated explicitly that the Scottish Parliament was simply a creature of statute, and not a sovereign body.⁹⁸ Conversely, this meant that the courts could, and should, intervene if the Parliament overstepped its powers,⁹⁹ and a specific comparison was made to the many other parliamentary democracies where courts wielded this power.¹⁰⁰ Whilst the courts have not foresworn this latter duty to intervene, subsequent cases do, it is submitted,

⁹⁵ B. McKain, "A green and fertile field for the lawyers", *The Herald*, 19 December 1997. See also H.L. MacQueen, "*Quis custodiet?: the Scotland Bill, human rights and the judges*" (1998) *Scotland Forum* (Issue 1) 8 at 9; Himsworth & O'Neill, *Scotland's Constitution*, p465.

⁹⁶ A. O'Neill, "The Scotland Act and the government of judges" 1999 SLT (News) 61 at 61-62. For a contrary view see Veitch, "Transitional jurisprudence in the UK", p128.

⁹⁷ And also the Supreme Court of Canada, which can strike down laws that are not consistent with the Constitution, with a great number of cases being brought in respect of alleged breaches of the Charter of Rights (Hogg, *Constitutional Law of Canada*, para 5.5(a)).

⁹⁸ *Whaley v Lord Watson* 2000 SC 340 *per* Lord President Rodger at 348-350; *per* Lord Prosser at 357-358.

⁹⁹ *Ibid.* *per* Lord President Rodger at 348-350; *per* Lord Prosser at 357-358.

¹⁰⁰ *Ibid.* *per* Lord President Rodger at 349.

indicate recognition of the Scottish Parliament as having a different status from other bodies subject to the Court of Session's power of review. Thus in *A v The Scottish Ministers*,¹⁰¹ Lord President Rodger considered it "right that the court should give due deference to the assessment which the democratically elected legislature has made of the policy issues involved".¹⁰² This was built upon in *Adams v Advocate General*,¹⁰³ in which the Lord Ordinary considered that it was "appropriate for this court to defer to a greater rather than to a lesser extent to the Scottish Parliament in respect of legislation such as the Protection of Wild Mammals Act".¹⁰⁴ Even more significantly, the Lord Ordinary was of the view that "despite the reference in the Human Rights Act to Acts of the Scottish Parliament being subordinate legislation, such Acts have in my opinion far more in common with public general statutes of the United Kingdom Parliament than with subordinate legislation as it is more commonly understood",¹⁰⁵ and also noted that "the Scotland Act is clearly intended to provide a comprehensive scheme, not only for the Parliament itself, but also for the relationship between the courts and the Parliament".¹⁰⁶ By the time of the decision in *Whaley v Lord Advocate*¹⁰⁷ in the summer of 2003, Lord Brodie agreed that one of the petitioners was:

"correct to say that the Scottish Parliament is governed by what is, in effect, a mini-constitution. By that I took him to mean that, in the Scotland Act, the Convention and Community law, there are written sources of law which have primacy over what the Scottish Parliament may purport to enact. In other systems, that of the United States, for example, the primary source of law is the written Constitution. In such systems, statutes may be held by the courts to be invalid, as being contrary to the Constitution. By his use of the expression 'mini-constitution', I understood [the petitioner] to be drawing an analogy as

¹⁰¹ 2001 SC 1.

¹⁰² *Ibid.* at 21.

¹⁰³ 2003 SC 171.

¹⁰⁴ *Ibid.* *per* Lord Nimmo Smith at 211.

¹⁰⁵ *Ibid.* *per* Lord Nimmo Smith at 201.

¹⁰⁶ *Ibid.* *per* Lord Nimmo Smith at 201.

¹⁰⁷ 2004 SLT 425.

between the Scotland Act and the Convention, on the one hand, and such a written Constitution, on the other".¹⁰⁸

Similarly, the Northern Ireland Act 1998¹⁰⁹ has been described in a House of Lords judgment as a constitution for Northern Ireland.¹¹⁰ Scottish courts have not shrunk from using their powers to strike down actions of the Lord Advocate (as a member of the Scottish Executive), on human rights grounds. Indeed on a number of occasions, the High Court of Justiciary has taken a more radical stance than the Judicial Committee of the Privy Council (JCPC) ultimately took on appeal.¹¹¹

The Scotland Act may not be a constitution in the traditional sense. Furthermore, whilst it allows the policing of the boundaries between devolved and reserved matters, once a matter is adjudged to be reserved, the constitutional rules of Westminster come into play. Despite this, it is submitted that academics and judges are correct to sense that the Scotland Act has a constitution-like quality. The Scotland Act puts the relationship between Scotland and the rest of the UK on a constitutional footing,¹¹² and this is particularly significant in the context of the subject-matter of this thesis. Territorial controls are also placed on the legislative competence of the Scottish Parliament.¹¹³ The Acts of Union and the Scotland Act are written documents, about which a constitutional structure for Scotland could be built. Whilst uncertainty about the justiciability of the Acts of Union may continue, the Scotland Act has clearly put in place a mechanism for the courts to enforce constitutional controls, including human rights guarantees, against the Scottish government of the day.

¹⁰⁸ Ibid. at 438.

¹⁰⁹ 1998, c.47.

¹¹⁰ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 *per* Lord Bingham of Cornhill at para 11; *per* Lord Hoffmann at para 25.

¹¹¹ *Brown v Stott* 2001 SC (PC) 43; *McIntosh, Petitioner* 2001 SC (PC) 89; *Dyer v Watson* 2002 SC (PC) 89. In cases which have not progressed to the JCPC or the House of Lords, Scottish courts have also sounded the death knell for temporary sheriffs (*Starrs v Ruxton* 2000 JC 208) and automatic warrants in writs for diligence on the dependence (*Advocate General for Scotland v Taylor* 2003 SLT 1340).

¹¹² Note also the disappearance of the Scotland Office and the Wales Office into a Department for Constitutional Affairs (Himsworth & O'Neill, *Scotland's Constitution*, p257).

¹¹³ Scotland Act 1998, ss29(1), (2) & 126.

The thistle and the maple leaf

From an Act of the Westminster Parliament in the late nineteenth century, the Canadians have constructed a Canadian constitution, to the extent that by the end of the twentieth century, it was suggested that issues between the provinces traditionally adjudicated through conflict rules, were in fact more properly dealt with by constitutional rules. It has been suggested above that the Scotland Act has qualities akin to a constitution, particularly in terms of Scotland's relations with England. This raises two questions. Could issues of jurisdiction, choice of law, or recognition now be resolved through the application of constitutional rules? This will be the subject of the present section. A number of justifications which have been advanced in Canada for adopting a constitutional approach will be examined, to see if they remain valid and feasible in the context of the legal relations between Scotland and England. Only then can the second question, whether such an approach would be desirable, be answered.

Common laws

One of the factors which was said to make the adoption of a strict *lex loci delicti* rule between the Canadian provinces constitutionally appropriate was the similarity of the domestic content of the various provincial legal systems.¹¹⁴ Firstly, only the federal Canadian Parliament may legislate in the fields of interprovincial trade, criminal law, marriage and divorce, and thus the law on these subjects can be made the same across Canada.¹¹⁵ The powers of the provincial legislatures are confined to matters of property and civil rights, although this is accepted to encompass most areas of private law, such as contract, tort, property, much commercial law and labour law.¹¹⁶ All but one of the Canadian provinces have a legal system based on the Common Law, and among these provinces the differences in private law rules are not great.¹¹⁷ The exception is, of course, the province of Quebec. As New France, the area had been governed by the law of their colonial masters. After the British conquest in the eighteenth century, there was a brief spell where English law was supposed to

¹¹⁴ *Tolofson v Jensen* (1994) 120 DLR (4th) 289 per La Forest J at 312-313 & 315-316; see also *Hunt v T&N plc* [1993] 4 SCR 289 per La Forest J at 328.

¹¹⁵ Hogg, *Constitutional Law of Canada*, para 5.1(g); J. Willis, "Securing uniformity of law in a federal system - Canada" (1943-44) 5 *U Toronto LJ* 352 at 361-362.

¹¹⁶ Hogg, *Constitutional Law of Canada*, para 5.1(g).

¹¹⁷ *Tolofson v Jensen*, *supra* at 312-313; Willis, "Securing uniformity", 352.

be applied. However, as early as 1774, it was allowed that French law might apply in matters of property and civil rights.¹¹⁸ English law was still to supply the rules of criminal law, and as we have seen, today this is a matter for the federal Parliament. Quebec's separate legal system, meanwhile, survived through confederation with the other provinces, and all that has followed. In modern times, the law of Quebec province is generally classed, like Scots law, as a mixed legal system.¹¹⁹ In the 1940's, when Montreal was, in many ways, the commercial centre of Canada, the existence of a different Quebecois legal system was thought by some to be problematic.¹²⁰ The intervening years, however, have seen a change in the economic geography of Canada, with the rise of Toronto. Furthermore, in *Tolofson v Jensen*, La Forest J questioned how far Quebec law does in truth diverge from that of the common law provinces.¹²¹ Brady has described Quebec as "a cultural island within the nation, but an island now with numerous bridges that diminish its isolation",¹²² and it is submitted that this analogy assists in understanding how the situation of Scotland and England within the UK differs from that of Canada in this regard. With nine common law provinces, there is a high degree of legal uniformity within Canada: Quebec is an exception, an island.¹²³ This is reinforced by the reservation of important topics such as marriage, divorce, and criminal law to the federal Parliament. It might also be questioned whether language is now more important than law in distinguishing Quebec from the rest of Canada.¹²⁴ In contrast, the UK really consists solely of two, differing, legal systems¹²⁵ albeit with a degree of legal

¹¹⁸ Hogg, *Constitutional Law of Canada*, para 2.3(b); H.P. Glenn, "Quebec: mixité and monism" in E. Örücü *et al.* (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer, 1996) p1; J-G. Castel, *The Civil Law System of the Province of Quebec: Notes, Cases, and Materials* (Butterworths, 1962), pp20-22.

¹¹⁹ Reeves J, "The Quebec Legal System" in G.L. Gall, *The Canadian Legal System* (Carswell, 1990), p165 at 165.

¹²⁰ Willis, "Securing uniformity", p367.

¹²¹ (1994) 120 DLR (4th) 289 at 316, *cf* Castel, *Introduction to Conflict of Laws*, p22.

¹²² A. Brady, "Quebec and Canadian Federalism" in J.P. Meekison (ed.), *Canadian Federalism: Myth or Reality* (Methven, 1968) p337 at 341-342.

¹²³ This pattern is reflected in the conflict of laws: "[a]lthough in strict theory the system of private international law could ... differ from province to province, in reality there are only two systems, that of Quebec and the common law system that applies everywhere else" (Blom, "The quiet Canadian revolution", 85).

¹²⁴ M. Richler, *Oh Canada! Oh Quebec! Requiem for a Divided Country* (Chatto & Windus, 1992), p8; S.M. Arnopoulos & D. Clift, *The English Fact in Quebec*, 2nd edn. (McGill-Queen's University Press, 1984), p51; R. Lévesque, *An Option for Quebec* (McClelland and Stewart, 1968), p14.

¹²⁵ Leaving aside, for the moment, the position of Northern Ireland.

inter-dependence. There is thus no general legal uniformity within the jurisdictions of the UK to which Scotland is an exception, and so this factor is not as relevant as it is in Canada.

Common legal education

A related factor is one identified in a United States context by von Mehren: the great similarities in legal education across all states, and the existence of nation-wide professional bodies.¹²⁶ This is also relevant in Canada, where problems of movement of lawyers across provincial boundaries are easing,¹²⁷ lawyers may be qualified in the law of a number of provinces,¹²⁸ and there is a nation-wide ethical code.¹²⁹ Once again, this factor is less relevant in the UK,¹³⁰ partly as a consequence of the separate legal systems therein. The protection of the Scottish education system by the Acts of Union also contributes to the differing structures, and lengths, of law degrees in Scotland and England. The professional bodies governing solicitors, and advocates or barristers, in Scotland and England are also distinct from each other.¹³¹

The Supreme Court

A crucial factor in the application of constitutional rules within Canada is "the essentially unitary nature of Canada's court system",¹³² with the Supreme Court of Canada at its apex. The Supreme Court hears all Canadian appeals.¹³³

¹²⁶ A.T. von Mehren, "Recognition and enforcement of sister-state judgments: reflections on general theory and current practice in the European Economic Community and the United States" (1981) 81 *Columbia LR* 1044 at 1046.

¹²⁷ J. van Rhijn, "Multi-jurisdictional practice for in-house counsel" 2001 (June) *Canadian Lawyer* 13.

¹²⁸ *Tolofson v Jensen* (1994) 120 DLR (4th) 289 per La Forest J at 313; *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 per La Forest J at 1100. See, however, on the need to qualify in civil law to practise at the Quebec Bar, Reeves, "The Quebec Legal System", pp180-181.

¹²⁹ *Morguard Investments Ltd v De Savoye*, supra, per La Forest J at 1100.

¹³⁰ T. Weir, "Divergent legal systems in a single member state" (1998) 6 *ZeUP* 564 at 572.

¹³¹ Ibid., 573. However, the Clementi review, which was confined to the subject of the regulation of lawyers in England and Wales has triggered an investigation of the position in Scotland (see *Consultation Paper on the Review of the Regulatory Framework for Legal Services in England and Wales*, March 2004; D. Mill, "New model army" (2004) 49 *JLSS* no 4, 20).

¹³² *Tolofson v Jensen*, (1994) DLR (4th) 289 per La Forest J at 315; see also *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 per La Forest J at 1100; Swan, "The Canadian Constitution, federalism and the conflict of laws" p310.

¹³³ Hogg, *Constitutional Law of Canada*, para 8.5(a).

Legislation ensures that three of the nine judges are drawn from Quebec.¹³⁴ By convention, Ontario contributes three judges, the Western provinces two, and the Atlantic provinces, one.¹³⁵ It is a strongly unifying body:

"The Supreme Court of Canada does not tolerate divergences in the common law from province to province, or even divergences in the interpretation of similar provincial statutes. Such divergences do develop from time to time, of course, but they are eventually eliminated by the Supreme Court of Canada. The assumption of the Court, which is shared by the Canadian bar, is that, wherever variations can be avoided, Canadian law, whether federal or provincial, should be uniform".¹³⁶

The existence of the Supreme Court ensures that there can be no doubts as to what might be termed natural justice guarantees within Canada.¹³⁷

In the past this has resulted in the introduction of a number of concepts by the Supreme Court, including the 'double rule' in tort, which have had to be reversed or altered by the Quebec provincial legislature, in order to cohere with the law of Quebec.¹³⁸ For a time, "il s'agissait d'une harmonisation unidirectionnelle: la solution de la common law était toujours imposée au droit québécois, jamais l'inverse".¹³⁹ Jobin, however, is convinced that this time has passed, and sees the Supreme Court now as a more benign influence.¹⁴⁰ It may be that the unifying goal of the Supreme Court is pursued with rather less vigour where the law of

¹³⁴ Supreme Court Act, RSC 1985, s6. A certain level of Quebecois representation has always been required (Hogg, *Constitutional Law of Canada*, para 8.3).

¹³⁵ Hogg, *Constitutional Law of Canada*, para 8.3.

¹³⁶ *Ibid.*, para 8.5(a). See also *Hunt v T&N plc* [1993] 4 SCR 289 *per* La Forest J at 318; Willis, "Securing uniformity" 356; D. Greschner, "The Supreme Court, federalism and metaphors of moderation" (2000) 79 *Can Bar Rev* 47 at 69.

¹³⁷ *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 *per* La Forest J at 1099-1100.

¹³⁸ P-G Jobin, "La Cour Suprême et la réforme du Code Civil" (2000) 79 *Can Bar Rev* 27 at 38-40.

¹³⁹ *Ibid.*, pp42-43.

¹⁴⁰ He notes, for example, the willingness of the Supreme Court to look at jurisprudence from civilian, or civilian influenced, systems, such as France, Belgium and Scotland (*ibid.*, p45). Bogart, however, detected the emergence of a less sympathetic approach to Quebec by the Supreme Court in recent times (W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Oxford University Press, 1994), pp224-225 & 245-248).

Quebec is involved.¹⁴¹ However, for example, the judgment in *Hunt v T&N plc*¹⁴² held a Quebec statute, which would have prevented the removal of documents on the order of a court of another province, to be constitutionally inapplicable.

For many years the closest analogy to a Supreme Court in the UK was the House of Lords. However, unlike the Supreme Court of Canada, the House of Lords was not a final court of appeal for the whole country. Although it acquired jurisdiction over Scottish civil appeals (in somewhat controversial circumstances),¹⁴³ there is no appeal from Scotland to the House of Lords in criminal matters. Moreover, on the introduction of devolution, it was decided that devolution issues should be heard not by the House of Lords, but by the JCPC.¹⁴⁴ In theory, another difference from the Supreme Court of Canada is that the House of Lords is not avowedly a unifying, or harmonising court. When sitting for a Scottish appeal, Scots law must be applied: the law of England and Wales will be applied in an appeal from that jurisdiction. A decision of the House of Lords in an English appeal is unlikely to be binding on a Scottish court, unlike its decision in a Scottish appeal.¹⁴⁵ A House of Lords decision in an English case may, however, be found to be persuasive.¹⁴⁶ In certain periods of its history, the position in practice has borne rather more resemblance to Jobin's 'harmonisation unidirectionnelle'. Initially, after the jurisdiction in civil appeals had been established, Scottish appeals were dealt with by English judges, or Scots judges trained solely in English law, and indeed might have been argued by English barristers. Judges often sought to equiparate a Scots law concept with its 'match' in English law, or relied on English authority to the exclusion of relevant Scottish

¹⁴¹ Hogg, *Constitutional Law of Canada*, para 8.5(a)

¹⁴² [1993] 4 SCR 289.

¹⁴³ See generally, A.D. Gibb, *Law from over the Border: a short account of a strange jurisdiction* (W. Green & Son, 1950).

¹⁴⁴ Scotland Act 1998, Sch. 6.

¹⁴⁵ *Dalglish v Glasgow Corporation* 1976 SC 32 per Lord Justice-Clerk Wheatley at 51-53; *Glasgow Corporation v Central Land Board* 1956 SC (HL) 1 per Lord Normand at 16-17.

¹⁴⁶ See *Robertson v Watt & Co.* (4 July 1995, unreported) IH; and *Holmes v Bank of Scotland* 2002 SLT 545, preferring the reasoning and result of the English appeal of *White v Jones* [1995] 2 AC 207 to the much earlier Scottish House of Lords decision of *Robertson v Fleming* (1861) 4 Macq 167. In *Commerzbank Aktiengesellschaft v Large* 1977 SC 375, the Inner House agreed with criticism, expressed in the English House of Lords decision of *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, of *dicta* from an earlier Scottish House of Lords case. For contrasting views of the effect of the *Miliangos* case on Scots law, compare A.D.M. Forte, "Questions of general jurisprudence: a case in point" (1977) 22 *JLSS* 377; and E.A. Marshall, "Decrees in foreign currency: a need for reform?" 1977 SLT (News) 230.

cases. It was sometimes assumed that English law applied, that the laws of the two countries "*must* be the same",¹⁴⁷ or that it would be unfortunate were that not so. This arguably resulted in cases which were decided erroneously, or the introduction of foreign concepts into Scots law.¹⁴⁸ Whilst matters improved with the introduction of Scots judges from the late nineteenth century, the arrangement is still beset with certain difficulties. Some modern judgments might be argued to be the result of a belief that it would be inequitable if things were done differently on either side of the border.¹⁴⁹ However, as Jobin had observed in the context of Quebec, such equity rarely seems to demand the imposition of a Scottish solution in England, but rather the reverse.¹⁵⁰ Harmonisation by the introduction of English concepts is a challenge to the structure and consistency of Scots law. Furthermore, it has been correctly observed that the idea that "it is appropriate to have a UK-wide court with the power to *impose* uniformity where lower courts are unwilling ... is wholly inconsistent with the devolution settlement".¹⁵¹ Perhaps most radically, it has now been suggested that the current composition of the House of Lords, involving as it does judges not qualified in Scots law sitting in Scots appeals, is a breach of Article 6 of the European Convention on Human Rights.¹⁵² Put so bluntly, it is hard to argue with the proposition that such an arrangement is, at best, undesirable.¹⁵³ Perhaps fortunately, relatively few appeals are taken from Scotland to the House of Lords, and an even smaller number succeed. Weir is probably correct in his conclusion that:

¹⁴⁷ Gibb, *Law from over the Border*, p57.

¹⁴⁸ For example, *Brand v Mackenzie* (1710) Robertson 8; *Bartonshill Coal Co. v Reid* 3 MacQ 278; *Brand's Trustees v Brand's Trustees* (1876) 3 R (HL) 16.

¹⁴⁹ See, for example, *Sharp v Thomson* 1997 SC (HL) 66; *Smith v Bank of Scotland* 1997 SLT 1061 *per* Lord Clyde at 1066 & 1067-1068.

¹⁵⁰ One of the few examples of the ultimate acceptance by the House of Lords of a gift from Scotland to England is in relation to the plea of *forum non conveniens* (*Spiliada Maritime Corporation v Cansulex* [1987] AC 460; and see earlier *The Atlantic Star* [1974] AC 436; *The Abidin Daver* [1984] AC 398).

¹⁵¹ J. Chalmers, "Scottish appeals and the proposed Supreme Court" (2004) 8 *EdinLR* 4 at 24.

¹⁵² R.G. Anderson, "Appeals to London and human rights" 2003 SLT (News) 297.

¹⁵³ Indeed, the Scottish National Party have proposed the abolition of Scottish appeals to the House of Lords (H.L. MacQueen, "Scotland and a Supreme Court for the UK?" 2003 SLT (News) 279). See also the thoughtful criticisms of the existence of this civil appellate jurisdiction in Chalmers, "Scottish appeals".

"It would be absurd to assert that the law of the two countries would not be more different if there were no common supreme court, still it can hardly be said that having one has produced very much common law".¹⁵⁴

Another body which must now be considered is the JCPC, because of its rôle as an appeal court for devolution issues, which includes the power to strike down legislation of the Scottish Parliament or actings of the Scottish Executive. The JCPC hears cases from other Commonwealth countries, but has no appellate rôle for England and Wales,¹⁵⁵ although its decisions are binding on the House of Lords.¹⁵⁶ In fact, when dealing with devolution issues, the JCPC draws on largely the same personnel as the House of Lords.¹⁵⁷ There is also a commonality in the substance of the natural justice guarantees which are being adjudicated upon by the JCPC and the House of Lords, but as has been pointed out, the enforcement mechanisms are very different.¹⁵⁸ In all the circumstances, however, it is submitted that the combination of the House of Lords and the JCPC do not equiparate to the unifying function and rôle of the Supreme Court of Canada. The existence of such a court therefore, whilst such a strong factor in Canada, is not of the same force as far as Scotland and England are concerned.

Could this change? The current UK Government is proposing the establishment of a Supreme Court in the UK, which would have jurisdiction over Scottish civil appeals, devolution issues, and all civil and criminal appeals from England, Wales and Northern Ireland.¹⁵⁹ It has been stressed that such a court would not be modelled on the United States Supreme Court, or a continental constitutional court.¹⁶⁰ It is noted in the consultation paper that the distinctiveness of the Scots legal system is guaranteed,¹⁶¹ and there has been some suggestion that it would sit

¹⁵⁴ Weir, "Divergent legal systems in a single member state", 569.

¹⁵⁵ Unless a devolution issue arises in a court in England and Wales.

¹⁵⁶ Scotland Act 1998, s103(1).

¹⁵⁷ However, judges from the Inner House can also sit on the JCPC, and thus a majority of Scots judges may sit (Scotland Act 1998, s103(2), and see *R v HMA* 2003 SC (PC) 21).

¹⁵⁸ Scotland Act 1998; Human Rights Act 1998, c.42; and see pp52-53 above.

¹⁵⁹ Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, Consultation Paper, July 2003.

¹⁶⁰ *Ibid.*, paras 22-23.

¹⁶¹ *Ibid.*, para 60.

as a Scots court in determining Scots appeals, as at present.¹⁶² Despite such apparently reassuring words, however, there are very worrying aspects to this reform. The Supreme Court would be "a single apex to the UK's judicial system", and prevent conflict between the House of Lords and the JCPC.¹⁶³ It is suggested that the President of such a court might eventually become a spokesperson for all judges in the UK.¹⁶⁴ Concerns have been raised about the naming of judges, funding, and location, of the proposed court, with the fear in all cases being integration into the English judicial system, contrary to the Acts of Union.¹⁶⁵ It will be necessary, of course, to scrutinise the final proposals if they come to fruition. It would appear that currently (2004) the pace at which this proposed development is to proceed has slowed. At present, it is submitted that the doubts and concerns expressed by Scottish judges and legal practitioners are well-founded. For the purposes of this thesis, however, it is enough to remark that any development of a unifying Supreme Court in the UK such as that which exists in Canada, may also have the unexpected result of an altered approach to conflict issues within the UK, on the Canadian model.

Need for certainty

The Supreme Court of Canada has also opined that the Canadian constitutional arrangements require there to be a high degree of certainty within Canada, meaning for example that a *lex loci delicti* rule should be applied in questions of choice of law in tort arising as between its provinces.¹⁶⁶ Similarly, Australian judges have also argued that certainty is a more desirable result in conflict of laws issues arising within a country, than it is if such issues involve foreign countries.¹⁶⁷ Certainty has sometimes been used as a justification for introducing

¹⁶² C. MacLeod & L. Adams, "Why the time has come for change", *The Herald*, 12 February 2004; Inaugural Falconer Lecture, "Constitutional reform: strengthening rights and democracy", given by Lord Falconer of Thoroton, Edinburgh, 20 February 2004.

¹⁶³ *Constitutional Reform*, Consultation Paper, para 20.

¹⁶⁴ *Ibid.*, para 62.

¹⁶⁵ Faculty of Advocates, *Response to the Consultation Paper by the Secretary of State for Constitutional Affairs and Lord Chancellor: Constitutional Reform: A Supreme Court for the United Kingdom*, November 2003; F. Gibb, "New court must adhere to 1707 union, says law lord" *The Times*, 19 June 2003; J. Rozenberg, "Law lords give thumbs down to Supreme Court", *The Telegraph*, 5 November 2003; R.C. Connal, "For the United Kingdom?" (2004) 49 *JLSS* no 3, 9.

¹⁶⁶ *Tolofson v Jensen* (1994) 120 DLR (4th) 289 per La Forest J at 315 & 307-308.

¹⁶⁷ *Breavington v Godleman* (1988) 169 CLR 41 per Dawson J at 147-148; *McKain v R.W. Miller and Company (South Australia) Pty Limited* (1992) 174 CLR 1 per Brennan, Dawson, Toohey

different international private law rules within the UK, instead of those which would otherwise apply.¹⁶⁸ Of course, if taken to extremes, this principle changes from a laudable aim of providing litigants with certainty, to the injustice of imposing a completely inflexible rule on parties to the court process.¹⁶⁹ The more fundamental criticism, however, is that it is hard to understand why litigants in cases with a foreign element should not be just as desirous, and deserving, of certainty in their actions. Even if it were accepted that certainty was a more important goal in respect of jurisdictions with a high degree of contact, this rationale is not confined to jurisdictions within a political state. Castel questions, it is submitted correctly, whether it is proper for the Supreme Court of Canada to take this type of differential approach.¹⁷⁰

Movement of persons

Another factor which has been cited in the Canadian context, but which does not seem to have such great force, is the high degree of movement of persons within Canada.¹⁷¹ It can, of course, be imagined that within a country there will be much movement of its citizens. However, it is submitted that this simply creates a need for rules of international private laws, or results in the frequent use of such rules. It does not require that these rules are constitutionally prescribed. Furthermore, as has already been argued, the level of contact between jurisdictions is a factual matter, which does not necessarily follow legal boundaries: in Canadian provinces which border with the United States, there may be as high a degree of contact with citizens of the US, as with those of other Canadian provinces.¹⁷² There could, therefore, be equal justification for a modification of the conflict rules in a particular international, as in an interprovincial, situation.

and McHugh JJ at 38; *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36 per Kirby J at para 123.

¹⁶⁸ For example the system of obligatory and discretionary stays in England in divorce actions (the equivalent of Scottish mandatory and discretionary sists): Law Com. No 48, *Report on Jurisdiction in Matrimonial Causes* (1972), para 82.

¹⁶⁹ See, for example, the doubts expressed in J. Walker, "Choice of law in tort: the Supreme Court of Canada enters the fray" [1995] 111 *LQR* 397; Blom, "The quiet Canadian revolution", 113.

¹⁷⁰ Castel, *Introduction to Conflict of Laws*, p22.

¹⁷¹ *Tolofson v Jensen*, (1994) 120 DLR (4th) 289 per La Forest J at 315; *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 per La Forest J at 1099.

¹⁷² One such incidence resulted in *Babcock v Jackson* [1963] 2 Lloyd's Rep 286.

The political factor: conflict rules a threat to union?

Perhaps, however, the most important factor in the drive to constitutionalise conflicts is one which is not always explicitly stated: the political factor. This underlies sentiments such as that of La Forest J, already quoted, that "the English rules seem to me to fly in the face of the obvious intention of the Constitution to create a single country",¹⁷³ or that:

"It is inconceivable that in devising a scheme of union comprising a common market stretching from sea to sea, the Fathers of Confederation would have contemplated a situation where citizens would be effectively deprived of access to the ordinary courts in their jurisdiction in respect of transactions flowing from the existence of that common market".¹⁷⁴

Similarly, in the Australian cases earlier cited, reference is made to the aim of the Australian Constitution being to create one nation from the various colonies.¹⁷⁵ It was argued by Deane J that this is threatened by the application of rules of international private law.¹⁷⁶ In the field of delict, these were rules which were "adopted to resolve competition between the tort laws of different independent nations and which are the antithesis of a single system of law".¹⁷⁷ Kirby J, in discussing the treatment of states as foreign countries in international private law, opines that "the whole purpose, character and organisation of a federation (at least one such as Australia) is inconsistent with such an approach".¹⁷⁸

This political factor can be more precisely defined as the elevation of political unity over legal diversity. It is seen to be of more significance that the country is a political whole, than that it is made up of different legal jurisdictions, and thus the latter fact must be played down. This may also be allied with a centralising tendency. It is submitted that this political factor is significant in Canada. As a former dominion, which has moved into statehood in its own right, it is important

¹⁷³ *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1099

¹⁷⁴ *Hunt v T&N plc* [1993] 4 SCR 289 per La Forest J at 330.

¹⁷⁵ *Breavington v Godleman* (1988) 169 CLR 41 at 121-122.

¹⁷⁶ *Ibid.* at 124-125.

¹⁷⁷ *McKain v R.W. Miller and Company (South Australia) Pty Limited* (1992) 174 CLR 1 per Deane J at 45.

¹⁷⁸ *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36 per Kirby J at para 121.

to cement a common (Canadian) identity, separate from the old mother-country.¹⁷⁹ This can be seen in the "patriation of the Constitution", which is to say "bringing it home to Canada".¹⁸⁰ In the wider context, it is also evident in the adoption of the (now distinctive) maple leaf flag, and perhaps, in marketing terms, the creation of a Canadian 'brand'. Furthermore, against this background it is important not only to underline the political unity of Canada by minimising the differences between the provinces, but also to be able to provide apparently distinctively Canadian solutions which spring from the machinery of the Canadian state itself, i.e., the Constitution.¹⁸¹ This is not to ignore the separatist movement in Quebec. However, even here, referenda have failed so far to produce a majority for separation.¹⁸² In any event, insofar as Quebec is an exception,¹⁸³ it is submitted that Brady's above-mentioned characterisation of the province as an island within the Canadian nation is apposite.¹⁸⁴ Moreover, it is significant that the Supreme Court of Canada posited the existence of a *constitutional* solution for this problem, viz., that the Canadian constitution would not allow Quebec to unilaterally secede from Canada.¹⁸⁵

In the past, sentiments have been expressed within the UK which might appear to value political unity over the legal diversity of its jurisdictions. This is arguably at least a factor in expressed desires for uniformity,¹⁸⁶ and certainly in the feeling that "conflicts between different law districts of the British Isles are ... when they occur, more embarrassing judicially than conflicts between English and foreign proceedings".¹⁸⁷ It is submitted, however, that whatever validity this political factor might once have had in the UK, it is of much less significance in the context of the present constitutional set-up. The advent of devolution was for Scotland the culmination of a process of the shifting of power away from the centre. Scotland's existence as a separate legal jurisdiction is buttressed by the

¹⁷⁹ See C.B. Picker, " 'A Light unto the Nations' - the new British federalism, the Scottish Parliament, and constitutional lessons for multiethnic states" (2002) 77 *Tulane Law Rev*, no 1, 1 at 79.

¹⁸⁰ Hogg, *Constitutional Law of Canada*, para 3.5.

¹⁸¹ It is submitted that this also broadly describes the Australian situation.

¹⁸² Hogg, *Constitutional Law of Canada*, para 5.7(a).

¹⁸³ See Greschner, "The Supreme Court, federalism and metaphors of moderation", p72.

¹⁸⁴ See p58 above.

¹⁸⁵ *Reference re Secession of Quebec* [1998] 2 SCR 217.

¹⁸⁶ For example, Law Com. No 48, *Report on Jurisdiction in Matrimonial Causes* (1972), para 81.

¹⁸⁷ *Ibid.*, para 82.

creation of a Scottish legislative body. There may, as a result, be a strengthening of a separate Scottish identity in the wider context, and indeed the concept of a 'Scottish constitution' may simply be part of this. In very broad terms, the current constitutional developments in Scotland are almost the reverse of the Canadian situation. It is therefore submitted that the political factor, so significant in Canada, is of much less importance in the UK.

Conclusion

Of the various reasons which may lie behind the constitutionalising of conflicts in Canada, the most significant seem to be the political dimension, the relative commonality of law across the provinces, and the existence of an avowedly unifying Supreme Court. It is submitted that, for the reasons outlined above in respect of each of these points, these factors have much less force as between Scotland and England. Thus, despite the growing acceptance of there being to some extent a Scottish constitution, it is not thought that the conditions are ripe for such a constitution to usurp the functions of international private law in Scotland.

The undesirability of the constitutionalising of conflicts in Scotland

If the conditions are indeed not ripe for the constitutionalising of conflicts in Scotland, this is not, it is submitted, a cause for concern: quite the reverse. It is contended that the constitutionalising approach is based on a fundamental misunderstanding of the purpose, and effect, of international private law rules. International private law rules do not create conflicts of law within a country. It is an inevitable consequence of the existence of different legal jurisdictions within a country that issues of jurisdiction, choice of law and recognition of judgments, will arise. Conflict rules simply acknowledge that these conflicts do exist, and provide tools whereby they may be resolved. The term 'conflict of laws' is not a rallying call to foment conflict: the aim is rather to make an enlightened choice between the claims of contending laws. Whilst the traditional nomenclature of the topic in Scotland speaks of an international dimension, the tools provided by conflict rules are in no way inherently unsuitable for intra-UK jurisdiction, recognition, or choice of law issues. On the other hand, constitutional rules are rarely drafted to incorporate specific rules on clashes of jurisdiction or laws, and

attempting to bring such issues under rules designed for different purposes would seem generally undesirable. Ultimately, if it is thought that a diversity of legal jurisdictions within one political nation is a hindrance, then the solution is total harmonisation, not the abolition of international private law rules in intra-UK situations.

Such criticisms have also been advanced by those in Canada, and Australia, who are unconvinced by the drive to constitutionalise conflicts. Thus Castel sees no justification for having different sets of rules for interprovincial and international cases. The rules which have been developed in cases such as *Tolofson v Jensen*¹⁸⁸ "can stand on their own merits" and "do not require the support of the Constitution".¹⁸⁹ Blom fears that in its reliance on the Constitution, "the Supreme Court ... may have gone further than it needed to, and further than is desirable".¹⁹⁰ In Australia, in discussing the suggestion that the doctrine of 'full, faith and credit' had a rôle in choice of law questions, Dawson J noted that:

"the requirement that full faith and credit be given to the laws of a State, statutory or otherwise, throughout the Commonwealth, affords no assistance where there is a choice to be made between conflicting laws ... The conflict rules ... unlike the full faith and credit requirement, provide a basis upon which the selection can be made".¹⁹¹

Furthermore, in concurring with Brennan, Toohey and McHugh, JJ, in *McKain v R.W. Miller and Company (South Australia) Pty Limited*, he recognised that differing legal results within Australia "may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union",¹⁹² and that it was the common law and not the Constitution which determined which law was to be applied.

¹⁸⁸ (1994) 120 DLR (4th) 289.

¹⁸⁹ Castel, *Introduction to Conflict of Laws*, p22.

¹⁹⁰ Blom "The quiet Canadian revolution" 115.

¹⁹¹ *Breavington v Godleman* (1988) 169 CLR 41 at 150.

¹⁹² (1992) 174 CLR 1 at 36-37.

It has been contended that the factors which were said to justify the constitutionalising of conflicts in Canada do not have the same force in the Scottish context. More importantly, it is submitted, this whole approach is fundamentally misconceived. It is not a path which Scotland should seek to follow.

4 INTERNALISING CONFLICTS

Defining the internalising of conflicts

It was submitted in the previous chapter that there has not been, in the UK, a constitutionalising of conflicts on any significant scale, and also that such a development would not be beneficial. However, there has been much evidence of another phenomenon, which can be described as 'internalising' conflicts.

The most obvious examples of internalising conflicts are the use of legislation by the Westminster Parliament in one of two ways. Firstly, statute can be used to remove a conflict altogether by changing one, or both, of the rules which cause a cross-border conflict between Scotland and England. Secondly, statutes may be passed which regulate an area of law in the UK, and contain rules providing for certain cross-border consequences, rather than leaving the matter to be dealt with by way of (usually common law) international private law rules. Such an approach is well illustrated by the remarks of the erstwhile Commissary Court judge, James Fergusson:

"In the relative situation also of Scotland to the sister kingdoms, it is obvious, that the delicacy, difficulty, and importance, of those legal questions which have been under review, are infinitely augmented by the complete political incorporation of all their subjects as one people, while the municipal law of their country, as well as that of England, is, by its national compact of union, maintained in perfect sovereignty and independence. But the same arrangement has bestowed a Parliament common to the whole, which can, by statute, remove collision, and reconcile their different interests, whenever the slow and still feeble operation of international law, the sole mediator between the conflicting jurisdictions of unconnected States, is found to be insufficient for that purpose".¹

¹ J. Fergusson, *Reports of some Recent Decisions by the Consistorial Court of Scotland in actions of divorce concluding for dissolution of marriages celebrated under the English law* (Archibald Constable & Co., 1817), pp20-21.

"I am going to Gretna Green, and if you cannot guess with who, ..."²

The so-called "runaway marriages"³ provide a relatively early example of an internalising approach to a cross-border conflict of laws between Scotland and England. One of the effects of the Acts of Union was to leave the laws of marriage in England and Scotland un-harmonised. In 1753, the Act for the better preventing of clandestine Marriages,⁴ more commonly known as Lord Hardwicke's Act, was passed, and prevented marriages in England taking place other than in a church, or without pronouncement of banns or a licence of marriage.⁵ Furthermore, parental consent was required in England in a marriage by licence if one of the parties was under twenty-one.⁶ Marriages celebrated in contravention of the Act were void.⁷ In comparison, irregular marriages remained possible in Scotland, one type of marriage requiring only simple consent, without the necessity of a religious celebrant being present. There was no need in Scots law for parental consent. The differences in the law between the two countries, together with the increasing ease of travel within Britain, made elopement to Scotland seem an attractive proposition to certain young English couples, and Gretna Green achieved notoriety.⁸

For international private lawyers, such marriages raise difficult questions: were such unions valid notwithstanding the lack of a true Scots domicile, the use of a form of ceremony impermissible in the country of true domicile, and a possible lack of capacity by that law? The Scots courts of the time seem to have been content that such marriages were valid. Thus in actions of divorce, the granting

² J. Austen, *Pride and Prejudice*, edition used: T. Tanner (ed.), (Penguin, 1972), p307.

³ The term is used, for example, in the contributed article "Runaway marriages" 1954 SLT (News) 217; A.E. Anton and Ph. Francescakis, "Modern Scots 'runaway marriages' " 1958 JR 253; and *The Marriage Law of Scotland* (Cmnd 4011) (1969) ("The Kilbrandon Report"), p25.

⁴ Clandestine Marriages Act 1753 (26 Geo II), c.33.

⁵ *Ibid.*, ss1, 4 & 8 (subject to the special licence which could be granted by the Archbishop of Canterbury to hold the marriage in any place: s6).

⁶ *Ibid.*, s11.

⁷ *Ibid.*, ss8 & 11.

⁸ Lamberton on the east coast was also the scene of runaway marriages (L. Wood, *The Berwickshire Coast* (Stenlake Publishing, 1998), p84), and it seems that Portpatrick was the equivalent for couples coming from Ireland (C. Norton, "A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill" (1855) reproduced in M.M. Roberts and T. Mizuta (eds), *The Wives: The Rights of Married Women* (Routledge/Thoemmes Press, 1994), p99, and see *Butler v Forbes* (1816) 19 Fac Coll 139).

of such a remedy presumes that a valid marriage was in existence.⁹ Furthermore, in *Gordon v Pye*,¹⁰ Lord Meadowbank explicitly suggested that a marriage between English domiciliaries, lacking capacity under English law, would be valid if celebrated in Scotland.¹¹ The English courts appear to have taken a similar view. In the 1769 case of *Compton v Bearcroft*,¹² the Court of Delegates refused to find a Gretna Green runaway marriage void as an attempt to circumvent Lord Hardwicke's Act.¹³ By 1802, however, the case was interpreted by the Consistory Court in London as clear authority for the proposition that the validity of the marriage was determined by the *lex loci celebrationis*.¹⁴ Thus since the marriage was valid under Scots law, this sufficed, despite the prohibition on the marriage in England.¹⁵

A comparison can be drawn with the judgment in the later case of *Brook v Brook*,¹⁶ which concerned the validity of a marriage in Denmark between an English domiciliary and his English-domiciled sister-in-law. The English court now drew a distinction between form and capacity, the latter being governed by the *lex domicilii*. Lord Hardwicke's Act was characterised as pertaining to matters of form, and thus the Gretna Green runaway marriages distinguished.¹⁷ It is submitted, however, that the significance of Lord Hardwicke's Act is downplayed, and there is no satisfactory explanation as to why the requisite parental consent can be said to be a matter of form.¹⁸ For whatever reason, it might seem that the judges simply found such a marriage more objectionable than had their

⁹ In *Wyche v Blount* (1801) Ferg Cons 263 a divorce was granted of a marriage between two English people which had taken place at Gretna, and *Wilcox v Parry* (1811) Ferg Cons 267 was an undefended action of divorce of an irregular marriage at Annan between two English domiciliaries.

¹⁰ (1815) Ferg Cons 276.

¹¹ *Ibid.* at 361-362.

¹² The case is incompletely reported, the report consisting of the libel and a note, incorporated within the report of the later case of *Middleton v Janverin* (1802) 2 Hagg Con 437 (at 444).

¹³ Similarly in *Harford v Morris* (1776) 2 Hagg Con 423, a marriage on the continent was argued to be an attempt to circumvent English law, but was found not to be void. The judge did not, however, appear to apply the *lex loci celebrationis*.

¹⁴ *Middleton v Janverin* (1802) 2 Hagg Con 437.

¹⁵ Conversely a marriage illegal in France had been held to be null by the English courts in *Scrimshire v Scrimshire* (1752) 2 Hagg Con 395 (although it was also illegal in England).

¹⁶ (1861) 9 HL Cas 193.

¹⁷ *Ibid.* per Lord Campbell LC at 214-215; per Lord Cranworth at 228-229.

¹⁸ Dicey and Morris describe the characterisation as "logically doubtful" (Collins, *Dicey and Morris on the Conflict of Laws*, para 17-015).

predecessors adjudicating on Gretna Green runaway marriages.¹⁹ However, there were many in the mid-nineteenth century that disapproved of the practice of elopement to Gretna Green, and legislation was in fact drawn up to put an end to the practice.²⁰ Thus, the Marriage (Scotland) Act 1856 was passed, which demanded that for a marriage in Scotland to be valid, at least one of the parties must have resided there for a minimum of twenty-one days.²¹ Given that *Brook v Brook* was decided only a few years later in 1861, this may point to another reason for the willingness of the judges to characterise Lord Hardwicke's Act, and the Gretna Green runaway marriages in defiance of it, as relating to matters of form: the phenomenon of the Gretna Green runaway marriages having been diminished by the 1856 Act, there was now no need for judicial action on this score. The important point for this thesis, however, is the ability of the Westminster Parliament to use legislation to solve the perceived cross-border problem, rather than leaving the issue to be resolved by rules of international private law.

Interestingly, the pattern of the Gretna Green runaway marriages was mirrored in the twentieth century. Once again, there was a spate of couples coming to Scotland to marry.²² The Court of Session made it clear that it "never has regarded itself as bound or its decision foreclosed" by an order from the English Chancery Court,²³ for example forbidding marriage by an English domiciliary. However, the existence of such an order would be particularly persuasive in the

¹⁹ Comments of Lord Campbell LC make clear the moral disapprobation: *Brook v Brook* (1861) 9 HL Cas 193 *per* Lord Campbell LC at 212. Perhaps by way of comparison, both the English Lord Chancellors Eldon and Brougham married in Scotland after an elopement (T.P.R., "Gretna Green: a romantic retrospect" 1925 SLT (News) 214 at 215). Fawcett argues that there were not such powerful policy objections to the Gretna Green runaway marriages, as to marriages such as that in *Brook v Brook*, *supra* (J.J. Fawcett, "Evasion of law and mandatory rules in private international law" (1990) 49 *CLJ* 44 at 45-46, 50 & 54-55).

²⁰ See T.P.R., "Gretna Green"; and M.C. Meston's annotations to the Marriage (Scotland) Act 1977; and note also the penalty of transportation for celebrants who solemnised English marriages in contravention of Lord Hardwicke's Act (Lord Hardwicke's Act, s8).

²¹ 1856, (19 & 20 Vict), c.96, s1. *Miller v Deakin* 1912 SLT 253 is an example of a marriage contravening this requirement being declared null by the Court of Session. Ironically the Act was brought into force under the stewardship of Lord Brougham (see note 19 above).

²² For example, in 1967 1,036 marriages took place in Scotland in which neither of the spouses were Scottish residents. One or more of the spouses were under 21 in around three-quarters of these marriages, and of these cases more brides came from England than from any other single country (The Kilbrandon Report, Appendix 6, p57).

²³ *Hoy v Hoy* 1968 SLT 413 *per* Lord President Clyde at 416; and see also *Stuart v Moore* (1861) 23 D 902 *per* Lord Campbell LC at 904.

decision to grant an interim interdict preventing marriage in Scotland, if one party was a Chancery ward who had been in England at the time of the making of the Chancery order.²⁴ It must be remembered, however, that the consideration of such cases in the context of the granting of an interim interdict necessitates the application of a different test by the court. These cases are not therefore authority for the proposition that such marriages are invalid, rather that it was not possible for the court at that stage to say that they were undoubtedly unobjectionable: therefore the balance of convenience favoured preventing the marriage taking place. Furthermore, in *Bliersbach v MacEwen*²⁵ it had been held by the Court that lack of parental consent to marry was merely a prohibitive impediment, the effect of which was determined by the *lex loci celebrationis*. By contrast, an irritant impediment by the law of the party's domicile would have resulted in that party lacking capacity to marry in Scotland.

As was the case in the nineteenth century, however, sections of the public found the incidence of runaway marriages objectionable. Questions were asked in the House of Commons as to whether the government would take action, since there was a "general anxiety that Scotland is becoming a sort of inverted Reno to which young people from other parts of the world can come to evade their own laws".²⁶ The General Assembly of the Church of Scotland also pushed for changes in the law to prevent such marriages.²⁷ Accordingly, one of the aims of the Kilbrandon Committee was to reduce the number of couples coming to Scotland to marry without parental consent²⁸ and the result was the Marriage (Scotland) Act 1977.²⁹

²⁴ *Hoy v Hoy, supra; Pease v Pease* 1967 SC 112.

²⁵ 1959 SC 43.

²⁶ Mr G.M. Thomson, HC Debs vol 570, col 1008.

²⁷ Anton & Francescakis, "Modern Scots 'runaway marriages' ", 255-256.

²⁸ The Kilbrandon Report, pp 29-30 & 32.

²⁹ 1977, c.15. As well as dealing with the domestic law of marriage the Act also has provisions which touch upon international private law matters. It provides that no Scots domiciliary may marry, and no foreign domiciliary may marry in Scotland, if he or she is below a certain age or if the parties are within certain prohibited degrees of relationship (*ibid.*, ss1 & 2). A requirement is introduced for a certificate confirming capacity for those domiciled in a politically foreign country (*ibid.*, s3(5)). It is also confirmed that a legal impediment to marriage in Scotland exists if such a marriage would be void *ab initio* by the law of a party to the marriage (that party being a foreign domiciliary) (s5(4)(f)). In fact, however, in 1969, the law in England was changed, so that parental consent was only needed up to the age of 18, rather than 21 (Family Law Reform Act 1969, c.46, s2(1)(c)), and there were also changes to the requirement for parental consent in other jurisdictions, which eased the perceived problem (annotations by M.C. Meston to the Marriage (Scotland) Act 1977). Indeed, a certificate confirming capacity to marry is not required if the party is domiciled in another part of the UK

Again, the Westminster Parliament had attempted to remove a problem from the sphere of international private law, to resolve it on its own terms.

UK common market law

Introduction and background

One of the areas reserved to the UK Parliament at Westminster under the devolution settlement was the law relating to "Common markets for UK goods and services",³⁰ dubbed by MacQueen "common market law"³¹ (an allusion to the UK, not the European, common market). This was said by the White Paper to encompass "the law on companies and business associations, insurance, corporate insolvency and intellectual property, regulation of financial institutions and financial services, competition policy ... consumer protection".³² It is submitted that the reservation of this area to the UK Parliament is significant, since this is also the area where the internalisation of conflicts has been most apparent.

Whilst debates rage about the real importance of arguments based on trade in achieving the passing of the Acts of Union,³³ Lord Hope of Craighead records how the Union has been seen as a significant stage "in the long story of Scotland's absorption into a wider Britain, which created an Anglo-Scottish common market that was the biggest customs-free zone in Europe and gave Scotland access to one of the largest empires in the world".³⁴ Levack stresses how unusual such an arrangement was in Europe at that time.³⁵ In seventeenth century Great Britain, those in power believed that "trade and patriotism were inseparably linked".³⁶ Colley has explored the extent to which participation in the Empire by Scots was

(Marriage (Scotland) Act 1977, s3(5)(d), and see E.M. Clive, "The Marriage (Scotland) Act 1977" 1977 SLT (News) 213 & 225 at 229).

³⁰ "Scotland's Parliament", para 3.3. Note too in the Canadian case of *Hunt v T&N plc*, the reference to "the common market created by the union" (*Hunt v T&N plc* [1993] 4 SCR 289 per La Forest J at 322 (and see also *ibid.* per La Forest J at 330).

³¹ H.L. MacQueen, "The Scotland Bill and private law" 1998 *Scotland Forum* (Issue 2) 3.

³² "Scotland's Parliament", para 3.3.

³³ See Riley, *The Union of England and Scotland*, Chap 6; Levack, *The Formation of the British State: England, Scotland and the Union 1603-1707*, Chap 5.

³⁴ *Lord Gray's Motion* 2000 SC (HL) 46 per Lord Hope of Craighead at 55-56; and see Levack, *The Formation of the British State: England, Scotland and the Union 1603-1707*, p138.

³⁵ Levack, *The Formation of the British State: England, Scotland and the Union 1603-1707*, pp167-168.

³⁶ L. Colley, *Britons: Forging the Nation 1707-1837*, 2nd Pimlico edn. (Pimlico, 2003), p120.

important in the development of a British identity.³⁷ The Empire, it should be noted, was always clearly described as British rather than English.³⁸ Indeed, recent studies have convincingly argued that Scots were often at the forefront of the many manifestations of the Empire, and some have spoken of a Scottish Empire.³⁹ Colley concludes that "The Scots, in particular, ... became British after 1707 in part because it paid such enormous commercial and imperial dividends".⁴⁰

However, this close relationship for Scots between *Britain*, and *commerce or trade*, has had an effect on Scots law. Miller goes so far as to state that "in mercantile law the laws of the three countries have been so much assimilated that conflicts do not arise".⁴¹ In the seventeenth century the English law of insurance became of great authority in Scotland, and English barristers would sometimes be consulted on this matter.⁴² The succession of Companies Acts have governed, and govern, companies both in Scotland, and in England and Wales. Furthermore, it has been said that "it is clearly desirable that the construction of statutes which affect the United Kingdom should be the same both north and south of the border, particularly statutes such as the Companies Act".⁴³ In such a scheme little room is left for the application of rules of international private law.⁴⁴ It is interesting that both the growth of the company as a commercial institution, and legal regulation of such bodies, are features of the nineteenth century,⁴⁵ which was also a time of industrial pre-eminence, and of Empire. The nineteenth century also saw the passing of the Partnership Act 1890,⁴⁶ and the Sale of Goods Act 1893⁴⁷ (the latter area now governed by the Sale of Goods Act 1979,⁴⁸ as

³⁷ Ibid., p130; see also D.W. Urwin, "Territorial Structures and Political Developments in the United Kingdom" in S. Rokkan & D.W. Urwin (eds), *The Politics of Territorial Identity: Studies in European Regionalism* (Sage Publications, 1982), p19 at 37.

³⁸ Colley, *Britons*, p130; "Death and the Reinvention of Scotland", lecture given by T. Devine, Glasgow, 9 April 2003.

³⁹ M. Fry, *The Scottish Empire* (Tuckwell Press & Birlinn, 2001); T. Devine, *Scotland's Empire 1600-1815* (Penguin, 2003); Welsh, *The Four Nations*, p246.

⁴⁰ Colley, *Britons*, p374 cf Devine, *Scotland's Empire*, pp62-63.

⁴¹ Miller, *The Law of Nature and Nations in Scotland*, pp125-126.

⁴² Cairns, "Historical introduction", pp161-162.

⁴³ *Inland Revenue v Highland Engineering Ltd* 1975 SLT 203 per Lord Grieve at 205.

⁴⁴ Indeed international private law rules were not considered in the apparently UK cross-border case of *Mace Builders (Glasgow) Ltd v Lunn* [1987] BCLC 55.

⁴⁵ S. Griffin, *Company Law: Fundamental Principles*, 3rd edn. (Longman, 2000), pp3-9.

⁴⁶ 1890 (53 & 54 Vict), c.39.

⁴⁷ 1893 (56 & 57 Vict), c.71.

amended). As a result, partnership law and the law of sale are, in effect, governed by statutory codes, which apply to the UK as a whole, and largely harmonise the substantive law of its jurisdictions.⁴⁹ The Bills of Exchange Act 1882 distinguishes between inland (or UK) bills, and foreign bills,⁵⁰ and also between inland and foreign promissory notes,⁵¹ although the distinction is of little consequence in practical terms. The major taxes, such as income tax, also apply in both Scotland and England. In the field of insolvency law, the Cork Committee argued that the insolvency systems within the UK were not sufficiently harmonised.⁵² In the context of discussing the (then) European Economic Community, the Committee noted "we are convinced that the ultimate harmonisation of insolvency laws in a trading community is essential".⁵³ In addition to Victorian, and British, ideals of free trade and expansive commerce, there is now a newer principle at work, which can be described as paternalistic, or consumerist. In the modern age of large multinational corporations, business can be characterised not as agreements between parties of equal bargaining power, but in terms of big business and consumers. In such a climate, governments formulate policies to protect the weaker party, for example, to prevent the imposition of unfair contracts,⁵⁴ or mis-selling of financial products, or to protect the public from unscrupulous traders.⁵⁵ It is difficult for a government with power over the UK as a whole to justify not extending consumer protection measures to all parts of the country, notwithstanding the different legal systems which obtain in its component parts. Indeed it has been argued that even on a global level, private international law "has proved inadequate for consumer laws".⁵⁶

⁴⁸ 1979, c.54.

⁴⁹ However, harmonisation of the law of sale by nineteenth century legislation was at the expense of the old Scots rules (R. Brown, *Treatise on the Sale of Goods*, 2nd edn. (W. Green, 1911), pp2-4).

⁵⁰ 1882 (45 & 46 Vict), c.61, s4.

⁵¹ *Ibid.*, s83(4).

⁵² *Insolvency Law and Practice* (Cmnd 8558) (1982) ("The Cork Report"), paras 1903-1904.

⁵³ *Ibid.*, para 1921.

⁵⁴ For example, the Unfair Contract Terms Act 1977, c.50, in respect of exemption clauses.

⁵⁵ This could influence, for example, the rules on insolvency, and breach of directors' duties.

⁵⁶ N. Cox, "The extraterritorial enforcement of consumer legislation and the challenge of the internet" (2004) 8 *EdinLR* 60 at 61.

In addition to actual harmonisation of substantive laws, however, it is submitted that there has also been much internalisation of conflicts in UK common market law, and some examples of this in the context of insolvency law will be examined in turn.⁵⁷

Internalising conflicts in UK insolvency legislation

Individual insolvency

To take as a starting point the insolvency of an individual, an earlier consolidating statute, the Bankruptcy (Scotland) Act 1913 provided that the notour bankruptcy of a person would be established in Scots law, *inter alia*, by the granting of a receiving order in England or Ireland.⁵⁸ In terms of the Bankruptcy (Scotland) Act 1985, apparent insolvency (which will trigger sequestration) will be constituted by, *inter alia*, the sequestration of the person's estate in England and Wales or Northern Ireland, or being adjudged bankrupt in one of these jurisdictions,⁵⁹ or the making of a receiving order against the person in England and Wales.⁶⁰ The methods of taking the creditor's oath depend on whether or not he is within the UK.⁶¹ A warrant may be obtained to arrest the debtor wherever he may be staying in the UK.⁶² Furthermore, for the purposes of offences committed by debtors, a debtor includes a person who has been adjudged bankrupt in England and Wales.⁶³ Lastly, the discharge of the debtor operates so as to free him of all debts and obligations in the UK at the time that he was sequestrated.⁶⁴ An example, observes Fletcher, of "a special approach" arising from "the constitutional affinities between the three parts of the United Kingdom".⁶⁵

⁵⁷ Left aside, for the moment, in examining the terms of the insolvency legislation drawn up by the Westminster Parliament, is the effect of the new European Regulation on insolvency matters (Council Regulation 1346/2000) which will be dealt with in Chap. 6.

⁵⁸ 1913 (3 & 4 Geo V), c.20, s5.

⁵⁹ 1985, c.66, s7(1)(a).

⁶⁰ *Ibid.*, s7(1)(c)(vi).

⁶¹ *Ibid.*, s11(2).

⁶² *Ibid.*, s46(1).

⁶³ *Ibid.*, s67(10)(ii). This was not the case in some prior bankruptcy legislation (*Kaye v HMA* 1957 JC 55).

⁶⁴ Bankruptcy (Scotland) Act 1985, s55(1).

⁶⁵ I.F. Fletcher, *Insolvency in Private International Law: National and International Approaches* (Oxford University Press, 1999), p109; and see also P.StJ. Smart, *Cross-Border Insolvency*, 2nd edn. (Butterworths, 1998), pp142-143.

Corporate insolvency

At base, it has been argued, there is a common approach towards the conflict rules of corporate insolvency, different from that on the continent.⁶⁶ Thus, for the Scottish and English courts, the domicile of the company equates with the place of registration, and dictates the law by which the company should be wound up. It is of no moment that the company may latterly have been run from, or that those in charge of the company operate out of, a different jurisdiction. By contrast, the continental approach is more akin to a concept of habitual residence.

The Insolvency Act 1986 provides that if an unregistered company has its principal place of business in Scotland, and England and Wales, the company is deemed to be registered in both jurisdictions for the purpose of its winding up.⁶⁷ There are also provisions concerning property situated in England and Wales, belonging to a company registered in Scotland.⁶⁸

In terms of section 72(1) of the Insolvency Act 1986:

"A receiver appointed under the law of either part of Great Britain in respect of the whole or any part of any property or undertaking of a company and in consequence of the company having created a charge which, as created, was a floating charge may exercise his powers in the other part of Great Britain so far as their exercise is not inconsistent with the law applicable there".

The wording of the section raises a number of questions for the conflicts lawyer. Does the reference to applicable law mean simply domestic law, or does it include the international private law rules? What is the term "not inconsistent with" intended to signify? The case of *Gordon Anderson (Plant) Ltd v Campsie Construction Ltd & Anglo Scottish Plant Ltd*⁶⁹ concerned a forerunner of section 72: section 15(4) of the Companies (Floating Charges and Receivers) (Scotland)

⁶⁶ J.B. St Clair & J.E. Drummond Young, *The Law of Corporate Insolvency in Scotland*, 2nd edn. (Butterworths, 1992), pp383-384.

⁶⁷ s221(3)(b).

⁶⁸ *Ibid.*, s128(2).

⁶⁹ 1977 SLT 7.

Act 1972.⁷⁰ However, section 15(4) restricted the powers of the receiver to "such part of that property as is attached". The case was therefore largely concerned with the argument (ultimately unsuccessful) that the appointment of a receiver to an English company did not cause the floating charge to attach to Scottish property. On this view, since the charge had not attached, the section could be of no assistance to the English receiver. At first instance, the sheriff did suggest that "[i]t may well be that some receivers to companies incorporated in England have powers in relation to property there which would be wholly inappropriate for them to have in relation to property in Scotland",⁷¹ but he does not give examples of what such powers might be. Some light was eventually thrown on the matter by *Norfolk House plc (in receivership) v Repsol Petroleum Ltd.*⁷² Giving an oral judgment from the Bench, Lord Penrose

"said that the intent and effect of s. 72 of the 1986 Act was the same as the earlier statutory provision which had been discussed in the *Gordon Anderson (Plant) Ltd.* case, which was to see that cross border procedural problems in receivership were limited as much as possible. Section 72 bridged the transaction from the original creation of the floating charge to the appointment of the receiver in order to ensure that a receiver could exercise his powers under Sched. 1 to the 1986 Act in relation to Scottish property untrammelled by Scottish conveyancing and property law".⁷³

Thus it would seem that, although referring to the applicable law, section 72 is concerned only with domestic law, and that the section simply sets out to establish a further special UK rule: in this instance to ease the cross-border use of powers by receivers.

Section 426 of the Insolvency Act 1986

A further provision of the Insolvency Act 1986, however, makes an explicit, if hard to fathom, reference to international private law. Section 426(1) provides for

⁷⁰ 1972, c.67.

⁷¹ 1977 SLT 7 at 9.

⁷² 1992 SLT 235.

⁷³ *Ibid.* at 236-237.

the automatic enforcement in the UK of orders regarding insolvency.⁷⁴ Smart argues convincingly that such enforcement must be through a court in the part of the UK where an order is sought to be put into effect.⁷⁵ Section 426(4) dictates that UK courts "shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory".⁷⁶ In doing so, section 426(5) allows the court:

"to apply ... the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law".

A prior provision, section 117 of the Bankruptcy Act 1883,⁷⁷ was not sufficient to assist an English House of Lords in *Galbraith v Grimshaw*.⁷⁸ In this case a Scottish money decree had been extended into England, and an appropriate order served by the holder of the decree on a firm who owed a sum of money to the debtor. Subsequently, the debtor was sequestrated in Scotland, and the entire estate of the debtor, wherever it may be, was purportedly vested in the trustee. A dispute then arose between the trustee and the holder of the decree: it was found that the latter had successfully attached the debt held by the English firm. It was acknowledged frankly that this would not have been the outcome if it had been an English bankruptcy, or if the attachment had been in Scotland.⁷⁹ Furthermore, it was conceded that:

"It may have been intended by the Legislature that bankruptcy in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the Legislature has not said so. The Act does not say that

⁷⁴ There is an exception regarding heritage, and a power to make regulations to apply the general rule in this area has not been acted upon (s426(2),(3)); see Fletcher, *Insolvency in Private International Law*, pp64-65 & 100.

⁷⁵ Smart, *Cross-Border Insolvency*, pp213-215.

⁷⁶ Either in response to a request from the other court, or a claim to property submitted by a trustee or assignee (s426(6)).

⁷⁷ 1883 (46 & 47 Vict), c.52. This section allowed Scottish court orders in bankruptcy matters to be enforced in England, and vice versa.

⁷⁸ [1910] AC 508.

⁷⁹ *Ibid.* per Lord Macnaghten at 511.

a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the Courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy".⁸⁰

In Scotland, however, later courts have been prepared to offer far-reaching assistance under section 426, without such clarity of wording as Lord Macnaghten seemed to believe might be necessary. Thus a Scottish liquidator was appointed in the Bank of Credit and Commerce International case at the request of an English court, although no Scottish winding up was in existence.⁸¹ The Keeper of the Registers has been given authority to allow the cancelling out of a transaction concerning Scottish heritage at the behest of an English court.⁸² Indeed, Aird and Jamieson suggest that as far as the Scottish courts are concerned, "there are examples where the degree of assistance may have extended beyond the confines of established principle and authority".⁸³

But what of the exhortation to have regard to rules of private international law? The view of Aird and Jamieson is that the section "invites the court to make a choice of law in cross-border insolvencies".⁸⁴ However, Fletcher notes that whilst this may have been what was envisaged by the legislature, it is only one of two possible ways of reading section 426(5).⁸⁵ In practice, the English courts have applied Irish law on one occasion, since there was no mechanism for putting in place a particular scheme under English law.⁸⁶ However, in another case, an English court would not give effect to Australian law, because English law came

⁸⁰ Ibid. *per* Lord Macnaghten at 511-512. Lord Dunedin noted the ability of the Westminster Parliament to pass suitable legislation to remedy the situation (ibid. at 513). Both Fletcher and Smart are of the view that the wording of s426 would not necessitate the same result, were the case to be decided today (Fletcher, *Insolvency in Private International Law*, p101; Smart, *Cross-Border Insolvency*, pp216-217).

⁸¹ *BCCI*, unreported, 1991 & 1992, but noted in St Clair & Drummond Young, *The Law of Corporate Insolvency in Scotland*, p409.

⁸² *Carman, Petr*, unreported, April 1995, but noted in R.E. Aird & J.N.StC. Jamieson, *The Scots Dimension to Cross-Border Litigation* (W. Green/Sweet & Maxwell, 1996), paras 21.42-21.43.

⁸³ Aird & Jamieson, *The Scots Dimension to Cross-Border Litigation*, para 21.42; and see also St Clair & Drummond Young, *The Law of Corporate Insolvency in Scotland*, p410.

⁸⁴ Aird & Jamieson, *The Scots Dimension to Cross-Border Litigation*, para 21.44.

⁸⁵ Fletcher, *Insolvency in Private International Law*, pp194-195.

⁸⁶ *Re Business City Express Ltd* [1997] 2 BCLC 510 (although see Smart, *Cross-Border Insolvency*, p415).

to a quite opposite result, based on reasons of policy.⁸⁷ However, it does not seem that these decisions as to which law to apply are the product of a strict application of rules of international private law. The fact that English law would have reached a different result, for example, should not necessarily prevent the application of English law. Dawson admits that the wording of the section is somewhat obscure.⁸⁸ The Cork Committee seemed to suggest that the immediate predecessor of section 426 was to be read in the context of private international law, thus transposing the revenue law exception into the statute.⁸⁹ It is submitted that once again section 426(4), (5) is intended to introduce a special rule between Scotland and England in insolvency law.⁹⁰ It attempts, for example, to iron out procedural differences between the two jurisdictions, by allowing the courts to take a very flexible approach, rather than be bound by the detailed rules of international private law. It is recognised, however, that some reference to the broad principles of the subject may assist a judge in deciding when it may be appropriate to turn to a foreign law to assist in the aims of the bankruptcy.⁹¹ This is supported, it is submitted, by the view of the English judge Rattee J. that:

"this court should exercise its discretion in favour of giving the particular assistance requested ... unless there is some good reason for not doing so. As the concluding words of s426(5) make clear, one such reason could in some cases be found in the rules of private international law,"⁹²

The fate of property law principles under common market law

The strength of the internalising drive in the field of common market law is, it is submitted, plain from the outcome when differing Scottish and English property

⁸⁷ *Re J.N. Taylor Finance Ltd, England v Purves* [1998] BPIR 347; and see the criticisms in Smart, *Cross-Border Insolvency*, pp418-419.

⁸⁸ K. Dawson, "International co-operation under section 426 of the Insolvency Act 1986: recent developments" 1999 (4) *Palmer's in company* 1 at 3; see also R.E. Aird, "Winding up across the legal borders of the United Kingdom - and beyond" 1997 SLT (News) 241 at 242.

⁸⁹ The Cork Report, para 1910 (discussing Bankruptcy Act 1914 (4 & 5 Geo V), c.59, s122); and see Smart's suggestion that considerations of public policy, or the revenue law exception, as well as other factors, could influence the exercise of discretion under s426 (Smart, *Cross-Border Insolvency*, p417).

⁹⁰ The section can also be applied with respect to certain foreign countries specified in secondary legislation.

⁹¹ Thus, an ability to take into account a number of matters, including international private law rules, in deciding which law is to be applied, is the second possible reading of s426(5) noted by Fletcher (Fletcher, *Insolvency in Private International Law*, p195).

⁹² *Re Bank of Credit and Commerce International SA (No 9)* [1994] 2 BCLC 636 at 657-658.

laws seem to create a friction in commercial transactions. These situations often involve security over property. Gretton has noted that the UK:

"is a financial market with a high degree of unity but a lower degree of legal unity. If secured lending were to be substantially more difficult in Scotland than in England it is arguable that financial institutions would shift their lending from Scotland to England. Or they would lend in Scotland only at higher average interest levels, in order to compensate for the increased risk that a lower degree of security would entail ... Why should credit be more expensive to Scottish businesses than to English ones? ... One cannot treat the Scottish economy in isolation".⁹³

It is submitted that such fears⁹⁴ have been crucial in developing the law, when property law principles and commercial transactions overlap. Thus, as will be demonstrated by reference to the law relating to floating charges, retention of title clauses and security over moveable property, international private law solutions which protected the fabric of Scots property law have been rejected in favour of commercially-driven internalising solutions.

Floating charges

A floating charge is a form of security which, on the appointment of a receiver, will attach to all assets within its scope. The charges do not appear in the Register of Sasines or the Land Register. In the context of English property law, which recognises many unregistered rights, such a form of security is unremarkable. It was, however, an anathema to many Scots lawyers, and it was not possible to create such a charge in Scotland prior to 1961.⁹⁵ The cross-border effect of a floating charge came before the First Division in the case of *Carse v Coppin*.⁹⁶ A company registered in Scotland had purported to create a charge over its assets in

⁹³ G.L. Gretton, "The Reform of Moveable Security Law" 1999 SLT (News) 301 at 304.

⁹⁴ Although see J. Hamilton *et al.*, *Business Finance and Security over Moveable Property* (Scottish Executive Central Research Unit, 2002), which suggests that these fears may not be justified, at least insofar as Small and Medium sized Scottish Enterprises are concerned.

⁹⁵ Collins characterises Scots law prior to 1961 as "positively hostile" to the concept of the floating charge (L. Collins, "Floating Charges, Receivers and Managers and the Conflict of Laws" in *Essays in International Litigation and the Conflict of Laws* (Oxford University Press, 1996), p433 at 439).

⁹⁶ 1951 SC 233.

Scotland and England. It was accepted at the outset that the floating charge was ineffective as regards the Scottish property. Lord Keith was of the view that the floating charge should be enforceable in England in respect of the assets there.⁹⁷ However, his opinion was a dissenting one, the majority opinion thus constituting one of the few occasions on which another law was preferred to the *lex situs*.⁹⁸ Lords Carmont and Russell queried whether there may be circumstances in which a Scottish company could create such a security over English assets, but were of the opinion that the charge in the instant case was ineffective.⁹⁹ Lord President Cooper, however, could not conceive of any such eventuality. He remarked *obiter* that "it is clear in principle and amply supported by authority that a floating charge is utterly repugnant to the principles of Scots law and is not recognised by us as creating a security at all".¹⁰⁰ However, commercial pressure led to the introduction of floating charges into Scots law under the Companies (Floating Charges) (Scotland) Act 1961.¹⁰¹ Rules of international private law could no longer be used as a barrier to the concept and effectiveness of a floating charge or, indeed, to provide any other solution to this clash between the different underlying principles of Scots and English property law. Arguably, however, the legislation which removed the problem of floating charges from the arena of international private law, simply transferred the friction between the charges and Scottish property law rules into a domestic setting. This came to somewhat of a head in the case of *Sharp v Thomson*¹⁰² which, as Gordon comments, "illustrates clearly how unsatisfactory it was to introduce a form of security over land which becomes real without recording or registration as required for other heritable securities".¹⁰³

Retention of title clauses

Under Scots domestic law it was clear that it was perfectly legitimate for a seller to insist on a simple retention of title clause, which meant that the buyer would

⁹⁷ Ibid. at 247.

⁹⁸ Crawford, *International Private Law*, para 14.11.

⁹⁹ *Carse v Coppen* 1951 SC 233 *per* Lord Carmont at 242-244; *per* Lord Russell at 244.

¹⁰⁰ Ibid. at 239; for a criticism of Lord President Cooper's conclusion see Collins, "Floating Charges", pp442-443.

¹⁰¹ 1961, c.46.

¹⁰² 1997 SC (HL) 66.

¹⁰³ W.M. Gordon, *Scottish Land Law*, 2nd edn. (W. Green, 1999), para 20-206.

not become the owner of the property in question until he had paid for it. However, in other jurisdictions, including England, it was possible to insist upon a more far-reaching type of retention clause, by which the buyer did not become owner of the goods until he had paid all sums owing to the seller from any transactions between them (often therefore described as 'all sums' retention of title clauses).¹⁰⁴ Again this causes no difficulty of principle in England, but in Scotland was regarded as tantamount to allowing a security to be constituted over moveables without possession. For Smith, the concept was "contrary to the principles of Scots law".¹⁰⁵ Must such clauses be afforded recognition under the rules of international private law when purportedly imposed by a foreign seller? Many of the cases, which came before the courts in quick succession, involved German sellers. But the issue was no less thorny in a UK cross-border setting. In *Emerald Stainless Steel Ltd v South Side Distribution Ltd*¹⁰⁶ there were no averments as to the content of English law, which was therefore presumed to be the same as Scots law. Consequently, Lord Ross found the 'all sums' retention of title clause to be "contrary to principle".¹⁰⁷ Averments as to West German law, under which such clauses were enforceable, were made in *Hammer and Sohne v HWT Realisations Ltd*.¹⁰⁸ The sheriff, however, found that the issue was one for the *lex situs*, which he considered to be Scots law, and thus the clause did not have its intended effect. He appeared also to be mindful of considerations of public policy, referring to *dicta* that "an agreement which was opposed to a fundamental principle of the Law of Scotland founded on considerations of public policy could not be relied upon and insisted upon in the Courts of Scotland".¹⁰⁹ It seemed that the Scottish courts were nearing the point where they might have to declare a clause, routine under English law, unenforceable in Scotland as contrary to public policy. Once more, however, the issue was removed from the sphere of international private law, by means of an apparent change in Scots domestic law, on this occasion effected by the House of Lords. In *Armour v Thyssen*

¹⁰⁴ For a discussion of the different types of Romalpa clauses see M. Sweeney, "The rationalisation of the Romalpa clause within the framework of the Scottish law of property and obligations" 1987 *JR* 62.

¹⁰⁵ T.B. Smith, "Retention of title: Lord Watson's legacy" 1983 *SLT* (News) 105 at 105.

¹⁰⁶ 1982 *SC* 61.

¹⁰⁷ *Ibid.* at 64.

¹⁰⁸ 1985 *SLT* (Sh Ct) 21.

¹⁰⁹ *Ibid.* at 23.

*Edelstahlwerke AG*¹¹⁰ their Lordships took the view that 'all sums' retention of title clauses did not constitute a security over moveables without possession. On a true construction of the contract, there could not be held to have been constituted a type of security unacceptable to Scots law: since property in the goods remained with the seller until all debts due to him had been paid, the buyer had merely possession and not ownership of the steel in question, and had no capacity to grant a security over it.¹¹¹ Since the clauses then became effective domestically, the international private law dimension disappeared. For Miller "[t]he development seems to reflect the claimed interests of commerce leading but the law hesitating in its response because of concern to maintain the integrity of established principles of property".¹¹²

Security over incorporeal moveable property

Commercial interests within the UK may be attracted to the English methods of creating a security over what would be described in Scotland as incorporeal moveable property. In England it may be possible to effect such a security without parting with ownership of the asset, nor intimation being required. By contrast, in Scotland, the main method of creating such a security remains the device of assignation. In this, once again, can be seen the importance attached in Scots law to public transparency, set against the flexible approach to property rights characteristic of the English system. In the field of intellectual property, Guthrie and Orr have sought to argue that an English company lending to a Scots firm could secure the investment by way of an English-style security over intellectual property.¹¹³ They accept, however, that there is dissent as to how reliable such a security would be in the event of the Scottish firm going into receivership or liquidation. Similarly, Sellar has submitted that English forms of security could be used in certain situations in relation to patents, but admits that the position is unclear should the company become insolvent.¹¹⁴ Recent research suggested that practitioners in Scotland would arrange for a particular incorporeal asset of a client to be domiciled in England, so that securities permitted under

¹¹⁰ 1990 SLT 891.

¹¹¹ *Ibid.* per Lord Keith of Kinkel at 894.

¹¹² D.L.C. Miller, *Corporeal Moveables in Scots Law* (W. Green, 1991), p285.

¹¹³ T. Guthrie & A. Orr, "Fixed security rights over intellectual property in Scotland" [1996] 11 *EIPR* 597 at 600-601.

¹¹⁴ D.P. Sellar, "Rights in security over 'Scottish patents' " 1996 *SLPQ* 137.

English law could be utilised.¹¹⁵ However, what is significant, it is submitted, is the commercial response to the situation. The Department of Trade and Industry produced a consultation paper, which argued for the introduction of a new type of fixed security into Scots law that did not result in ownership being transferred to the security-holder.¹¹⁶ Thus far, the recommendations have not borne fruit. However, it would seem that in the future difficult cross-border issues regarding securities over moveables could well be resolved, not by the application of international private law rules, but through internalisation of the conflict whether by changes to Scots domestic law or the imposition of special cross-border rules.

Conclusion

In all three of the areas discussed above, the strength of the commercial concerns bound up in UK common market law, can be seen by the importance of the property law principles which were, however, subordinated to the drive to internalise cross-border conflicts within the UK in this field.

Break downs in internalising rules in UK common market law

Whilst, however, it is submitted that UK common market law is an area which has seen much internalisation of conflicts, such attempts have not always been wholly successful.

Thus it was thought necessary to make all those residing outwith the Court of Session's jurisdiction ineligible to be appointed permanent trustee in a sequestration,¹¹⁷ and there are, it is submitted, good practical reasons for such a rule. There is no equivalent statutory provision in respect of liquidators, although an English liquidator was removed by the court in the case of *Skinner (Hannan's Development and Finance Corporation Ltd)*.¹¹⁸ Lord Stormonth Darling was of the view that "[t]he liquidator is truly the hand of the Court",¹¹⁹ and thus it was

¹¹⁵ Hamilton *et al.*, *Business Finance and Security over Moveable Property*, para 4.27.

¹¹⁶ Department of Trade and Industry, *Security over Moveable Property in Scotland: A Consultation Paper* (1994). See also A.L. Diamond, *A Review of Security Interests in Property* (1989) on the view that the law on security for moveable property should ideally be alike in Scotland and England.

¹¹⁷ Bankruptcy (Scotland) Act 1985, s24(2)(d).

¹¹⁸ (1898) 6 SLT 388

¹¹⁹ *Ibid.* at 388.

preferable that he should be in the court's jurisdiction. Whilst the appointment of an English liquidator has been allowed in some cases,¹²⁰ it was frowned upon, and indeed remains rare to this day.¹²¹

Furthermore, whatever the intention behind the rules, poor draughtsmanship can result in an, unintentional, survival of rules of international private law which are used, along with principles of statutory interpretation to make sense of the legislation. A good example of this is provided by the Insolvency Act 1986. The lack of clarity in the drafting of section 426 has already been noted.¹²² Smart has also raised concerns about the fact that Scottish and English insolvency law, as defined for the purposes of section 426, is limited to legislative measures,¹²³ thus taking common law measures outwith the assistance provisions of section 426.¹²⁴ More generally, however, a Scottish, and an English, winding up are distinguished in the Act, but then different sections refer variously to those sections applying to Scotland, or to property or events in Scotland, or the winding up of a company registered in Scotland, or to winding up by the court in Scotland.¹²⁵ This sloppiness in the drafting of the Act has been the subject of, it is submitted, justified criticism.¹²⁶ One particularly troublesome issue is whether the provisions which are said to apply to Scotland in respect of gratuitous alienations and unfair preferences, could apply to a transaction entered into by an English company being wound up in England, or could cover a transaction entered into outside Scotland by a Scottish company being wound up in Scotland. In respect of the first, there seems agreement that the section in question is not habile to encompass this type of situation,¹²⁷ and this would seem to be the correct approach. The second matter, for this writer, must be resolved through the application of principles of statutory interpretation. This is no easy matter, and

¹²⁰ *The Barberton Development Syndicate* (1898) 25 R 654.

¹²¹ St Clair & Drummond Young, *The Law of Corporate Insolvency in Scotland*, p384.

¹²² See pp81-84 above.

¹²³ Insolvency Act 1986, s426(10).

¹²⁴ Smart, *Cross-Border Insolvency*, pp412-413.

¹²⁵ See D.P. Sellar, "The Insolvency Act 1986 and cross-border winding up: which law applies and where" (1995) 40 *JLSS* 102.

¹²⁶ *Ibid.*; Aird & Jamieson, *The Scots Dimension to Cross-Border Litigation*, para 21.35; E.B. Crawford, "A question of jurisdiction in respect of sequestration: *Reid v Ramlort Ltd*, 1998 GWD 20-1040 and 29-1504" 1999 *JR* 203 at 208.

¹²⁷ Sellar, "The Insolvency Act 1986 and cross-border winding up" at 103; Aird & Jamieson, *The Scots Dimension to Cross-Border Litigation*, para 21.35.

the case of *Reid v Ramlort Ltd*¹²⁸ illustrates the difficulties which arose when a Scottish judicial factor attempted to challenge a transaction as a gratuitous alienation under the Bankruptcy (Scotland) Act 1985, where the recipient was domiciled in England. What is significant is that, despite the obvious desire to internalise the rules referable to these situations, the result of poor legislative drafting was to throw practitioners and academics back onto international private law rules, as well as the rules on the interpretation of statutes, in order to try to make sense of the provisions.¹²⁹

Common market law on a larger scale

The twentieth century saw the development of a much larger economic area, indeed one initially often referred to as the Common Market, and now more properly as the European Union. The effect of European legislation on the international private law rules between Scotland and England will be examined in a later chapter.¹³⁰ However, what is interesting to note in the present context, is the EU concern that the lack of harmonisation of contract laws within the Union may be hampering trade.¹³¹ It has been argued that such economic reasons are being used to justify the introduction of a European contract law.¹³² It is submitted that this merely serves to demonstrate, albeit on a larger scale, the power of commerce, and the ability of business concerns to displace traditional international private law rules within a common market, or trading area.

Internalising conflicts with administrative rules

In a number of areas legislation from the Westminster Parliament has served to remove the need for traditional international private law rules by the introduction of rules for cross-border recognition, enforcement or execution, which are almost akin to administrative procedures.

¹²⁸ 1998 GWD 20-1040 & 29-1504.

¹²⁹ See Crawford, "A question of jurisdiction".

¹³⁰ See Chap. 6.

¹³¹ J. Smits, *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System*, transl. N. Kornet (Intersentia, 2002), pp2-3; "Discussion Paper on the Law of Contract", paper given by H.L. MacQueen at Franco-British Lawyers Society Conference, Glasgow, 19 September 2003.

¹³² Eighth Wilson Lecture, "Harmonisation of Contract Law in Europe" given by H.M. Watt, Edinburgh, 20 November 2003.

Administration of the succession

Unlike continental civilian systems, in which property usually devolves to the heir (or similar) himself, both Scots and English law have a neutral figure interposed, known in Scotland as the executor.¹³³ There are, however, subtle differences such as the power of personal representatives in England to commence gathering the estate and to carry out certain other functions prior to the granting of probate, in cases of testate succession.¹³⁴ Nevertheless, legislation has been used to make the administration of cross-border estates in the UK very much an administrative matter. Thus if the deceased died domiciled in Scotland, the Inventory will show estate in Scotland, followed by estate in England and Wales, and Northern Ireland, respectively. Estate from outwith the UK is noted after the summary for confirmation. The confirmation then granted gives the executor sufficient title to the property. There is no need for resealing,¹³⁵ nor any need to lead evidence in England to prove that the document is a Scottish confirmation.¹³⁶ Similar rules exist in England to allow English personal representatives to deal with Scottish property of the deceased.¹³⁷ In contrast, if the deceased was domiciled in a Commonwealth country or South Africa at the time of his death, resealing will be required before the personal representative may deal with Scottish property of the deceased.¹³⁸ If the deceased was domiciled in a country which is not a member of the Commonwealth or South Africa, then the resealing procedure is not available. In these circumstances, the foreign executor must prove his legal entitlement to deal with any asset of the deceased in Scotland, and confirmation solely in respect of the Scottish asset will have to be obtained.¹³⁹

These rules (which ante-date modern EU-inspired commercially driven harmonisation) can be characterised as representing ever-decreasing circles of convenience. Within the UK, since there is much cross-border movement and cross-border property holding, it is felt that inconvenience should be at a

¹³³ Anton with Beaumont, *Private International Law*, p648; P. North & J.J. Fawcett, *Cheshire and North's Private International Law*, 13th edn. (Butterworths, 1999), p975.

¹³⁴ J.G. Currie, *The Confirmation of Executors in Scotland*, 8th edn., by E.M. Scobbie (W. Green/Sweet & Maxwell, 1995), para 14.25.

¹³⁵ Administration of Estates Act 1971, c.25, s1.

¹³⁶ *Ibid.*, s4(1).

¹³⁷ *Ibid.*, s3.

¹³⁸ Colonial Probates Act 1892 (55 & 56 Vict), c.6.

¹³⁹ Currie, *Confirmation*, paras 14.12-14.13.

minimum: recognition of confirmation-type documentation is automatic and no additional paperwork is required. The nature of inheritance tax as a UK-wide system no doubt eases this approach. Within the Commonwealth, perhaps as a throwback to Empire, or perhaps in recognition of 'ex-pats' dispersed across the former Empire, a concession is made in the availability of the resealing procedure. Outwith these areas, however, the number of estates with a UK dimension is not sufficient, or the clamour is not loud enough, for the Westminster Parliament to introduce an easier method of dealing with the estate of the deceased.¹⁴⁰

Recognition and enforcement of judgments

A somewhat similar pattern can be traced in respect of cross-border recognition and enforcement of judgments. Initially in order to enforce a foreign decree *in personam* in Scotland it was necessary to obtain decree conform.¹⁴¹ However, the Westminster Parliament passed legislation such as the Crown Debts Act 1801,¹⁴² and the Judgments Extension Acts of 1868 and 1882,¹⁴³ which made provision for the recognition and enforcement of decrees within the various jurisdictions of the UK.¹⁴⁴ Such legislation perhaps reflects the sentiments of Lord President Inglis that "I can conceive nothing more anomalous or indecent than that any Court in Great Britain or Ireland should scrutinise the decrees of another Court of the United Kingdom, as if they were those of a foreign country".¹⁴⁵ Later a need developed for wider recognition provisions, encompassing the countries of the Empire: the Administration of Justice Act 1920, Part II.¹⁴⁶ Eventually a scheme was enacted which extended to countries outwith the dominions, in the Foreign Judgments (Reciprocal Enforcement) Act 1933.¹⁴⁷

¹⁴⁰ The UK chose not to ratify Hague Conventions of 1973 and 1989 on succession. Contrast, perhaps, the attitude of European legislators: there are currently proposals (known as "Brussels IV") for an EU Regulation on succession matters.

¹⁴¹ Crawford, *International Private Law*, para 19.10.

¹⁴² 1801 (41 Geo III), c.90.

¹⁴³ Judgments Extension Act 1868 (31 & 32 Vict), c.54; Inferior Courts Judgments Extension Act 1882 (45 & 46 Vict), c.31.

¹⁴⁴ This also gave rise to the subsidiary result that, except in special circumstances, the court will not require an English party to a court action to sist a mandatory (*Lawson's Trs v British Linen Co.* (1874) 1 R 1065), since a Scottish decree for expenses can be enforced in England.

¹⁴⁵ *Wilkie v Cathcart* (1870) 9 M 168 at 171.

¹⁴⁶ 1920 (10 & 11 Geo V), c.81 (it was open to dominions to transfer to the 1933 Act scheme).

¹⁴⁷ 1933 (23 & 24 Geo V), c.13.

These schemes worked by replacing the necessity of obtaining a new decree in Scotland, with administrative-type provisions whereby a foreign judgment could be registered in Scotland. However, although registration is, in certain circumstances, compulsory under the 1933 Act, there remain certain grounds on which the registration can be set aside, such as a lack of jurisdiction in the original court, fraud or a breach of natural justice.¹⁴⁸ Within Europe the harmonisation of rules on jurisdiction in the Brussels Convention, and now Council Regulation 44/2001 ("the Brussels I Regulation"), allowed the inclusion of rules easing the enforcement of judgments within the states of the European Union. Indeed securing the " 'free movement' of judgments"¹⁴⁹ within the (then) EEC was the principal aim of the Brussels Convention, in which aim the securing of agreement on acceptable grounds of jurisdiction was a pre-requisite and concomitant. It is notable that it is the jurisdictional rules which have proved a richer source of litigation. There are, however, limited grounds on which recognition of a judgment may be denied.¹⁵⁰

By contrast, over time, the enforcement of judgments awarding sums of money within the UK had become more or less automatic. The Civil Jurisdiction and Judgments Act 1982, which implemented the Brussels Convention, was also used as an opportunity to codify and to innovate upon the existing rules for enforcing judgments within the UK. The preceding report prepared by the Maxwell Committee demonstrated the Committee's concern that enforcement should not be easier as between the (then) EEC states, than the jurisdictions of the UK, and suggested an "even more 'automatic' " system.¹⁵¹ For civil judgments falling

¹⁴⁸ Ibid., s4 (or, in cases falling under the Administration of Justice Act 1920, justifying refusal of registration).

¹⁴⁹ Jenard Report [1979] OJ C59/1 at 59/7.

¹⁵⁰ These are, in terms of the Brussels I Regulation, Art. 34, failure to serve certain documentation in sufficient time to, or in a manner which allows one to, prepare one's defence; irreconcilability with certain prior judgments; and public policy (on which see, e.g., *Krombach v Bamberski* [2001] All ER (EC) 584; *SA Marie Brizzard et Roger International v William Grant & Sons Ltd (No 2)* 2002 SLT 1365). The Brussels I Regulation, Art. 35 also allows non-recognition if any of the insurance, consumer contracts and exclusive jurisdiction, provisions have not been followed, as well as containing a transitional provision.

¹⁵¹ *Report of the Scottish Committee on Jurisdiction and Enforcement* (1980) ("The Maxwell Report"), para 15.5. It was suggested that "there seems little harm in enforcing the occasional judgment founded on exorbitant jurisdiction ... pronounced in another law district" of the UK (The Maxwell Report, para 15.59), but generally the endorsement of the proposed enforcement procedures seems to have been dependent on suitable jurisdiction rules being arrived at: "We would not find it tolerable that over the wide range of judgments to which our proposals ...

within the ambit of the scheme, there is a straightforward procedure for the cross-border enforcement of money judgments.¹⁵² An interested party obtains a certificate from the court which pronounced the original judgment, and presents this to the appropriate court in the jurisdiction in which the decree is to be enforced. As a general rule registration of the judgment by the latter court will present little difficulty. The grounds of challenge are very limited, the registration only requiring to be set aside if the procedure has not been correctly followed, and there being a discretion to do so if *res judicata* is successfully argued.¹⁵³ A similar scheme for non-money judgments is put in place by Schedule 7 of the Civil Jurisdiction and Judgments Act. The Maxwell Committee pulled back, however, from proposing that English money judgments should be enforceable in Scotland without the need for a judicial or administrative procedure of any kind, and vice versa. The Committee was concerned about the difficulties for sheriff officers in satisfying themselves that a judgment was genuine and felt, in any event, that it should continue to be the case that only a Scottish court may bestow authority on its officers to enforce decrees within its territory.¹⁵⁴ These practical objections are indeed well-founded. However, it is submitted that there is a more fundamental difficulty with such a proposal: it would represent the first step on a road which leads to assimilation, if not the submersion of the Scottish legal system within the English system.

Family law

The ease with which decrees of divorce are recognised within Britain nowadays belies the troubled history of this subject. From the time of the Reformation it was possible in Scotland to obtain a divorce on the grounds of adultery, and divorce on the basis of desertion was permitted by legislation of 1573.¹⁵⁵ By contrast, in England there was no means of divorcing, unless a private Act of Parliament was passed, until the passing of the Matrimonial Causes Act 1857.¹⁵⁶

relate the Scottish courts would be obliged to give automatic recognition or enforcement of for example judgments given in England and Wales on a jurisdiction based solely on the service of a writ on a Scotsman momentarily present in England and Wales" (The Maxwell Report, para 15.5).

¹⁵² Civil Jurisdiction and Judgments Act 1982, c.27, Sch. 6.

¹⁵³ *Ibid.*, Sch. 6, para 10.

¹⁵⁴ The Maxwell Report, para 15.64.

¹⁵⁵ APS, III, 81 (1573).

¹⁵⁶ 1857 (20 & 21 Vict), c.85, ss27 & 31.

Inevitably, English parties sought to take advantage of the more liberal Scottish position. For their part, Scots courts were content to take jurisdiction on the basis of residence,¹⁵⁷ and possibly also if the matrimonial offence was committed in Scotland.¹⁵⁸ Scots law was applied, even although the marriage had taken place in England.¹⁵⁹ However, in *Lolley's Case*¹⁶⁰ an Englishman who had divorced his wife in Scotland, and then remarried in England was convicted of bigamy there. It was stated that English marriages could not be terminated by divorce, and the courts of another country could not purport to do so. It was confirmed in *Shaw v Gould*¹⁶¹ that, unless the parties to the marriage were domiciled in Scotland, a Scots divorce would be held by the English courts to be of no effect.¹⁶² A domicile established by forty days residence (which might be sufficient for the Scots courts to take jurisdiction) would not suffice to establish a Scottish domicile for the purposes of recognition by the English courts.¹⁶³

The situation eased with the wider availability of divorce in English domestic law after 1857, and the acceptance in both Scots and English law of the husband's domicile as the appropriate ground of jurisdiction.¹⁶⁴ In the 1942 divorce action of *Sellars v Sellars*,¹⁶⁵ Lord President Normand noted that:

"We are now less embarrassed in cases of this kind than formerly, because the oblique motive which sometimes induced a pursuer in an action of divorce to

¹⁵⁷ See, for example, *Utterton v Tewsh* (1811) Ferg Cons 23.

¹⁵⁸ See J. Hosack, *A Treatise on the Conflict of Laws of England and Scotland* (William Blackwood and Sons, 1847), pp283-284. This was eventually rejected in the later case of *Stavert v Stavert* (1882) 9 R 519.

¹⁵⁹ There is interesting discussion of the appropriate law to be applied in such cases, and the basis for this, in the judgments of *Edmonstone v Lockhart*; *Butler v Forbes*; *Duntze v Levett* (1816) 19 Fac Coll 139. In *Gordon v Pye* (1815) Ferg Cons 276 at 361, Lord Meadowbank posed the colourful question: "Would a husband in this country be permitted to keep his wife in an iron cage, or beat her with rods the thickness of a Judge's finger, because he had married her in England, where it is said this may be done?".

¹⁶⁰ (1812) Russ & Ry 237.

¹⁶¹ (1868) LR 3 HL 55: this case is discussed in greater detail at pp127-128 below.

¹⁶² See also the English cases of *Conway v Beazley* (1831) 3 Hagg Ecc Rep 639; *Dolphin v Roberts* (1859) 7 HL Cas 39.

¹⁶³ *Shaw v Gould* (1868) LR 3 HL 55. It was accepted that limping marriages might therefore result (*ibid.*, *per* Lord Cranworth at 72).

¹⁶⁴ *Le Mesurier v Le Mesurier* [1895] AC 517; Crawford, *International Private Law*, paras 10.03-10.05.

¹⁶⁵ 1942 SC 206.

assert a Scottish domicile in preference to an English domicile has been removed, since the statutory amendment of the law has for practical purposes brought the law of divorce for desertion in England and in Scotland into close agreement".¹⁶⁶

By the time legislation on the recognition of foreign divorces was contemplated later in the twentieth century, the Law Commissions had concluded that easier recognition of divorces emanating from politically foreign countries, than of British divorces would be "an absurdity".¹⁶⁷ The scheme originally contained in the Recognition of Divorces and Legal Separations Act 1971,¹⁶⁸ and now the Family Law Act 1986,¹⁶⁹ reflects such thinking. A clear distinction is drawn between divorces granted by courts within the British Isles and those outwith Britain. There is automatic recognition in Scotland of divorces in the former category.¹⁷⁰ The grounds on which recognition of a British divorce may be refused are limited: this will be examined in a later chapter in the context of public policy.¹⁷¹ As will later be seen, the advent of the Brussels II Regulation has added an extra layer in terms of the recognition of divorce decrees from EU members, but does not affect the intra-UK internalising rules laid down in the Family Law Act.¹⁷²

The recognition and enforcement of custody decisions within the UK has been placed on an almost administrative footing. Again, this was for a long time a fraught area of the law, with conflicting conclusions as to the appropriate custody arrangements for a child being reached on both sides of the border.¹⁷³ However, the Family Law Act 1986, Part I, provided that custody decrees emanating from

¹⁶⁶ Ibid. at 210.

¹⁶⁷ Law Com. No 34/Scot. Law Com. No 16, *Hague Convention on Recognition of Divorces and Legal Separations* (1970), para 1 of Notes to Clause 1 of draft Bill.

¹⁶⁸ 1971, c.53.

¹⁶⁹ 1986, c.55.

¹⁷⁰ Ibid., s44.

¹⁷¹ See p199 below.

¹⁷² See Chap. 6.

¹⁷³ See pp120-121 below. The first battle was on jurisdiction, the historical basis of which was different in each of the two legal systems (stress being laid in Scotland on the father's domicile, and in England on residence or nationality). It was suggested by one English judge that "Neither court is averse of jurisdiction, and neither court will disclaim the jurisdiction with which it is entrusted" (*Re X's Settlement* [1945] 1 Ch 44 *per* Vaisey J at 47), but it might be doubted whether the latter clause of the *dictum* was more accurate than the first. See also *Re P (GE) (an infant)* [1964] 3 All ER 977 *per* Lord Denning MR at 980-981.

UK courts should be recognised automatically throughout the UK.¹⁷⁴ Furthermore, once such a judgment is registered in another part of the UK, it may be enforced by that court.¹⁷⁵ This has even allowed an English court to enforce an interim order of the Scottish courts, when the action for divorce and custody would ultimately be heard in England.¹⁷⁶ The path of the legislative scheme has not been quite so smooth in Scotland, as is witnessed by the First Division decision of *Woodcock v Woodcock*.¹⁷⁷ The court in this case effectively found that there remained an inherent jurisdiction to refuse to enforce English custody orders despite the provisions of the Family Law Act: a conclusion which seems to go against the clear terms of the legislation.¹⁷⁸

In terms of the status of adopted children, an order which has the effect of an adoption in England and Wales is placed on a par with a Scottish adoption order.¹⁷⁹ Unlike overseas adoption orders, the relevant legislation did not allow for an English adoption order to be annulled or made invalid in Scotland.¹⁸⁰ The consequence of all this is that English adoption orders are automatically recognised in Scotland.¹⁸¹ Recent legislation to allow the implementation of a new Hague Convention in this area does not change the position as between Scotland and England.¹⁸²

Execution of criminal warrants across the border

A special statutory procedure also exists which allows for the enforcement of warrants for apprehension and imprisonment within the UK. Thus a warrant issued in England and Wales (or Northern Ireland) can be executed by a Scottish police constable, or by a constable from the jurisdiction in which the warrant was

¹⁷⁴ Family Law Act 1986, s25.

¹⁷⁵ Ibid., ss25 & 29.

¹⁷⁶ *Re M (Minors) (Custody: Jurisdiction)* [1992] 2 FLR 382.

¹⁷⁷ 1990 SLT 848.

¹⁷⁸ See D.J. Edwards, "A domestic muddle: custody orders in the United Kingdom" (1992) 41 *ICLQ* 444.

¹⁷⁹ Adoption (Scotland) Act 1978, c.28, s38(1).

¹⁸⁰ Ibid., s47. This may be based on a public policy objection (Ibid., s47(2)(a)). The common law rules as to recognition may sometimes still be relevant in respect of adoptions in politically foreign countries (Crawford, *International Private Law*, para 11.15).

¹⁸¹ See too A.B. Wilkinson & K.McK. Norrie, *The Law Relating to Parent and Child in Scotland*, 2nd edn., by K.McK. Norrie (W. Green, 1999), para 5.40.

¹⁸² Adoption (Intercountry Aspects) Act 1999, c.18, in implementation of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

issued.¹⁸³ Similarly, a Scottish warrant may be enforced in England and Wales (or Northern Ireland) by a constable from Scotland, or the jurisdiction in which the warrant is to be executed.¹⁸⁴ There is no need in either circumstance for endorsement of the warrant. There are also provisions allowing for cross-border arrests to be made without a warrant, and detailing the powers available to constables in such a situation.¹⁸⁵ Proposals to sanction the giving of assistance by one police force to another were ultimately abandoned,¹⁸⁶ but it is interesting to note that these proposals arose from a report by the Lothian and Borders, Dumfries and Galloway, Northumbria and Cumbria police forces.¹⁸⁷ Notwithstanding the international nature of modern crime, there is perhaps still an acute awareness of the difficulties when two jurisdictions meet, at the border of those jurisdictions.¹⁸⁸

Recognition of previous convictions

Traditionally, previous convictions from a foreign country are not put before a Scottish criminal court at sentencing, since the behaviour in question may not have been such as to secure a conviction in Scotland and, in any event, it could be difficult to provide the necessary proof of the conviction.¹⁸⁹ The current 'codification' by means of statute of the criminal procedure rules in Scotland does not explicitly allow the prosecutor to refer to English convictions, nor does it define a previous conviction. However, it is provided that a previous conviction can be proved by, *inter alia*, "extract conviction of any crime committed in any part of the United Kingdom".¹⁹⁰ An extract conviction and extract of previous conviction are defined so as to encompass a "document lawfully issued from any court of justice of the United Kingdom as evidence of a conviction".¹⁹¹ This apparent ability to refer to English convictions when sentencing in Scotland is

¹⁸³ Criminal Justice and Public Order Act 1994, c.33, s136(1), (7).

¹⁸⁴ *Ibid.*, s136(2), (7).

¹⁸⁵ *Ibid.*, ss137, 138 & 140.

¹⁸⁶ *Ibid.*, s141 (now repealed).

¹⁸⁷ Annotations by H.H.J. R. May & J.J. McManus to the Criminal Justice and Public Order Act 1994.

¹⁸⁸ Indeed it was remarked during the parliamentary debates that "I am bound to say that I am surprised that we have got to 1994, after nearly 300 years of union between Scotland and England, and have not managed until this Bill to put in place proper arrangements for cross-Border policing" (Lord Fraser of Carmyllie, HL Debs, vol 554, col 504).

¹⁸⁹ Crawford, *International Private Law*, para 20.11.

¹⁹⁰ Criminal Procedure (Scotland) Act 1995, c.46, s285(1), (6).

¹⁹¹ *Ibid.*, s307(1).

borne out by the Crown *Book of Regulations*, which confirms that only previous convictions arising from Scottish or English and Welsh proceedings should be raised by the prosecutor in Scotland.¹⁹² However, these provisions of the Criminal Procedure (Scotland) Act 1995 in effect only deal with the second of the traditional objections to raising foreign previous convictions, that of proof. Thus, in practice, it may be that an English previous conviction is of little assistance to a sentencing judge in Scotland if the substance of the English offence is unclear. Perhaps the most dramatic impact of an English conviction is to be found in the case of *Herd v HMA*.¹⁹³ The accused had committed a number of offences of the same nature in England and Scotland over a period of time. In 1991, he was duly convicted and sentenced by an English court, which imposed a period of six months imprisonment. Having been convicted by a court in Scotland in respect of the Scottish offences, the Scottish Court of Criminal Appeal reduced the resultant sentence of imprisonment to take account of the fact that "if all the offences had taken place in England, they would all have been dealt with in 1991".¹⁹⁴ This case would seem very much to depend on its own facts.

Internalising conflicts by judge-made law?

The examples of the internalising of conflicts discussed thus far have, almost without exception,¹⁹⁵ been carried out by the use of legislation. Is it possible for the internalisation of conflicts to be brought about through case law?

There certainly have been some judicial *dicta* that might be thought to display internalising sentiments. As well as the words of Lord President Inglis in *Wilkie v Cathcart* quoted above,¹⁹⁶ there have been more modern examples. In *Davenport v Corinthian Motor Policies at Lloyds*¹⁹⁷ the pursuer had earlier raised an action for damages, and obtained decree, following a road traffic accident. Having

¹⁹² *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 17, para 794. In the case of *Mawhinney v HMA* 1948 JC 44, previous convictions from England and Ireland were libelled as an aggravation of the offence committed. Successful objection was taken to the inclusion of the Irish conviction, but none to the reference to the English conviction.

¹⁹³ 1993 GWD 24-1503.

¹⁹⁴ *Ibid.*

¹⁹⁵ That exception being the House of Lords decision in *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891.

¹⁹⁶ See p93 above.

¹⁹⁷ 1991 SLT 774.

failed to recover the sum from the defender, she sought to take advantage of a statutory provision, and raised an action against the defender's insurers. She did so in Scotland, where she had successfully raised the first action. The insurers, however, were domiciled in England, and therefore entered a plea of no jurisdiction. The pursuer failed to convince the sheriff and an Extra Division of the Inner House that her claim was one relating to delict in terms of Schedule 4 of the Civil Jurisdiction and Judgments Act 1982. Lord Prosser felt that the general spirit of Schedule 1 of the Act had to be adhered to,

"notwithstanding the fact that the Sched. 4 version is concerned with allocation of jurisdiction within the United Kingdom, where it might be easier to regard jurisdiction based on domicile as less a matter of principle, and the 'special' jurisdictions not as derogations from any such sensible (and perhaps the obviously sensible) basis for jurisdiction".¹⁹⁸

Lord Milligan was even more blunt:

"I add only a note of regret in that there seems to me much to be said for there being jurisdiction to pursue an action such as the present in a court where there was jurisdiction in the delictual action, and rather less to be said against this being so, at least within the United Kingdom".¹⁹⁹

Such regrets, however, did not prevent the Division finding against the pursuer.

*Sokha v Secretary of State for the Home Department*²⁰⁰ was an immigration case, in which the petitioner brought a petition for judicial review to challenge his detention. Although he had no links with Scotland, it appeared that such challenges were far more likely to meet with success in the Scottish courts as opposed to the English courts. The question of *forum non conveniens* was accordingly under consideration. Lord Prosser opined that:

¹⁹⁸ Ibid. at 780-781.

¹⁹⁹ Ibid. at 782.

²⁰⁰ 1992 SLT 1049.

"I am disposed to think that where the alternative jurisdiction is another part of the United Kingdom, rather than a wholly foreign country, and at least where the ground of jurisdiction is a normal one such as domicile, and not an oddity such as arrestment ad fundandam jurisdictionem, a strong preference might indeed be given to the forum chosen by the petitioner".²⁰¹

Ultimately, however, Lord Prosser found that England was the appropriate forum.

*Clements v HMA*²⁰² was a criminal appeal against convictions of being concerned in the supply of drugs contrary to the Misuse of Drugs Act 1971:²⁰³ a UK statute. Whilst the two appellants had been found to be involved in the chain of supply which ended in Scotland, neither had actually carried out any of the relevant acts in Scotland, indeed the position of the second appellant was that he did not know that it was Scotland for which the drugs were bound. It was argued before the Court of Criminal Appeal that the trial court had accordingly had no jurisdiction, however, the appeal met with no success. For Lord Justice-General Hope it was "sufficient to look only to the situation within the United Kingdom and to ask why the courts of one part of it should be denied jurisdiction if the activities of persons elsewhere in the United Kingdom are seen to have their harmful effects in that part".²⁰⁴ He was attracted to the idea that everyone who had taken part in the chain of supply should be prosecuted in the UK jurisdiction to which the chain led.²⁰⁵ It is submitted that the majority opinion in *Clements v HMA* constitutes a very subtle internalising approach to the difficulties which the case, at first glance, presented. Any perceived need for an intention to commit the crime in Scotland under the normal jurisdictional rules²⁰⁶ (which would have caused particular difficulties in respect of the second appellant) was avoided by the characterisation of certain actings within the UK as constituting concern in the

²⁰¹ Ibid. at 1054.

²⁰² 1991 JC 62.

²⁰³ 1971, c.38.

²⁰⁴ Ibid. at 69.

²⁰⁵ Ibid. at 70. He noted that this would avoid a multiplicity of trials, and differences in sentencing, where such groups of offenders were involved. See also *per* Lord Wylie at 76-77; *cf* Lord Coulsfield at 74; and compare also P.W. Ferguson, "Jurisdiction and criminal law in Scotland and England" in R.F. Hunter (ed.), *Justice and Crime* (T&T Clark, 1993), p96.

²⁰⁶ *Clements v HMA, supra, per* Lord Justice-General Hope at 70-71.

supply of drugs to Scotland, irrespective of where those acts took place, and thus a crime under the law of Scotland.

However, it is submitted that *Clements v HMA* is a rare example of the judicial internalisation of conflicts. For the most part, in those few cases where internalising sentiments have been voiced, such as *Davenport* and *Sokha*, they have had no effect on the ultimate judicial decision. The internalising of conflicts within the UK is generally carried out by means of legislation, not judicial *dicta*. This is partially because of the lack of any mechanism to give vent to internalising impulses in the Scottish courts.²⁰⁷ It is significant that the backdrop to *Clements v HMA* was a statute with UK-wide application. A comparison can be drawn with the constitutionalisation of conflicts,²⁰⁸ which could be advanced judicially since judges can call upon general aims and themes of the constitution to give legitimacy to the decision they reach. Furthermore, it has been submitted that economic and commercial concerns have been of vital importance in prompting the passing of internalising legislation. Arguably such pressure is less likely either to be brought to bear on, or to be given effect to, the judiciary in Scotland. Perhaps, indeed, a quite opposite concern will constitute a greater influence on Scottish judges, and that is the (even subconscious) impulse to preserve the separate Scots legal system.

The effect of devolution on the internalising of conflicts

The devolution settlement brings opposing forces to work on the concept of internalising conflicts. On the one hand, it has been submitted that the impetus for the internalising of conflicts has in the past generally come from the legislature rather than the judiciary. Devolution involves the fragmentation of legislative power, with one of the wielders of legislative power (the Scottish Parliament) only having competency within Scotland.²⁰⁹ On a purely technical level this could affect the ability to pass internalising legislation. Furthermore, on a broader level, the existence of a Scottish Parliament gives added legitimacy to

²⁰⁷ The somewhat unusual position of the House of Lords allows for some internalising of conflicts in that forum: reference has already been made to *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891.

²⁰⁸ See Chap. 3.

²⁰⁹ Scotland Act 1998, s29.

notions of Scotland as a separate, and different, entity. There may, therefore, be less acceptance of the view that the UK is a political whole, and that conflicts should be avoided by internalisation. It is interesting to note in this connection the disquiet in Scotland over the use of the Sewel Convention, the method by which the Westminster Parliament passes legislative schemes applying to the UK as a whole even although the subject-matter is one which is devolved to the Scottish Parliament.²¹⁰ In this context, many people have seen use of the Sewel Convention to introduce UK-wide schemes as a failure in itself, or certainly as a procedure which is being over-used: "the United Kingdom Government should not legislate on devolved matters; they are devolved precisely because it is our job to legislate on them";²¹¹ "This is Scotland's Parliament; let Scotland's Parliament legislate".²¹² In the context of the Civil Partnership Bill 2004, it was argued that the Scottish Executive, in supporting a Sewel motion was "ducking controversial moral issues ... People do not send us here to Edinburgh ... so that we can pick and choose what bits of the job we want to do".²¹³ Such sentiments militate against UK-wide schemes, and foster peculiarly Scottish legislative solutions.

However, there are other considerations to be set against the factors outlined above. It has been submitted that much of the internalising of conflicts has taken place in the area of UK common market law. As was stated earlier, from the outset, the White Paper on Devolution made it clear that UK common market law would be reserved to the Westminster Parliament, and this intention has been carried through into the Scotland Act 1998.²¹⁴ Thus the UK Parliament retains the ability to pass UK-wide legislative schemes, incorporating internalising rules, in the subject area which, in the past, it has perhaps been most likely so to do. Furthermore, the fact that UK common market law is reserved, in stark contrast to the many devolved areas of law, may strengthen the conviction of the UK Government that it is appropriate to treat of such commercial law areas on a UK-

²¹⁰ See pp147-149 below.

²¹¹ A. Morgan, SPOR, vol 1, no 8, col 361 (9 June 1999).

²¹² R. Cunningham, SPOR, vol 10, no 4, col 403 (18 January 2001).

²¹³ N. Sturgeon, SPOR, vol 2, no 6, col 8950 (3 June 2004). See also M. Fraser, SPOR, vol 2, no 6, cols 8961-8963 (3 June 2004).

²¹⁴ s29 & Sch. 5.

wide basis, rather than make separate provision for Scotland.²¹⁵ In addition, even within the Scottish Parliament, the dominance of Labour in the current ruling coalition, coupled with that party holding power in the UK Parliament, might lead to some similar legislative objectives. The Mortgage Rights (Scotland) Act 2001²¹⁶ is an example of Scottish legislation which brings Scots law closer to rules of English commercial law in that area.²¹⁷ The existence of administrations dominated by the same political party in both the Scottish and Westminster Parliaments, together with the existence of the Sewel Convention, may allow a pan-UK agenda to be followed on particular policy issues. A Sewel motion was successfully carried in the Holyrood Parliament by the Scottish Executive in respect of the Civil Partnership Bill 2004.²¹⁸ In its current form, the Bill provides for automatic recognition throughout the UK of dissolutions or annulments of a civil partnership²¹⁹ (or legal separations of its partners) which emanate from a UK court,²²⁰ subject to very few exceptions.²²¹ This can be contrasted with the provisions in respect of overseas dissolutions, annulments or legal separations.²²² On balance, therefore, the conclusion is that the advent of devolution may do very little to staunch the flow of legislative internalisation of conflicts within the UK.

²¹⁵ Thus Himsworth questions "whether the ... reservation of certain matters to the Westminster Parliament will, over time, have the effect of persuading the courts that such reservation implies an intended uniformity of provision across the United Kingdom" (Himsworth, "Devolution and the mixed legal system of Scotland", 124).

²¹⁶ 2001, asp 11. Disappointingly, the Act also adopts an English term of art in its short title.

²¹⁷ M. Higgins, "2001 - a base (rate) odyssey" 2001 SLT (News) 273.

²¹⁸ SPOR, vol 2, no 6, cols 8978-8980.

²¹⁹ This being defined as a relationship between two persons of the same sex (Civil Partnership Bill 2004, cl.1(1)).

²²⁰ Ibid., cl.225(2).

²²¹ These are irreconcilability (ibid., cl.225(3)), and the lack of an actual civil partnership in the view of the law of the court asked to recognise the dissolution, annulment or legal separation (ibid., cl.225(4)).

²²² Ibid., cls.226-228. Clause 211 allows for special provision to be made for the recognition of judgments of courts of member states of the EU.

5 APPLICATION OF INTERNATIONAL PRIVATE LAW RULES WITHIN THE UNITED KINGDOM

Purpose of chapter

Having examined the extent to which there is any constitutionalising, or internalising, of the conflicts arising as between Scotland and England, the present chapter turns to the situations in which traditional international private law rules are applied. Lasok and Stone posit that:

"the political-legal status of a territory, although relevant in certain respects, such as state and diplomatic immunity and treaty-making power, is not the sole factor determining the need for conflict rules. What matters is the existence of an autonomous legal order pertaining to a territory ... as in the case of Scotland".¹

However, it is submitted that it is the political-legal status of Scotland (as set out in the Acts of Union) which has allowed for the existence of an autonomous legal order.

In this chapter, it will be sought to identify the areas in which rules of jurisdiction, choice of law, and on the recognition of judgments, are applied in the Scottish courts indiscriminately, i.e., making no differentiation as between England or a politically foreign jurisdiction. The reasons for such use of international private law rules will be analysed, with one eye always on the desirability, or otherwise, of reform. The effect of devolution on Scottish conflict rules, and on the reliance upon such rules for resolving intra-UK conflicts, will also be examined.

¹ D. Lasok & P.A. Stone, *Conflict of Laws in the European Community* (Professional Books, 1987), p4.

Proof of English law

The status of English law in Scots courts

English law, like any foreign law, is a matter of fact, which must be proved in the Scottish courts if it is to be relied upon. This flows from the fact that: "the judicatories of Scotland and England are as independent of each other, within their respective territories, as if they were the judicatories of two foreign states".² Indeed, it is submitted that the treatment of English law as any other foreign law is a cornerstone of the Scottish legal system preserved by the Acts of Union. If Scots law is to remain a separate system, it is crucial that English law is seen to be different, and thus requiring of explication by English practitioners. It is sometimes argued, however, that while this is the general rule, there are certain limited exceptions to it.³ It is submitted that, as will become clear, on closer analysis the examples commonly given are not true exceptions to the rule.

Firstly, English charity law is often said to be within judicial knowledge in Scotland.⁴ This can be traced back to the English House of Lords decision in *Commissioners for Special Purposes of Income Tax v Pemsel*,⁵ in which the meaning of the word 'charitable' in the context of the Income Tax Act 1842⁶ was in issue. Lord Herschell recognised that, in a UK statute, it was not acceptable simply to apply English law.⁷ However, both he and Lord Watson were of the view that Scots and English law on this point were very similar.⁸ One could be critical of this conclusion, as demonstrating too ready a willingness on the part of the House of Lords to find Scots and English law to be the same. The words of Lord Macnaghten (who was also of the opinion that Scots and English law in this matter were broadly similar) are particularly disturbing:

² *Orr Ewing & c v Orr Ewing's Trs* (1884) 11 R 600 *per* Lord President Inglis at 629. The same position is adopted in England towards Scots law (T. Hodgkinson, *Expert Evidence: Law and Practice* (Sweet & Maxwell, 1990), p294, and note, for example, the giving of evidence on the content of Scots law in *Shaw v Gould* (1868) LR 3 HL 55).

³ I.D. Macphail, *Evidence: A Revised Version of a Research Paper on the Law of Evidence in Scotland* (The Law Society of Scotland, 1987), paras 2.04-2.05; F. Raitt, *Evidence*, 3rd edn. (W.Green/Sweet & Maxwell, 2001), para 4.08; M.L. Ross with J. Chalmers, *Walker and Walker: The Law of Evidence in Scotland*, 2nd edn. (T&T Clark, 2000), para 16.5.1.

⁴ Macphail, *Evidence*, para 2.04; Raitt, *Evidence*, para 4.08; Ross with Chalmers, *Walker and Walker*, para 16.5.1.

⁵ [1891] AC 531.

⁶ 1842 (5 & 6 Vict), c.35.

⁷ [1891] AC 531 at 570-571.

⁸ *Ibid.* at 573 & 563; *cf* Lord Chancellor Halsbury at 548-550.

"A simpler plan is now recommended. Though the words have a definite legal meaning in England, you must not, it is now said, look at that meaning unless it be in vogue north of the Tweed. You must put out the light you have, unless it penetrates directly to the furthest part of the room".⁹

However, the reason for being critical of the judgment is because the case may seem to be another historical example of the House of Lords introducing English legal concepts into Scots law.¹⁰ These then become a part (however ill-fitting) of Scots law. Thus as Lord Normand later recognised:

"their Lordships ... are technically not bound by the decisions of the English courts in the matter of charities, and it is not improper for them to discuss or criticise English decisions. The Court of Session is not reduced to the rôle of an obsequious follower of decisions either of a Judge of first instance or of the Court of Appeal, though it is only good sense to pay special regard and respect to the decisions and opinions pronounced by the English Courts on a branch of the law built up by English Judges, and familiar to them by long training and experience".¹¹

It is submitted that Lord Reid correctly states the position in giving judgment in the same case:

"It has commonly been accepted since *Pemsel's* case that the words charity and charitable in income tax legislation must be interpreted according to English law, but I do not think that that is a full or accurate statement of the position. In my judgment, holding that those words must be interpreted according to English law must mean that it is to be held that Parliament enacted that on that matter the law of England should also become the law of Scotland, and it must follow that Parliament must be held to have placed on the Courts of Scotland

⁹ Ibid. at 580. Lord Morris concurred with Lord Macnaghten.

¹⁰ See pp61-63 above.

¹¹ *Inland Revenue v Glasgow Police Athletic Association* 1953 SC (HL) 13 at 22.

the duty of administering what was formerly only the law of England but what has been made by Act of Parliament the law of both countries".¹²

The definition of charity for the purposes of the law relating to income tax is now set out in the Income and Corporation Taxes Act 1988,¹³ a statute which applies *inter alia* to both England and Scotland. Accordingly, the Scottish courts are simply being asked to interpret a UK statutory provision, not apply English law. In looking to English cases to assist in that interpretation, the courts are sensibly drawing guidance from the source of the definition, but that does not mean that the English law of charities is being applied, nor that it must fall within judicial knowledge. A modern parallel might be the ability of judges to look at human rights cases from other jurisdictions to assist in interpreting the European Convention on Human Rights, or cases emanating from other EU members in interpreting EU legislation.¹⁴

Similarly, whilst it is often said that the English law of treason is within judicial knowledge,¹⁵ it is submitted that this is another example of English concepts being imported into Scots law, on this occasion by legislation in the form of the Treason Act 1708.¹⁶ Accordingly, whatever its initial source, this is now merely a part of Scots law.

Scottish judges are also said to take judicial notice of English substantive and procedural criminal law when sitting in Courts Martial appeals.¹⁷ However, it is submitted that in such appeals judges are simply applying a particular code, which applies in what is effectively an internal military situation. In practice this code is derived from English law and procedure, but it is perhaps an exaggeration to say that English law is within judicial knowledge in this context.

¹² Ibid. at 29. *Jackson's Trs v Inland Revenue* 1926 SC 579 is an example of an earlier case displaying the attitude which Lord Reid here criticised.

¹³ 1988, c.1, s506(1). Certain statutes provide that "charitable" is to be construed as it is in the income tax legislation: Consumer Credit Act 1974, c.39, s189; Local Government (Financial Provisions, etc.) (Scotland) Act 1962, c.9, s4(10)(a).

¹⁴ *Roy v M.R. Pearlman Limited* 2000 SLT 727 per Lord Hamilton at 734.

¹⁵ Macphail, *Evidence*, para S2.04.

¹⁶ 1708 (7 Anne), c.21, s7.

¹⁷ Macphail, *Evidence*, para 2.05; Raitt, *Evidence*, para 4.08.

The last example commonly offered as an exception to the general rule that English law is within judicial knowledge, is English maintenance law in the context of certain legislation on maintenance orders.¹⁸ This is moving into the territory of international private law. A Scottish court is empowered to take notice of the law of another part of the UK when varying the rate of periodical payments set down in a judgment from that part which has been registered in Scotland.¹⁹ The varied payment may not exceed the maximum in the jurisdiction whence the judgment was issued.²⁰ It is therefore submitted that the provision only allows the court to refer to the current maximum rates of payment, and there is *obiter dicta* to this effect in *Thompson v Thompson*.²¹ The Maintenance Orders (Reciprocal Enforcement) Act 1972 allows the application of the law in force in a reciprocating country relating to sufficiency of evidence.²² However, this clearly need not be confined to English law and, in any event, would seem simply to be a choice of law provision.²³ Once again, therefore, it is submitted that these are not in reality examples of English law being a special case, and thus admitting of exceptions to the general rule that foreign law is not within judicial knowledge.

Introduction of English law into a Scots action

It is generally accepted that English law, like any foreign law, must be raised by one of the parties to the action in the pleadings if it is to be relied upon. If not, it seems that the case will proceed on the basis that Scots law applies.²⁴ Furthermore, even if a foreign law is said to apply, in the absence of averments as to the content of that law, it would appear that it will be presumed to be the same as Scots law.²⁵ Accordingly, the introduction of English, or any other, law into an

¹⁸ Macphail, *Evidence*, para 2.05.

¹⁹ Maintenance Orders Act 1950 (14 Geo VI), c.37, s22.

²⁰ *Ibid.*

²¹ (1953) 69 Sh Ct Rep 193; in which case evidence was also led from an expert as to the powers of the English courts (*cf Cowan v Cowan* 1952 SLT (Sh Ct) 8).

²² 1972, c.18, s7(7)(c).

²³ *cf Killen v Killen* 1981 SLT (Sh Ct) 77.

²⁴ *Pryde v Proctor and Gamble Limited* 1971 SLT (Notes) 18; Anton with Beaumont, *Private International Law*, pp411 &775; Macphail, *Evidence*, para 2.08.

²⁵ See *Rodden v Whatlings Limited* 1961 SC 132; *Bonnor v Balfour Kilpatrick Ltd* 1975 SLT (Notes) 3, although compare *MacKinnon v Iberia Shipping Co.* 1955 SC 20 *per* Lord Carmont at 33 and Anton with Beaumont, *Private International Law*, pp774-775.

action becomes very much a tactical decision to be taken by the pleaders and their clients.²⁶

In this, Scots law adopts a similar position to English law, where the introduction of foreign law can be described as voluntary.²⁷ Mandatory introduction of foreign law into an action is usually associated with the civilian systems, although in truth there is a certain amount of variation between these.²⁸ Within Canada, however, it has been argued that a court is constitutionally obliged to apply the true content of the law of a sister province where that would govern the matter.²⁹

It has already been argued that the constitutionalising of conflicts within the UK is not desirable,³⁰ and thus that basis for such a Canadian rule would not recommend itself. However, it is submitted that there are other powerful reasons why the Scots courts should adopt a mandatory approach to the introduction of any foreign law into an action, including English law. Choice of law rules allow the application of the rules of a legal system closely connected to the factual matters from which the case arises, and this seems desirable.³¹ Concern has been expressed in France that "French choice-of-law will remain a pure theoretical masterpiece, as long as courts are not ready to consider it as an integral part of the French law for purposes of application".³² Scottish international private law rules are part of Scots law, and it seems inappropriate that they may be ignored on the basis of the two presumptions outlined at the beginning of this section. Arguably, judges could, and should, raise the question of whether a foreign law applies *ex proprio motu*, since the content of Scots conflict rules is within judicial knowledge. Scotland is a mixed legal system, and one which has long been

²⁶ As Fentiman notes, this may amount to a choice of law in favour of the *lex fori* (R. Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998), pp19, 22, 60-61 & 95).

²⁷ See Fentiman, *Foreign Law*; S. Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford University Press, 2004).

²⁸ Fentiman, *Foreign Law*, Chap.9; T.C. Hartley, "Pleading and proof of foreign law: the major European systems compared" (1996) 45 *ICLQ* 271; Geeroms, *Foreign Law*.

²⁹ Castel, *Introduction to Conflict of Laws*, p58; although see Tetley, "On-going saga", 40-41, discussing the case of *Belliveau v Royal Bank of Canada* (2000) 224 NBR (2d) 354.

³⁰ See Chap. 3.

³¹ As Fentiman observes "a case's foreign elements are important because they allow courts to arrive at results which reflect a case's true nature" (Fentiman, *Foreign Law*, p308).

³² Geeroms, *Foreign Law*, para 2.57; and see Fentiman: "the obligation to introduce foreign law connotes more than a duty to rely upon foreign law. It implies a requirement that a case should be fought as a conflicts case" (Fentiman, *Foreign Law*, p70).

receptive to other systems of law. It is not theoretically problematic to place a duty upon the judge within an adversarial system, to introduce the question of applicability of foreign law, where *prima facie* indicated by choice of law rules.³³ The judge has available as a sanction the power to dismiss cases which ignore a conflicts issue.³⁴ The move towards greater judicial case management in certain types of action³⁵ would also lend itself to the exercise of such a judicial duty.

Methods of proof of English law

The content of English law, like that of any other foreign law, can be admitted by the opposing party,³⁶ or can be proved by leading an expert witness,³⁷ or remitting to a foreign lawyer.³⁸ English statute law cannot simply be interpreted by a Scots court as if it were a UK statute.³⁹ There is legislation allowing a court within the Crown's dominions to give its opinion on the application of its law to certain facts,⁴⁰ and arguably the terms of the statute would not prevent it applying as between the jurisdictions of the UK. There is evidence of its use in just such a fashion.⁴¹ The usefulness of such a provision should not be overlooked. Fentiman has described the Act as requiring "effectively, a mini-trial abroad",⁴² but it might be questioned whether the expense of carrying out such an exercise in England is necessarily much more costly or time-consuming than hearing evidence from English experts in the Scottish courts. In certain cases, this may be a worthwhile method of proceeding, and is at least an option which should not be rejected out of hand.

³³ Fentiman, *Foreign Law*, pp63 & 267; Geeroms, *Foreign Law*, paras 2.121-2.126. Nor is the mandatory introduction of foreign law incompatible with that law being a factual matter which requires to be proved (Fentiman, *Foreign Law*, pp267-268).

³⁴ See Fentiman, *Foreign Law*, p68.

³⁵ For example commercial actions in the Court of Session.

³⁶ Anton with Beaumont, *Private International Law*, p776; Crawford, *International Private Law*, para 4.12.

³⁷ Ross with Chalmers, *Walker and Walker*, para 16.5.4. See, for example, *McKeand v Dorian* 2000 GWD 15-578.

³⁸ Ross with Chalmers, *Walker and Walker*, para 16.5.3.

³⁹ *Higgins v Ewing's Trs* 1925 SLT 329.

⁴⁰ British Law Ascertainment Act 1859 (22 & 23 Vict), c.63.

⁴¹ *Earl of Eglinton v Lamb* (1867) 15 LT 657 (case to be stated for the opinion of Scots court); *Duncan v Lawson* (1889) 41 ChD 394 (a remit from the Court of Session); a reference to the Scottish courts was also suggested as a possible course in *Re Stirling* [1908] 2 Ch 344.

⁴² Fentiman, *Foreign Law*, p239.

Are there grounds for altering the rules on the methods of proving English law in Scotland? It has been argued that the content of foreign law is now so easily ascertainable that it should be possible in Scots courts for parties to research foreign law and place the relevant information before a judge, thus dispensing with the need to lead expert evidence.⁴³ It may be thought that this reasoning is particularly valid with respect to English law. Scottish lawyers have often in the past had to make reference to English legal writing,⁴⁴ and often still rely on English cases which are effectively authoritative in Scotland.⁴⁵ However, it is submitted that this would be a path fraught with danger. There would be practical difficulties with legal aid rules,⁴⁶ and the professional indemnity insurance of counsel and agents, although neither of these should be insurmountable. The more fundamental objection is that whilst English law might be similar to Scots law and accessible to Scots lawyers in some areas, in others it is quite different. The potential for misunderstanding a system in which the Scots lawyer has not been trained, and consequently misapplying the law, is great. As Dewar Gibb has pointed out:

"Each system has an idiom and the genius of a language. Just as a language is best expounded, not by the ignorant foreigner who has never studied it but by a person steeped in it for a lifetime, so is it with the law of a country".⁴⁷

More recently, Lord Reed has perceptively noted that:

"a legal system is more than an accumulation of solutions to problems: even if two legal systems provided identical solutions to all the most common

⁴³ Macphail, *Evidence*, para 2.08, commenting on proposals from the Canadian Law Reform Commission.

⁴⁴ Although over the years there has been a welcome increase in the quantity of legal texts dealing specifically with aspects of Scots law: see C. McDiarmid, "Scots law: the turning of the tide" 1999 *JR* 156 at 165-166.

⁴⁵ For example, *Carlill v Carbolic Smoke Ball Co.* [1893] 1 QB 256; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Associated Picture Houses v Wednesbury Corporation* [1948] 1 KB 233; and see McDiarmid, "Scots law: the turning of the tide", 161-163.

⁴⁶ See, for example, The Scottish Legal Aid Board, *The Scottish Legal Aid Handbook*, 6th edn. (Scottish Legal Aid Board, 2001), pA:17, para 1.11.8.

⁴⁷ Gibb, *Law from over the Border*, p2.

problems of life, they could nevertheless remain profoundly foreign to each other's practitioners".⁴⁸

A slightly different response has been adopted in England. Generally, foreign law is a matter of fact, which requires to be proved. However, if a point of foreign law has been the subject of a decision by a higher civil or criminal court, the report of that case provides proof of foreign law in subsequent civil cases, unless disputed by a party to the action.⁴⁹ Macphail has argued that such a provision could usefully be introduced into Scots law.⁵⁰ However, this is to make the (unrealistic) assumption that foreign law is static and unchanging. If a foreign law is to be applied, it is desirable that that law, in its current form, is accurately applied.⁵¹ Otherwise, the rule becomes an artificial presumption, somewhat ridiculously allowing historic rules, which may no longer be the law, to be relied upon in the absence of challenge by the opposing party.

If Scots lawyers are required to prove English law by the leading of evidence, are there any grounds for allowing English lawyers to appear in Scots courts in a representative capacity to deal with such points? In *Hoekstra v HMA*⁵² both Dutch and Scots advocates were allowed to appear for the appellants. It is also understood that English barristers have attempted to assert rights of audience before the Inner House, in an appeal from an Employment Tribunal. It is submitted that allowing English counsel to appear in Scots courts would have serious, and damaging, consequences. It would be a short step to allowing barristers to argue points thought to be common to the whole of the UK. Larger corporations, or English-based parties, may simply instruct English counsel, thereby putting Scots practices at risk. There is also a risk that points of

⁴⁸ Lord Reed, "The constitutionalisation of private law", 69.

⁴⁹ Civil Evidence Act 1972, c.30, s4. This is not possible in Scotland at common law (*Killen v Killen* 1981 SLT (Sh Ct) 77 at 82).

⁵⁰ Macphail, *Evidence*, para 2.07.

⁵¹ Insofar as any application of foreign law can be described as accurate. Fentiman makes the point well that "We need not expect the proof of foreign law to produce a correct result, any more than the process of adjudication ever does so. But we may insist that the process be authentic, capturing the assumptions, reasoning and idiom of the foreign forum" (Fentiman, *Foreign Law*, p20).

⁵² (28 January 2000, unreported).

difference between the two systems become lost, as the Scots system becomes swamped by the personnel of our larger neighbour.

It is therefore submitted that there is no reason why, in principle, English law should be any easier to prove than the laws of a politically foreign jurisdiction. The possibility of agreeing, in effect, to proceed upon a version of the law which may be out of date (as with the English Civil Evidence Act 1972), seems to undermine the goal of reaching a conclusion on the foreign law, such as would have been arrived at by a court of that foreign country. Nor, for the reasons outlined above, would it be of benefit to allow English lawyers to appear in a Scots court and present cases in which a question of English law arises (as opposed to the unobjectionable practice of leading such lawyers as expert witnesses in the course of a proof). In appropriate cases, however, the procedure under the British Law Ascertainment Act 1859 might be worth adopting, and thus its potential in intra-UK cases should not be forgotten by practitioners.

One quirk in the system is, however, provided by the position of the House of Lords. The laws of all parts of the UK are deemed to be within their Lordships' judicial knowledge.⁵³ Hence, what has been a matter of fact and proof below, may become a matter of law and argument above. Moreover, if evidence of English law has been led in the Scottish courts, the House of Lords may rely on their own knowledge of English law to find the opinion evidence mistaken.⁵⁴ The extent to which the ability of the House of Lords to call upon English and Scottish law has resulted in the introduction of English concepts into Scots law has already been noted.⁵⁵

The connecting factor in matters of status

The connecting factor may provide the basis on which a court takes jurisdiction in areas such as divorce, or dictate which law is to be applied, for example, to questions of capacity to marry. Despite increasing encroachment by the use of

⁵³ Presumably this would also be the case in the Supreme Court proposed by the current government (see pp63-64 above).

⁵⁴ *Macpherson v Macpherson* (1852) 1 Macq. 243 *per* Lord Chancellor St. Leonards at 248.

⁵⁵ See pp61-63 above.

concepts such as habitual residence,⁵⁶ domicile remains perhaps the most important connecting factor in matters of status within both jurisdictions of the UK.⁵⁷ Traditionally, however, domicile has been seen as a badge of a Common Law system, whereas the use of nationality as a connecting factor is more closely linked to civil law countries.⁵⁸ Why then has the former been favoured in Scotland? Why, indeed, is a connecting factor required to link persons to Scotland, rather than to the UK?

The answers to these questions can be traced back to the Acts of Union. As has been seen, the system of the Acts was to establish one nation state (Britain), but to preserve two legal systems. This constitutional set-up was already in place when the use of nationality as a connecting factor gained significant ground.⁵⁹ Accordingly nationality could not operate as an adequate connecting factor in the UK, since this would not indicate which system of private law should govern, for example, issues of capacity to marry, or choice of law in succession. Instead a connecting factor was required to link persons to a particular legal system within Britain, and the concept of domicile could fulfil this rôle. Thus whilst shorthand references are often made to a Scots domicile, it must be remembered that this domicile does not connect a person to Scotland *per se*, but rather to the Scots legal system. Even proponents of the use of nationality as a connecting factor, such as Mancini, recognised that domicile was more appropriate where a state consisted of a number of legal systems.⁶⁰

The nature of domicile in both England and Scotland, with the persistence of the domicile of origin, is often said to spring from the position of Britain as the headquarters of an Empire, and the consequent desire to preserve ties between the

⁵⁶ See, for example, Child Abduction and Custody Act 1985, c.60; the Brussels II Regulation. Ordinary residence can also be of relevance. See P. North, *Private International Law Problems in Common Law Jurisdictions* (Martinus Nijhoff, 1993), pp8-9.

⁵⁷ It remains, for example, of significance in questions of choice of law in succession, capacity to marry, and status generally.

⁵⁸ K.H. Nadelmann, "Mancini's nationality rule and non-unified legal systems: nationality versus domicile" in K.H. Nadelmann, *Conflict of Laws: International and Interstate* (Martinus Nijhoff, 1972), p49 at 49.

⁵⁹ Crawford, *International Private Law*, para 6.28.

⁶⁰ Nadelmann, "Mancini's nationality rule and non-unified systems", p49.

Empire's servants and their homeland.⁶¹ As has already been noted, the British Empire was an enterprise in which Scots are now recognised to have played a significant part,⁶² and thus this rationale is as important for Scotland, as for England, in the development of domicile rules. Both before, and after, she gained access to a British Empire, Scotland saw periods of mass emigration.⁶³ Again, this may tend to buttress a concept of domicile which retains links with its peoples, however far they may have travelled.⁶⁴ A contrast can be made with the United States, which over the centuries has been a receiver of immigrants, and thus logically favours domicile rules which lay emphasis on easy changes of domicile.⁶⁵ In fact, cases now regarded in England and Scotland as seminal on the continuance of the domicile of origin,⁶⁶ and the revival of the domicile of origin,⁶⁷ were actually Scottish cases heard by the House of Lords on appeal.

It has been suggested in the past that it may be easier for a person to change his domicile as between the jurisdictions of the UK, than between Scotland and a politically foreign country. Is this so? The connecting factor of nationality is "state-centred":⁶⁸ nationality is in the gift of a state, and will generally only be gained or lost as a result of application by the citizen to the state. Political changes to the state may affect a person's nationality,⁶⁹ but less commonly his domicile. Indeed domicile, by contrast, is "person-centred".⁷⁰ It has been well-described as a person's " 'legal' centre of gravity".⁷¹ Based as it is on a number of factors concerning a person's residence, intention and state of mind, it is open to a person to change his domicile at his own hand. It is not dependent on acceptance by a state. At their most general level, the rules of domicile are designed to

⁶¹ J.G. Collier, *Conflict of Laws*, 3rd edn. (Cambridge University Press, 2001) pp51-52; R.H. Graveson, "The law of domicile in the twentieth century" in R.H. Graveson, *Comparative Conflict of Laws* (North-Holland, 1977), Vol I, p160 at 160.

⁶² See pp76-77 above.

⁶³ See, for example, Devine, *Scotland's Empire*, Chaps 1, 5 & 6.

⁶⁴ C. Robertson, "International succession law: a co-ordinated approach?" (1989) 34 *JLSS* 377 at 379.

⁶⁵ *Ibid.*; Collier, *Conflict of Laws*, p51.

⁶⁶ *Bell v Kennedy* (1868) 6 M (HL) 69.

⁶⁷ *Udny v Udny* (1869) 7 M (HL) 89.

⁶⁸ Anton with Beaumont, *Private International Law*, p123.

⁶⁹ See *Re O'Keefe* [1940] Ch 124, in which a British national who had a domicile of origin in the south of Ireland (and had acquired an Italian domicile of choice) was held to be a national of the new Republic of Ireland, on her death.

⁷⁰ Anton with Beaumont, *Private International Law*, p123.

⁷¹ K.McK. Norrie, "Personal law: concept and development" 1983 *SLT* (News) 53 at 53.

identify the legal system, rather than the political state, with which the *propositus* is most closely linked. It is therefore submitted that, in theory, the fact that the competing legal systems in a question of domicile are part of one political country should make no difference to the application of the rules on domicile. Domicile eschews the political influence of the state implicit in a nationality-based connecting factor. The factors which are taken into account in determining whether a person has altered his domicile are not tied inseparably to notions of political state. Whilst it may in the past have been easier to move from Scotland to England, than to a country outwith the UK,⁷² in principle, this touches only on the residence component of domicile, which factually and legally is easily changed within one sovereign state. Furthermore, such practical ease of movement is not available only within a politically unified nation. The existence in the past of a large Empire, together with certain government encouragement of migration, allowed inexpensive movement to English-speaking countries, where newly-arrived immigrants remained under the protection of the British Crown. In modern times, the European Union has introduced measures to allow workers to move within Europe, with certain minimum rights guaranteed. In theory then, it should be no easier to change domicile as between Scotland and England, than Scotland and other countries.

It is submitted that this is supported by the case law. In the case of *Liverpool Royal Infirmary v Ramsay*⁷³ a Scotsman lived in Liverpool for almost forty years, and showed no desire to return to Scotland. However, it was found that his move to Liverpool was motivated by a wish to obtain support from his family in Liverpool, and that his long residence there was not coupled with the requisite intent to effect a change of his Scottish domicile. There is no suggestion in the

⁷² See the comments of Sir Jocelyn Simon P in the English case of *Henderson v Henderson* [1967] P 77 at 79-80: "England and Scotland have distinctive legal systems. But the high roads between the two countries are not barred by any frontier; there is merely a border to be crossed. A common tongue is spoken on either side. Many English people go to work in Scotland and even more Scotsmen come to work in England. They settle down in a new home near the place where they are working. Intermarriage is frequent. But most people, and not least Scotsmen, retain a pride of ancestry and a sentiment of attachment to the land of their fathers. It is often difficult to determine whether they have settled in their new place of residence with the intention of making it their permanent home; or whether they intend to return at some time to live permanently in their country of origin; or whether, thirdly, the residence is quite indeterminate in character, no clear intention as to ultimate permanent residence being formed".

⁷³ 1930 SC (HL) 83.

judgments of a less stringent test for acquisition of a new domicile within the UK.⁷⁴ The more recent cross-border case of *Reddington v Riach's Executor*⁷⁵ may have found there to be a loss of Scottish domicile, but again there is no indication that the judge directed himself to a different test because the issue was whether the *propositus* had a Scottish or English domicile.⁷⁶ Furthermore, as Lord Sands once observed "[r]esidence in England, or other relations with England, will never establish a domicile in Scotland".⁷⁷

Some nations which make use of domicile as a connecting factor do appear to allow easier alteration of domicile within a country, but this effect has been achieved by legislation. In New Zealand there are rules to assign domicile when a person arrives in the country with a clear intention to stay in New Zealand, but is as yet uncertain as to the part of the country in which he will settle.⁷⁸ Such legislation, however, only affects new arrivals to the country. Australian legislation on this topic is more far-reaching. Anyone who is "domiciled in a union, but is not ... domiciled in any particular one of the countries that together form the union", will be assigned the domicile of the country "with which he has for the time being the closest connection".⁷⁹ It might be speculated that this legislation makes it easier to assign to an immigrant the domicile of one of the Australian states, even if it is not yet clear in which state he will ultimately settle. Perhaps the legislation reflects Australia's status, like the United States, as a receiver of immigrants. In the past, the Law Commissions have recommended legislation on the Australian model, although alert to the very real danger that a domicile may be allocated which does not spring from particularly close ties with

⁷⁴ See also *Sellars v Sellars* 1942 SC 206, in which an English domiciliary posted in Scotland during the Second World War was unable to establish the acquisition of a Scottish domicile of choice.

⁷⁵ 2002 SLT 537.

⁷⁶ It might, however, be thought after comparison of *Liverpool Royal Infirmary v Ramsay* 1930 SC (HL) 83; and *Reddington v Riach's Executor* 2002 SLT 537, that the task of dislodging the domicile of origin, whatever it be, has become easier in modern times.

⁷⁷ *Grant v Grant* 1931 SC 238 at 254.

⁷⁸ Law Com. No 168/Scot. Law Com. No 107, *Private International Law: the Law of Domicile* (Cm 200) (1987), para 7.6. Note, for historical interest, what was effectively the allocation of a domicile within the UK to refugees in the Guardianship (Refugee Children) Act 1944 (7 & 8 Geo VI), c.8, s2.

⁷⁹ Domicile Act 1982, s11.

the jurisdiction in question.⁸⁰ Looked at solely in terms of alteration of domicile as between the jurisdictions of the UK, it is submitted that there is no good theoretical reason for the introduction of such legislation. The concept of domicile is sufficiently subtle, and flexible, to deal with movement of persons between Scotland and England.

However, modern times have seen a weakening of the claims of both domicile⁸¹ and nationality⁸² to be pre-eminent connecting factors within the law of persons. There is now a range of connecting factors, mostly variations on residence, for example, habitual residence or ordinary residence. Poland once had two different connecting factors, one for conflicts with other countries and one for conflicts within Poland.⁸³ Scots law has never embraced such an approach. Whilst it now recognises a number of possible connecting factors, the applicability of these is determined on a topical, rather than geographical, basis. More recently, however, the possibility of different connecting factors being used within the UK, from those relevant to foreign states, has arisen. Conventions and legislation from the European Union may prescribe a connecting factor between members states, but the UK may be free to choose whether to apply the European rules as between its constituent parts. This issue will be examined in a later chapter.⁸⁴

It would also be possible for different connecting factors to be adopted by the Scots and English legal systems respectively in a particular area. Were this to occur, would it be desirable? It is instructive to look at jurisdiction in custody matters prior to the passing of the Family Law Act 1986. Scottish courts would assume jurisdiction on the basis of the child's domicile as a matter of status, whereas English courts were prepared to take jurisdiction if the child was

⁸⁰ Law Com. No 168/Scot. Law Com. No 107, *Private International Law: the Law of Domicile* (Cm 200) (1987), paras 7.8 & 7.4.

⁸¹ See, for example, North & Fawcett, *Cheshire and North's Private International Law*, pp160-162; Law Commission/Scottish Law Commission, *Custody of Children - Jurisdiction and Enforcement within the United Kingdom* (Working Paper No 68/Memorandum No 23) (1976), paras 3.44-3.52.

⁸² Nadelmann, "Mancini's nationality rule and non-unified systems", p81; Th.M.de Boer & R. Kotting, "Private international law" in J.M.J. Chorus *et al.*, *Introduction to Dutch Law*, 3rd revised edn. (Kluwer Law International, 1999), p265 at 276.

⁸³ Nadelmann, "Mancini's nationality rule and non-unified systems", p74; Lasok & Stone, *Conflict of Laws in the European Community*, pp126-127.

⁸⁴ See Chap. 6.

resident, or present, in England as a matter of protection. The use of these different connecting factors meant that both courts might claim jurisdiction in the same case. This occurred in *Stuart v Moore*,⁸⁵ and having both assumed jurisdiction, the Court of Session and the English Chancery Court delivered opinions, each at variance with the other. In *Babington v Babington*⁸⁶ the Court of Session considered it had jurisdiction based on the child's domicile, and would not decline jurisdiction in favour of an English court which took jurisdiction on the ground of the child's presence. The ultimate result was two irreconcilable decrees. This is as undesirable within the UK, as it is on a wider stage. Interestingly, in modern times a proposed bill on civil partnerships in England and Wales required only the residence of one of the parties *in the UK* for cohabitants to be able to register their relationship, and thus obtain particular rights in law.⁸⁷ A later bill on this subject altered the connecting factor to habitual residence or domicile (of one partner), and narrowed the territory indicated by that connecting factor to England and Wales.⁸⁸ This raised the possibility of a Scottish domiciliary, unable by virtue of Scots common law to enter into a marriage with someone of the same gender, entering into a statutory civil partnership under such an English statute. Would Scots law recognise the relationship?⁸⁹ It now seems, however, that this matter is to be dealt with by UK-wide legislation: another potential conflict internalised?⁹⁰

Perhaps the most radical suggestion in the field of connecting factors in questions of status is the argument that connecting factors, in the sense of a link to a legal system other than the one in which a person is present, should be abolished altogether. Raeburn has argued that it should be acknowledged that public policy considerations dictate the use of these connecting factors.⁹¹ This may well be one

⁸⁵ (1860) 22 D 1504; (1861) 23 D 51, 446, 595, 902.

⁸⁶ 1955 SC 115.

⁸⁷ Relationships (Civil Registration) Bill 2001, cl.1(1).

⁸⁸ Civil Partnerships Bill 2002, cl.2(1)(b).

⁸⁹ Examining similar Scandinavian legislation, Norrie reasoned that a registered homosexual partnership, entered into by a Scots couple abroad, would not be recognised in Scotland (K.McK. Norrie, "Reproductive technology, transsexualism and homosexuality: new problems for international private law" (1994) 43 *ICLQ* 757).

⁹⁰ See pp105 above & 150-151 below, and on the internalisation of conflicts generally, Chap. 4.

⁹¹ W. Raeburn, "Dispensing with the personal law" (1963) 12 *ICLQ* 125. Such considerations are certainly apparent in Law Com. No 168/Scot. Law Com. No 107, *Private International Law: the Law of Domicile* (Cm 200) (1987), para 3.6, in the comment that habitual residence

aspect of the development and application of connecting factors. Since it will be argued in a later chapter that despite the union of Scotland and England in a single political framework, reliance on public policy objections within the UK remains possible in Scots law,⁹² this does not undermine the case for retaining these connecting factors within the UK. In any event, it is submitted that the use of such connecting factors is still valuable in the quest to identify the most appropriate legal system to determine important matters such as status.

Property law

Property law has traditionally been seen as an area of the law where the civilian influences on Scots law are much in evidence. Reid has opined that:

"Scots law is a mixed legal system, but it is a mixture in which the ingredients are unevenly distributed ... Property law is nine parts Roman to one part feudal and, except in the related field of the law of trusts, English law has little or no place".⁹³

In Scots law property rights are generally easily verifiable through public records, and matters are usually 'black and white': one either possesses a real right to property which can be ascertained, or one does not, and has only a personal right. English law, however, contains rather more shades of grey, the influence of the separate equity jurisdiction having created a multitude of rights to property which are not a matter of public record.⁹⁴ Furthermore, the remedy of specific implement has always had a significance in Scotland unknown to the law of England.⁹⁵

"would cut the links between many temporary expatriates and their homeland, isolating them and their dependants from its law and courts despite their remaining closely connected with that country. The results would be particularly dramatic where the cultural background of the country of habitual residence, as reflected in its law, was very different or even alien to the culture of the person's own country".

⁹² See Chap. 7.

⁹³ K.G.C. Reid, "*Sharp v Thomson: a civilian perspective*" 1995 SLT (News) 75 at 75. See too Smits, *The Making of European Private Law*, p112.

⁹⁴ See, for example, P. Birks (ed.), *English Private Law*, Vol I (Oxford University Press, 2000), Chaps 4 & 5.

⁹⁵ D.M. Walker, *The Law of Civil Remedies in Scotland* (W. Green & Son, 1974), pp276-277.

For the purposes of international private law, however, both countries adopt the classification of property into immoveables and moveables. This terminology is quite different from the English domestic categories, and there is not an exact correspondence between the two.⁹⁶ In the Canadian Common Law context, Castel has argued that:

"to arrive at an internationally accepted basis upon which to solve ... disputes, Canadian courts do not use the common law technical distinction between realty and personalty. The more natural civil law distinction between movables and immovables has been adopted, even in situations involving property located in common law jurisdictions".⁹⁷

In Scots law there is a closer similarity between the domestic and the international classifications, both in terminology and in content. Whilst it is true that the concept of heritage is jettisoned in international matters, the old bond and disposition in security seems to be the only case where the categories of heritage and immoveable property may not coincide.⁹⁸

There is little differentiation in the generality of conflict rules in Scots property law as to whether English law, or some other legal system is involved.⁹⁹ It is submitted that this can be accounted for by a number of factors. The Acts of Union preserved the distinct legal bases of the two systems of property law. However, the existence of a British state allowed persons to travel freely between the jurisdictions. Together with the shared language, and the increasing ease of travel over the years, this made cross-border landholding a real possibility in Britain.¹⁰⁰ By contrast, until the passing of the Naturalization Act 1870, it was

⁹⁶ For example, a mortgage is personalty, but in a conflicts context immovable (North & Fawcett, *Cheshire and North's Private International Law*, p925).

⁹⁷ Castel, *Introduction to Conflict of Laws*, p155.

⁹⁸ R.D. Leslie, "Prior rights in succession: the international dimension" 1988 SLT (News) 105 at 106; Crawford, *International Private Law*, para 14.02. An English court might, however, treat a Scottish heritable security as movable (see Anton with Beaumont, *Private International Law*, p600).

⁹⁹ In contrast the position when property law comes into contact with commercial law has been noted in Chap. 4 (see pp84-89 above).

¹⁰⁰ For example the *propositus* in the cross-border domicile dispute of *Marchioness of Huntly v Gaskell* (1905) 8 F (HL) 4, held land in Scotland and England.

not possible for non-British subjects to own land in Scotland, or England.¹⁰¹ Thus at a time when conflict of laws principles applicable to property were developing, it can be inferred that most such disputes would be within Britain.¹⁰² Since the property laws of Scotland and England differed significantly, the rules developed in a British cross-border setting could then be applied, without the need for any further alteration, to international property disputes. Secondly, property law has for many years been characterised in Scotland by a lack of legislative intervention.¹⁰³ As has been seen in the last chapter, it is usually through statute that internalising solutions are introduced.

Matters of succession

Substantive succession law is an area which has been approached quite differently on either side of the Tweed, thus giving rise to a number of interesting conflict questions.¹⁰⁴

Perhaps the most obvious difference in domestic law between the jurisdictions over the years has been the attitude to provision for close family after death. Whereas in Scotland, the spouse and children have long had indefeasible rights to fixed portions of the deceased's estate, in England a system of complete freedom of testation was favoured. English law has gradually moved to a position where the courts have a discretion to award certain relatives and others part of the deceased's estate.¹⁰⁵

Potential cross-border conflicts are resolved in Scots law by reliance on common law, international private law, rules. If the deceased died domiciled in Scotland,

¹⁰¹ 1870 (33 & 34 Vict), c.14, s2; see, for example, *Leslie v Forbes* (1749) Mor 4636.

¹⁰² For example, cross-border property holdings within Britain giving rise to conflict cases in the nineteenth century in the Scots courts include *Monteith v Monteith's Trs* (1882) 9 R 982 and *Carruther's Trs, Allan's Trs* (1896) 24 R 238; and in the English courts, *Adams v Clutterbuck* (1883) 10 QBD 403, and *Duncan v Lawson* (1889) 41 ChD 394.

¹⁰³ Although this may be changing; see Title Conditions (Scotland) Act 2003, asp 9; and the current proposals for legislation on the law of the tenement.

¹⁰⁴ Discussed below. As to the future, see the discussion of the possibility of EU legislation at p158 below.

¹⁰⁵ The first steps were taken with the Inheritance (Family Provision) Act 1938 (1 & 2 Geo VI), c.45, and the law is now contained in the Inheritance (Provision for Family and Dependents) Act 1975, c.63, discussed below at p126.

legal rights are exigible from the moveable estate.¹⁰⁶ It has been posited that moveable property, situated in Scotland, but owned by an English domiciliary, could not be used to satisfy legal rights.¹⁰⁷ Hence domicile, rather than *situs*, is the key. This result seems justifiable: a legal obligation to provide for the immediate family after death reflects the morals of a particular society, and it would seem right that the deceased should have 'belonged' to that society before he is made subject to such an obligation. The Succession (Scotland) Act 1964¹⁰⁸ also established certain prior rights which accrue to a person's spouse on intestacy. One of these is the right to a dwellinghouse in which the deceased was ordinarily resident, and had a relevant interest.¹⁰⁹ Concerned as this is with immovable property, it is the *lex situs* which determines the application of prior rights: thus a widow or widower has a right to such a house if it is situated in Scotland, but not if it is in England.¹¹⁰ This reflects the continued importance of the *lex situs* in questions concerning immovables. However, a further right, to furniture and plenishings from a house in which the deceased was ordinarily resident,¹¹¹ raises a nice point. Technically, these are items of moveable property, and thus should be available to a spouse in fulfilment of his prior rights if the deceased was a Scottish domiciliary at the date of death.¹¹² In practice, however, it is very likely that the furniture and plenishings will be those of the dwellinghouse referred to above.¹¹³ There would therefore seem to be much to recommend the view that the furniture and plenishings should be within a house in Scotland for a prior right to them to be exercised.¹¹⁴ The spouse also has a right to a cash sum from the estate. This is only applicable in respect of

¹⁰⁶ Anton with Beaumont, *Private International Law*, p673.

¹⁰⁷ D.R. Macdonald, *Succession*, 3rd edn. (W. Green/Sweet & Maxwell, 2001), para 14.26.

¹⁰⁸ 1964, c.41.

¹⁰⁹ *Ibid.*, s8(1).

¹¹⁰ M.C. Meston, *The Succession (Scotland) Act 1964*, 5th edn. (W. Green/Sweet & Maxwell, 2002), p133; Anton with Beaumont, *Private International Law*, pp674-675.

¹¹¹ Succession (Scotland) Act 1964, s8(3),(4).

¹¹² Scottish Law Commission, *Some Miscellaneous Topics in the Law of Succession* (Memo No 71) (1986), para 6.2(b); Meston, *The Succession (Scotland) Act 1964*, p134; Anton with Beaumont, *Private International Law*, p675.

¹¹³ Although they may not be: the deceased may have had a number of properties, or may have been ordinarily resident in a property in which he did not have the requisite interest demanded by s8(1).

¹¹⁴ Macdonald, *Succession*, para 14.29; Anton with Beaumont, *Private International Law*, p675; Leslie, "Prior rights in succession", 105 (in which he argues that the deceased must also be domiciled in Scotland at death because the furniture and plenishings are moveable).

moveables belonging to the deceased if the deceased was domiciled in Scotland at death, and in respect of heritage in Scotland.¹¹⁵

The statutory discretionary scheme under English domestic law is triggered only where the deceased was a domiciliary of England and Wales,¹¹⁶ but applies in a testate or intestate succession.¹¹⁷ A spouse,¹¹⁸ or child,¹¹⁹ or someone who was maintained by the deceased,¹²⁰ may seek an order, for example, for a payment from the estate or a transfer of property.¹²¹ The test is that reasonable financial provision has not been made for that person in the succession.¹²² This is measured in terms of what is reasonably required for his or her maintenance, except in the case of the spouse, where it is determined by a concept of reasonableness.¹²³ There are a number of factors to which the court must have regard in considering the making of such an order.¹²⁴

However, in contrast to the position in substantive succession law, Scots and English law rely upon the same conflict rules. In both there is an adherence to the scission principle, and the same connecting factors are utilised on either side of the border with respect to succession to heritage and to moveables. However, the difference between the domestic laws is perceived by some to result in, for example, unfair windfalls.¹²⁵ The Scottish Law Commission has argued that the operation of the principle leads to an "anomaly ... between two jurisdictions

¹¹⁵ Succession (Scotland) Act 1964, s9 (Meston, *The Succession (Scotland) Act 1964*, pp134-135; Anton with Beaumont, *Private International Law*, p675). Under s8(1), a cash sum can also be claimed, but this is in lieu of the dwellinghouse, and thus entitlement is also determined by the *lex situs* since it is a surrogate for heritage (Meston, *The Succession (Scotland) Act 1964*, p134), although *cf* Anton with Beaumont, *Private International Law*, p675.

¹¹⁶ Inheritance (Provision for Family and Dependents) Act 1975, s1(1).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, s1(1)(a); and also a former spouse who has not remarried (*ibid.*, s1(1)(b)), or someone living as a spouse for a particular period of time (*ibid.*, s1(1)(ba) & 1(1A)).

¹¹⁹ *Ibid.*, s1(1)(c); and also somebody who was treated as a child of the family by the deceased (*ibid.*, s1(1)(d)).

¹²⁰ *Ibid.*, s1(1)(e).

¹²¹ *Ibid.*, ss1(1) & 2(1).

¹²² *Ibid.*, s1(1).

¹²³ *Ibid.*, s1(2).

¹²⁴ *Ibid.*, s3.

¹²⁵ In the nineteenth century case of *Train v Train's Executrix* (1899) 2 F 146, the Court of Session found the widow of an Irish domiciliary to be entitled to terce out of two bonds over Scottish subjects, since the bonds were heritable in Scots law. The bonds were, however, classified as movable under the law in Ireland and the widow accordingly took a further share of the bonds under that law. The case is criticised in Anton with Beaumont, *Private International Law*, p599.

which attempt to achieve much the same result in the case of intestacy but by different methods".¹²⁶ The extent of the coincidence between the aims of the two systems could, however, be doubted. Furthermore, whilst heritage and moveables are, generally speaking, no longer separately dealt with domestically following the passing of the Succession (Scotland) Act 1964, it is submitted that this does not necessarily rob the principle of an international, or intra-UK, justification. The law of the *situs* does have a colourable claim to regulate succession to immoveables in its territory.

Although properly a question of status, issues of legitimacy and legitimation are often intimately linked with questions of succession.¹²⁷ This is an area where widely differing stances once were taken in Scots and English law. In Scotland, it was possible for a child to be legitimate, even if the marriage of the child's parents was invalid; separately, there were also rules of law that a child could be legitimated by the subsequent marriage of its parents.¹²⁸ In conflict terms, Scots law looked to the domicile of the child's parents at its birth, and the domicile of the father at the time of the marriage, respectively.¹²⁹ A difficulty arose within Britain, because not only did English law (unusually) not countenance either legitimacy arising from a putative marriage, or legitimation,¹³⁰ but its conflict rules were designed to reflect this. Legitimacy was determined solely by the view of English law as to the validity of the marriage of the child's parents. This is illustrated by the case of *Shaw v Gould*.¹³¹ Miss Hickson married in England as a result of the fraud of her groom, Mr Buxton, who was sentenced to imprisonment for his pains. Many years later, Mr Buxton was persuaded to go to Scotland, where the marriage between himself and Miss Hickson was dissolved. Miss Hickson then became married in Scotland to Mr Shaw. The latter had initially intended to become a barrister, but instead called to the Scots Bar, and the couple remained in Scotland until their death. After Miss Hickson's (or, in the eyes of

¹²⁶ Scottish Law Commission, *Some Miscellaneous Topics in the Law of Succession* (Memo No 71) (1986), para 6.3.

¹²⁷ J.H.C. Morris, *The Conflict of Laws*, 5th edn., by D. McClean (Sweet & Maxwell, 2000), p295.

¹²⁸ Anton with Beaumont, *Private International Law*, pp487 & 492.

¹²⁹ *Ibid.*, pp487-488 & 492.

¹³⁰ North & Fawcett, *Cheshire and North's Private International Law*, pp888-889 & 899; Morris, *The Conflict of Laws*, pp296-297 & 303.

¹³¹ (1868) LR 3 HL 55.

Scots law, Mrs Shaw's) death, a question arose in the interpretation of her great-uncle's will, as to whether the children of her second 'marriage' were legitimate. The House of Lords concluded that the first, English, marriage was not dissolved by the Scottish divorce, and thus the children of the second 'marriage' were not legitimate. Short shrift was given to the point that even if the Scottish marriage had been invalid under Scots law, this would not have rendered the children of the union illegitimate in Scotland:

"if a constructive legitimacy of this kind would, under the circumstances, have arisen in *Scotland*, I cannot think that we could be bound to recognise it so far as to qualify the offspring of a void marriage to take under the description of 'children' in an English will".¹³²

The conclusion that the children of a couple validly married under Scots law, who lived in Scotland for the rest of their days, should be held illegitimate in England, appears unsatisfactory. As the editor of Morris observes, the effect of these cases was that "English law has no conflict rule for legitimacy, only a conflict rule for the validity of marriage".¹³³ In another sense too, English law was bereft of a conflict rule in such cases insofar as the children of a putative marriage were concerned: the concept being unknown to English law, their legitimacy could never be recognised there. The advent of the twentieth century signalled that a different approach might be taken. In the English case of *Re Stirling*¹³⁴ the legitimacy of a child would determine his right to succeed to certain Scottish, and English, property. The child's mother had married a Scotsman in Canada, but he had subsequently divorced her in North Dakota. She accordingly remarried, and the child was the product of that second relationship. The English judge classified the (incorrect) view of the child's parents that the North Dakota divorce was valid, as an error of law. After hearing evidence from Scots lawyers, he concluded that an error as to fact was required before the child would be regarded as legitimate in Scotland as springing from a putative marriage. Thus the child was illegitimate. However, the judge seemed perhaps more prepared to

¹³² *Ibid.* per Lord Chelmsford at 79.

¹³³ Morris, *The Conflict of Laws*, p296.

¹³⁴ [1908] 2 Ch 344.

countenance the possibility of recognising a child's legitimate status despite the lack of a valid marriage. Following the introduction of legislation in 1959, the laws of England on legitimacy have changed, and the concept of a putative marriage is now recognised.¹³⁵ Concerningly, however, the editor of Morris is of the view that the current legislative provisions would not alter the result of a modern-day *Shaw v Gould*.¹³⁶ Similarly, it was only with the introduction of a concept of legitimation into English law, that the strictness of the conflicts rule was relaxed.¹³⁷ In Scotland, legitimation is now governed by statute: the Legitimation (Scotland) Act 1968¹³⁸ provides for the legitimation of a child by the subsequent marriage of its parents, effectively if its father is domiciled in Scotland at marriage. In the case of *Dunbar of Kilconzie*,¹³⁹ this was said to operate so as to legitimate the son of an English domiciliary (who married the child's mother in 1912) as from the date of the Legitimation (Scotland) Act coming into force. Whilst this might seem a possible statutory interpretation, Anton is surely correct to argue that what was important was the English law of the father's domicile at the time of marriage, and the date that the legitimation came into effect under that law (1959).¹⁴⁰ An interesting point as to how the separate Scottish and English legislation meshes together presented itself in *Wright's Trs v Callender*.¹⁴¹ Both the Legitimation (Scotland) Act 1968 and the English Legitimacy Act 1959 contained provisions to the effect that their terms did not affect deeds executed before the passing of the respective statutes. The House of Lords was concerned to avoid the result that an English legitimation could not affect prior English deeds, but was effective in respect of prior Scottish deeds.¹⁴²

¹³⁵ Legitimacy Act 1959 (7 & 8 Eliz II), c.73, and see now Legitimacy Act 1976, c.31, although the proper effect of the conflicts case of *Re Bischoffsheim* [1948] Ch 79 remains a moot point (Morris, *The Conflict of Laws*, pp299-300; North & Fawcett, *Cheshire and North's Private International Law*, pp893-894).

¹³⁶ Morris, *The Conflict of Laws*, p301.

¹³⁷ Legitimacy Act 1926 (16 & 17 Geo 5), c.60.

¹³⁸ 1968, c.22.

¹³⁹ 1986 SLT 463.

¹⁴⁰ Anton with Beaumont, *Private International Law*, p494.

¹⁴¹ 1993 SLT 556. The case concerned the ability of persons to benefit under the trust disposition and settlements of their Scottish great-grandparents. The mother of the great-grandchildren in question was domiciled in England. The great-grandchildren had been legitimated *per subsequens matrimonium* on the coming into force of the English Legitimacy Act 1959.

¹⁴² *Wright's Trs v Callender* 1993 SLT 556 *per* Lord Keith of Kinkel at 559-560 (expressing the *obiter* view that "While it is for the law of Scotland to recognise the status of legitimacy conferred by the Act on the children of fathers domiciled in England at the time of relevant

It can be appreciated that the gulf between Scottish and English domestic law on legitimacy and legitimation, quickly raised conflict issues. Anton notes that this is the cause for the speed with which the subject of choice of law in legitimation came to be studied.¹⁴³ However, these issues continue to be dealt with by and large, by the application of traditional methodology, rather than through internalising legislation.

One further matter is of interest before leaving matters of succession. It is widely the case that the property of a deceased dying without heirs will fall to the state. However, whereas in most European countries this is a rule of succession, in both Scotland and England it is analysed as a Crown right to unclaimed property.¹⁴⁴ At one stage it was recommended by the Scottish Law Commission that Scots law should be changed to bring it into line with the majority of European countries,¹⁴⁵ and this seems unobjectionable. Possible cross-border difficulties within the UK caused by English law remaining unchanged seemed to have been considered, and discounted.¹⁴⁶ However, some years later the Commission recorded that it was "persuaded that there is at present no compelling reason to alter the basis on which the Crown takes and that it could be awkward to have the Crown taking on one footing in Scotland and on another in the rest of the United Kingdom".¹⁴⁷ Later in this chapter the potential effect of devolution on such reasoning will be examined.

Delict

Briggs has mused as to "whether there are, in the conflict of laws in general, but in tort in particular, differing degrees of foreignness, which in turn suggest that the law should develop choice of law rules which vary according to their

marriage, it must also be appropriate for that law to recognise that the legitimacy so conferred was subject to limitation"); and *per* Lord Jauncey of Tullichettle at 563 (the avoidance of such a "bizarre" result strengthening his view on the correct interpretation of the testator's intention). See also E. Crawford, "It's a wise testator who knows his own great grandchildren" 1994 SLT (News) 225.

¹⁴³ Anton with Beaumont, *Private International Law*, p492.

¹⁴⁴ Scottish Law Commission, *Some Miscellaneous Topics in the Law of Succession* (Memo No 71) (1986), para 6.12.

¹⁴⁵ *Ibid.*, paras 6.12-6.13.

¹⁴⁶ *Ibid.*, para 6.12.

¹⁴⁷ Scot. Law Com. No 124, *Report on Succession* (1990), para 10.10.

context".¹⁴⁸ As has been touched upon earlier, in both Canada and Australia, at least for a period of time, it was thought by some to be appropriate to have different choice of law rules in tort dependent upon whether the case was international or interprovincial/interstate.¹⁴⁹ The extent to which this was said to be justified with reference to the constitutional arrangements of those countries, and the inapplicability of that reasoning to the situation of the UK, has already been discussed above.¹⁵⁰ Another factor mentioned in the case of *Tolofson v Jensen* was the ease with which the laws of the various Canadian provinces could be ascertained within Canada,¹⁵¹ but the position in the UK has been touched on above.¹⁵² A further argument put forward in *Breavington v Godleman* as justification for the differentiation between international and Australian interstate conflict cases, was that a person would appreciate that he was moving between states which had different systems of law.¹⁵³ It is unclear why this justifies a different approach from that adopted in international matters, since it is usually just as apparent that one is crossing an international boundary, if not more so: "whereas it may be plain within Europe that one is in Rome, it may not be so obvious in the United States that one is not in Kansas any more".¹⁵⁴ This observation applies with equal force to the border between Scotland and England.

Certainly Scotland has never differentiated between England and other countries in the application of choice of law rules in delict. Matters have been dealt with by undiscriminating, common law, international private law rules. These rules have, for the most part, now been replaced by a statutory *lex loci delicti* rule, with a flexible exception, introduced by the Private International Law (Miscellaneous Provisions) Act 1995.¹⁵⁵ The possibility of an exception for delicts and torts

¹⁴⁸ Briggs, *The Conflict of Laws*, p178.

¹⁴⁹ Interestingly, it would appear that the vast majority of tort conflicts cases raised in Australia are interstate, rather than international (Nygh, "Choice of law in tort in Australia", 60).

¹⁵⁰ See Chap. 3, in particular pp57-70 above.

¹⁵¹ *Tolofson v Jensen* (1994) 120 DLR (4th) 289 per La Forest J at 312-313.

¹⁵² See pp113-114 above.

¹⁵³ *Breavington v Godleman* (1988) 169 CLR 41 per Mason CJ at 78.

¹⁵⁴ Briggs, *The Conflict of Laws*, p177.

¹⁵⁵ 1995, c.42; for the potential difficulties in establishing the *locus delicti* see B.J. Rodger, "Ascertaining the *statutory lex loci delicti*: certain difficulties under the Private International Law (Miscellaneous Provisions) Act 1995" (1998) 47 *ICLQ* 205. There is likely to be EU legislation (the proposed "Rome II Regulation") on this subject in the future, on the effect of which see Chap. 6.

occurring entirely within the UK had been considered.¹⁵⁶ On this approach, the law of the part of the UK in which the most significant elements of the wrong took place would have been applied.¹⁵⁷ Consequently, there would have been no statutory displacement rule within the UK.¹⁵⁸ It seems clear that this did not reflect a decision that different rules were appropriate depending on whether the case was international or intra-UK. Rather it was driven by the consideration that common law rules may in the past have dictated that English law would always be applied to torts occurring in England.¹⁵⁹ No authority was cited by the Law Commissions for such a rule forming part of Scots law. It is unclear from cases such as *Convery v Lanarkshire Tramways Co*¹⁶⁰ and *Naftalin v London, Midland and Scottish Railway Co*¹⁶¹ whether Scots law would apply to delicts within Scotland because it was the *lex loci delicti*, or as a result of the application of the double rule. Given the stress placed upon the *lex loci delicti* rather than the *lex fori* by the Scots courts, and the uncertainty surrounding the ability to rely upon a flexible exception in Scots law,¹⁶² this issue has perhaps caused less concern in Scotland than in England. In any event, for the reasons stated at the outset of this section, a differentiated approach is as undesirable as it was unprincipled, and was indeed ultimately rejected.¹⁶³ The Private International Law (Miscellaneous Provisions) Act makes it clear that its provisions apply equally between Scotland and England, as between Scotland and foreign countries.¹⁶⁴ The factors listed as ones which a court might take into account in considering whether to displace the general rule, can be said to relate to the factual aspects of the case.¹⁶⁵ There is accordingly nothing to prevent the displacement provision being utilised as

¹⁵⁶ Law Com. No 193/Scot. Law Com. No 129, *Private International Law: Choice of Law in Tort and Delict* (1990), paras 3.14-3.19.

¹⁵⁷ *Ibid.*, cl.3 of the proposed Bill (pp38-40).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, paras 3.14-3.19; and see *Ennstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059 (the cause of action having arisen prior to the passing of the legislation described above), in which negligent advice provided by the Scottish office of an English company to the English claimant, in respect of stone used in a Scottish building, was held to be an English tort, and thus English law applied.

¹⁶⁰ (1905) 8 F 117.

¹⁶¹ 1933 SC 259.

¹⁶² See p133 below.

¹⁶³ See the criticisms of the Law Commissions' proposal in P.B. Carter, "Choice of law in tort and delict", [1991] 107 *LQR* 405 at 415-417.

¹⁶⁴ Private International Law (Miscellaneous Provisions) Act 1995, s9(7).

¹⁶⁵ *Ibid.*, s12(2).

between Scotland and England. There is also a public policy exception,¹⁶⁶ however, the ability of a court to avail itself of such an objection to rules of law within the UK will be examined in a later chapter.¹⁶⁷

The old common law choice of law rule continues to apply in defamation actions.¹⁶⁸ In Scots law, this rule operates so as to require that the delict should be actionable under both the *lex loci delicti* and the *lex fori*.¹⁶⁹ The test under English law, whilst similar and deriving from the same (English) roots, is not in exactly the same terms: the tort has to be actionable by the *lex fori*, and not justifiable by the *lex loci delicti* (which was eventually found to mean that the alleged tortfeasor must be civilly liable for his acts by the *lex loci delicti*).¹⁷⁰ Latterly, English law had arrived at the position where either the *lex fori* or the *lex loci delicti* could be displaced in particular circumstances,¹⁷¹ but there were no instances of its use in Scotland before 1996, and to date there is nothing to suggest that a Scots court would in future wish to take, or exercise, such a discretion.¹⁷² As between the two jurisdictions, this merely represents slight differences in the development and interpretation of the double rule, but on the main issue under discussion there is no doubt that the same choice of law rule will be utilised in Scots law for delictual events with an English, as opposed to a foreign, element. The same view will prevail in England.

The classic exposition of the application of the double rule in Scotland is the intra-UK case of *M'Elroy v M'Allister*,¹⁷³ a case to which history has not been

¹⁶⁶ Ibid., s14(3)(a)(i). An exception if the application of the *lex loci delicti* would result in enforcement of penal, revenue, or other public, laws is contained in s14(3)(a)(ii). The operation of these concepts within the UK has already been discussed at pp48-51 above.

¹⁶⁷ See Chap. 7.

¹⁶⁸ Private International Law (Miscellaneous Provisions) Act 1995, s13.

¹⁶⁹ See *Naftalin v London, Midland and Scottish Railway Co.* 1933 SC 259; *M'Elroy v M'Allister* 1949 SC 110.

¹⁷⁰ *Phillips v Eyre* (1870) LR 6 QB 1; *Chaplin v Boys* [1969] 2 All ER 1085; see also *Ennstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059. The case of *Machado v Fontes* [1897] 2 QB 231 was authority in England for a spell, but was disapproved in the Scottish case of *M'Elroy v M'Allister*, *supra* (see, for example, the comments of Lord Justice-Clerk Thomson at 118).

¹⁷¹ *Chaplin v Boys*, *supra*; *Red Sea Insurance Co. Ltd v Bouygues SA* [1994] 3 WLR 926.

¹⁷² B.J. Rodger, "The Halley: holed and now sunk" (1996) 1 *SLPQ* 397 at 399-400; Crawford, *International Private Law*, paras 13.14-13.16; Anton with Beaumont, *Private International Law*, pp404-405.

¹⁷³ 1949 SC 110.

kind,¹⁷⁴ but which bears further examination. Mr McElroy was employed by a firm based in Glasgow. Whilst in one of the firm's lorries, which was being driven by the defender (a Glasgow resident), an accident occurred and Mr McElroy was killed. The accident happened at Shap, in the north west of England, and Mr McElroy and the defender had been heading south at the time. The pursuer (Mr McElroy's widow) brought an action in the Court of Session, both as his widow, and in her capacity as executrix. It was not at that time inevitable that the widow would also be executrix. She sought damages under four heads: *solatium*; a sum under the English Fatal Accidents Acts; a sum under English law in terms of the Law Reform (Miscellaneous Provisions) Act 1934;¹⁷⁵ and funeral expenses. The pleadings, even to modern eyes used to a more relaxed approach, are not admirable. It was said that Scots law applied, or that alternatively English law may apply in which case only certain of the claims should succeed. There is no appreciation of the application of the double rule. However, the double rule was applied both before the Lord Ordinary, and on appeal to a bench of seven judges, with the net result that the pursuer received only funeral expenses. A bench of seven judges has considerable scope for overturning older authorities to achieve a just result. However, it seems that in all the circumstances the judges were not convinced that the outcome was unfair.¹⁷⁶ The claim for *solatium* fell because there was no such award under the *lex loci delicti*. The claim under the Fatal Accidents Acts was time-barred under English law, and the judges were particularly critical of the notion that the defender should be robbed of this defence simply by the device of the pursuer bringing the action in Scotland.¹⁷⁷ The claim as executrix under the Law Reform (Miscellaneous Provisions) Act 1934 was valid under English law, but had no Scottish equivalent, and so also failed. It should be noted that, certainly in modern times, any sums awarded under this Act must be set off against awards in

¹⁷⁴ Collier describes the case as "unfortunate", with a "preposterous result" (Collier, *Conflict of Laws*, pp221 & 223). For the editor of Morris it is an example of how the double rule can cause "gross injustice" (Morris, *The Conflict of Laws*, p361); and see also the oblique, unflattering, reference by Lord Wilberforce in a parliamentary debate (Lord Wilberforce, HL Debs, vol 559, col 841).

¹⁷⁵ 1934 (24 & 25 Geo V), c.41.

¹⁷⁶ Only Lord Keith maintained a partial dissent.

¹⁷⁷ 1949 SC 110 *per* Lord Russell at 126-127; *per* Lord President Cooper at 137.

terms of the Fatal Accidents Acts.¹⁷⁸ It was clear that Lord President Cooper was of the view that the pursuer should properly have raised her case in the English courts.¹⁷⁹ Seen in the light of its circumstances the result is perhaps not as monstrous as critics have suggested. It may be thought to be unfortunate that the pursuer was not allowed to recover either *solatium* or a sum under the Law Reform (Miscellaneous Provisions) Act 1934. However, the latter was payable to an executor, and it was simply fortuitous that the pursuer also held that capacity. *Solatium* is a uniquely Scottish concept, and it might be questioned whether a defender should properly expect, when driving under English highway rules, to become liable for such a sum. It has been said that the accident happened "a mere 40 miles south of the border",¹⁸⁰ and so the application of English law was inappropriate. However, the argument for giving a rôle to the *lex loci delicti* should not recede the closer one is to home.¹⁸¹

It is interesting to speculate whether a different result would be achieved under the new statutory provisions were an accident with these facts to occur today. It is submitted that a radically different conclusion would not be reached. If the pursuer was (fortuitously) executrix, she would receive an award under the Law Reform (Miscellaneous Provisions) Act 1934. Otherwise she would only receive the funeral expenses, were section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 applied. Would the displacement rule contained in section 12 have been applied? The editor of Morris clearly thinks this would be appropriate.¹⁸² The English courts have now twice invoked the displacement rule in cases where an English passenger has been injured in a car, driven by an English driver, in an accident on foreign roads.¹⁸³ In a road accident in another EU member state, the ability to raise an action other than in the courts

¹⁷⁸ P. Shears & G. Stephenson, *James' Introduction to English Law*, 13th edn. (Butterworths, 1996), pp314-315.

¹⁷⁹ 1949 SC 110 *per* Lord President Cooper at 139 (interestingly he remarks that "Difficulties may of course arise in founding jurisdiction against the defender in the foreign forum, but I should consider that risk a slight one where the foreign forum is England").

¹⁸⁰ Morris, *The Conflict of Laws*, p356.

¹⁸¹ And indeed in this example the parties were travelling away from Scotland!

¹⁸² Morris, *The Conflict of Laws*, p356.

¹⁸³ *Edmunds v Simmonds* [2001] 1 WLR 1003; *Hamill v Hamill* (24 July 2000, unreported). See also the remarks in *Roerig v Valiant Trawlers Ltd* [2002] 1 All ER 961 *per* Waller LJ at 967-968. In *Hulse v Chambers* [2001] 1 WLR 2386, it was noted that the plaintiff had accepted there was no displacement, despite the first two cases referred to, which were said to be factually comparable.

of the place where that accident occurred, will depend on the domicile of the defender. Accordingly the English courts will only have jurisdiction in 'foreign' accidents of that kind if the defendant is English domiciled.¹⁸⁴ If foreign law is always to be displaced in these circumstances, then this may point to the establishment of a homeward trend, whereby English law will usually be applied in cases before the English courts, of torts committed abroad.¹⁸⁵ Furthermore, in *Roerig v Valiant Trawlers Ltd*¹⁸⁶ the (English) *lex loci delicti* was not displaced in a claim by a Dutch woman in respect of her Dutch husband, who was an employee of a Dutch company and was injured on an English-registered trawler owned by an English company (a subsidiary of a Dutch company) which had set sail from a Dutch port to fish. These cases therefore seem somewhat concerning. Interestingly, although in *M'Elroy v M'Allister*¹⁸⁷ both the deceased and the defender were Scottish, as has been seen the court appears to have been of the view that England, and not Scotland, was the proper place for the action to have been raised.¹⁸⁸ It can be inferred from this that the court in that case would not have been minded to invoke any available displacement rule to apply Scots law. It is to be hoped that a more thoughtful jurisprudence will characterise the Scottish approach to the new statutory rules, in that any tendency in England to refer too readily to the forum's law will not be slavishly followed in Scotland.

The precise amount recovered in damages for delictual actings with an English, or a foreign, element, also remains a matter governed by rules of international private law. In both intra-UK, and international, situations, Scots law adheres to the rule that the availability of heads of damages is a matter for the law which

¹⁸⁴ If the defendant is English resident, but the plaintiff is resident in the country in which the accident occurred, it might be thought more likely that the latter will choose to raise the action in his home court, and not in England. Such facts are therefore perhaps unlikely to come before the English courts.

¹⁸⁵ See B.J. Rodger, "Developments in international private law in 2000" (2001) 6 *SLPQ* 293 at 302. It is reminiscent, perhaps, of the position in the past, where a fictional English *locus* was assigned to torts which had occurred abroad, in order to bestow jurisdiction on an English court. Although note that the proposed Rome II Regulation would allow, as an exception to the general rule, a delictual obligation to be governed not by the law of the country where the damage arises, but by the law of the country in which both the perpetrator of the delict and his victim are habitually resident (the Wallis Report, however, suggests this should simply be one of a number of factors in deciding whether the general rule would be inappropriate). Both the Rome II Regulation and the Wallis Report are discussed in Chap. 6.

¹⁸⁶ [2002] 1 All ER 961.

¹⁸⁷ 1949 SC 110.

¹⁸⁸ See also *Naftalin v London, Midland and Scottish Railway Co.* 1933 SC 259.

governs liability for the delictual actings, whereas quantification of these heads is left to the *lex fori*.¹⁸⁹ Foreign law may be relevant to quantification in one slightly unusual situation. In a claim under the Damages (Scotland) Act 1976, the court may take into account that the deceased was under a legal duty to support another person.¹⁹⁰ A recent case suggests this is not limited to duties under Scots law.¹⁹¹ In contrast, the Australian courts have moved to the position in interstate cases where the *lex loci delicti* now also governs the quantification of damages,¹⁹² although this approach has not yet been adopted in international cases.¹⁹³ The appropriateness of a rule obliging damages to be quantified in terms of the *lex fori* is a wide topic of study, the detailed examination of which is outwith the scope of this thesis. It can, however, be observed that, at least in intra-UK personal injury actions, there would appear to be good reasons for removing the rôle of the *lex fori* in Scotland in matters of *quantum*. Whilst heads of damages may be special to a system of law, and thus unusual for the forum,¹⁹⁴ the assessment of many of these heads is simply a factual matter.¹⁹⁵ If unfamiliar heads of damages are to be enforced, then it would seem both possible and desirable that an approach is taken which approximates to that of the system from which they emanate. Even in *solatium*-type awards, it might be questioned how far questions of law are really involved, as opposed to the derivation of an appropriate figure from a range of past awards. It is often argued that losses typically arise in the forum, making the law of that court the most appropriate in the exercise of quantification. Of course this may not be so, but even in those cases where it is, there seems no reason why the location of evidence as to factual matters such as hospital treatment or loss of wages particularly requires the quantification thereof by the *lex fori*.¹⁹⁶ As has

¹⁸⁹ Anton with Beaumont, *Private International Law*, p405.

¹⁹⁰ 1976, c.13, s1(6).

¹⁹¹ *Shaher v British Aerospace Flying College Ltd*, reported in part 2002 SLT 833, reversed on another point in the Inner House.

¹⁹² *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36.

¹⁹³ *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.

¹⁹⁴ See, for example, *Mitchell v McCulloch* 1976 SC 1.

¹⁹⁵ For example, in Scotland, past and future wage loss, or loss of pension rights, are factual matters. In the English case of *Kornatzki v Oppenheimer* [1937] 4 All ER 133, the judge concluded that the amount of money to be released was a question of fact, rather than being a matter of discretion.

¹⁹⁶ There is, in any event, increasing flexibility in where courts may sit: a New South Wales court recently sat in Dublin to take the evidence of an Irishman who was paralysed in a swimming accident in Australia ("Australian legal action heard in Dublin", <http://www.rte.ie/news/2002/0902/mulligang.html>; "Paralysed swimmer seeks \$4.8m", http://www.news.com.au/common/story_page/0,4057,5031552%5E1702,00.html).

been noted above, the extent to which these arguments might be sufficient in the international arena to justify jettisoning the orthodox approach is outwith the purview of this thesis. However, it is submitted that they certainly have added force in Scottish conflicts cases with an English element. Scottish judges are already able to look for guidance to English awards on pain and suffering, and the seminal English case of *Heil v Rankin*¹⁹⁷ has been accepted as a legitimate factor for consideration by Scottish judges in domestic damages awards in cases of personal injury.¹⁹⁸ The ability to call upon a public policy exception may be sufficient to protect the forum from unconscionable quantifications of damages: the availability of such an objection within the UK will be examined in a later chapter.¹⁹⁹

Cross-border crime

In criminal matters, the divide between the Scottish and English legal systems has always been distinct. Neither the House of Lords, nor any equivalent, has ever had an appellate rôle in the Scottish criminal justice system. The final court of appeal in criminal matters is the High Court of Justiciary sitting in an appellate capacity in Edinburgh.²⁰⁰ English cases do not enjoy the same influence in shaping Scots criminal law as they may do in other areas. It is clear that Scots law will be applied by the criminal courts in Scotland, and thus both international and intra-UK issues resolve purely into questions of jurisdiction.²⁰¹

American courts over the centuries have tried cases dealing quite literally with shootings²⁰² (and 'misses'²⁰³) over the state line. Such dramatic case law may not exist in Scotland, but its courts have been called upon to adjudicate issues of cross-border criminal liability within the UK. The rules which have been applied

¹⁹⁷ [2000] 2 WLR 1173.

¹⁹⁸ *Duthie v Macfish Ltd* 2001 SLT 833; *Wallace v Paterson* 2002 SLT 563.

¹⁹⁹ See Chap. 7.

²⁰⁰ Although appeals on devolution issues in criminal cases may now be taken to the JCPC (see p63 above).

²⁰¹ Various matters akin to recognition issues can arise: these have been discussed in Chap. 4.

²⁰² *State v Hall* 114 NC 909, 19 SE 602 (1894).

²⁰³ *Simpson v State* 92 Ga. 41, 17 SE 984 (1893).

are for the most part derived from common law, and subject to no differentiation dependent upon whether the crime has an English, or other foreign, element.²⁰⁴

In *HMA v Bradbury*²⁰⁵ the accused posted in England a letter, requesting goods from Scotland, for which he had never intended to pay. Lord Neaves took the view that since "[t]he deceptive instrument used, after being set in motion, exploded, and took effect in"²⁰⁶ Scotland, the Scottish courts had jurisdiction. It was of no moment whether or not the actings complained of were a crime in England.²⁰⁷ It was also said that the Scots court would have been clothed with jurisdiction had a Scotsman attempted to perpetrate such a fraud in England.²⁰⁸ Similar facts gave rise to the case of *HMA v Allan*.²⁰⁹ Once again the Scots court was content to take jurisdiction, but indicated that the English courts could equally have heard the case.²¹⁰ The reverse situation occurred in the more recent case of *Laird and Goddard v HMA*.²¹¹ Here a plan was conceived in Scotland, and carried out by actions in Scotland and England, to defraud an English company. The Scottish courts were found to have jurisdiction, apparently on the basis that the genesis of the plan was in Scotland, which also hosted some of the machinations necessary to action it. *HMA v Bradbury* touches on the issue of whether actings require to be criminal in England before a cross-border crime is prosecuted in Scotland.²¹² This problem is rendered particularly acute by the power of the High Court in Scotland to declare certain acts to be criminal, even although there may have been no prior prosecutions. It is uncertain whether this power has survived the introduction of Convention rights into the UK jurisdictions.²¹³

²⁰⁴ For the position with respect to statutory crimes see *Clements v HMA* 1991 JC 62, discussed at pp102-103 above.

²⁰⁵ (1872) 2 Couper 311.

²⁰⁶ *Ibid.* at 319.

²⁰⁷ *Ibid.* *per* Lord Neaves at 320; *cf* the position in the delict of defamation (*Evans & Sons v Stein & Co.* (1904) 7 F 65).

²⁰⁸ *HMA v Bradbury* (1872) 2 Couper 311 *per* Lord Neaves at 320.

²⁰⁹ (1873) 2 Couper 402.

²¹⁰ *Ibid.* *per* Lord Ardmillan at 407; *per* Lord Justice-Clerk Moncreiff at 408.

²¹¹ 1984 SCCR 469.

²¹² See above.

²¹³ See, for example, C.H.W. Gane *et al.*, *A Casebook on Scottish Criminal Law*, 3rd edn. (W. Green/Sweet & Maxwell, 2001), p8.

These are thorny issues. To solve them, commentators have attempted to classify crimes into conduct crimes, and result crimes, and thus determine what actings in each type of crime should clothe a court with jurisdiction.²¹⁴ However, in such debates it is unimportant whether the countries involved are Scotland and England, or Scotland and another foreign country. The policy reasons for and against the prosecution of persons from another jurisdiction²¹⁵ are not special to the intra-UK situation. Similarly in England, it would seem that cross-border crimes within the UK are treated no differently from those involving a foreign country.²¹⁶

Any legislative provisions in this area have largely been designed to bestow jurisdiction in respect of acts committed outwith the UK, and are of no application as between Scotland and England.²¹⁷ Section 11(4) of the Criminal Procedure (Scotland) Act 1995, is remarkable for its rarity: it allows a person in possession of property stolen in another part of the UK, or in receipt in Scotland of such property, to be indicted as if the property had been stolen in Scotland.²¹⁸

One remaining issue in the criminal law field is the effect of a previous trial in England. Again it seems immaterial to the question of whether the accused has tholed his assize whether that trial has been held in England or elsewhere. It is stated bluntly in Renton & Brown that "[t]he assize need not be tholed in Scotland",²¹⁹ for this doctrine to apply. In *Hilson v Easson*²²⁰ it was indicated that

²¹⁴ Ferguson, "Jurisdiction and criminal law"; G.H. Gordon, *The Criminal Law of Scotland*, 3rd edn., edited by M.G.A. Christie (W. Green, 2000), Vol 1, paras 3.42-3.47.

²¹⁵ See, for example, G. Williams, "Venue and the ambit of criminal law" [1965] 81 *LQR* 276 & 395.

²¹⁶ *R v Robert Millar Ltd* [1970] 2 QB 54. This case involved the prosecution of a Scottish company in respect of the condition of one of its motor vehicles, which was said to have contributed to an accident in England.

²¹⁷ For example, Criminal Law (Consolidation) (Scotland) Act 1995, c.39, s16B; Criminal Procedure (Scotland) Act 1995, ss11(1) & 11A.

²¹⁸ Interestingly, a number of US states have similar provisions (W.R. LaFave and A.W. Scott, *Handbook on Criminal Law* (West Publishing Co., 1972), pp119-120). Another such unusual provision is to be found in the Computer Misuse Act 1990, where certain actings need not have taken place in Scotland for a conviction to be secured (1990, c.18, ss4 & 5).

²¹⁹ R.W. Renton & H.H. Brown, *Criminal Procedure according to the Law of Scotland*, 6th edn. (updated looseleaf edition), (W. Green/Sweet & Maxwell, 2001), para 9-09.

²²⁰ (1914) 7 Adam 390. In the course of being tried for an offence in England, the accused admitted his guilt of a separate offence for which a warrant had been issued in Scotland. It appeared that the English judge had taken this into account when sentencing. The Scottish court witheringly dismissed the notion that the accused had tholed his assize, but allowed that

an actual trial must have taken place, which was not so in that case. There is also a later, *obiter* remark by Lord Justice-Clerk Hope that if someone has been "tried for theft in England, we would not try him again here".²²¹ Even if the authority for the proposition is somewhat sparse, it does seem unlikely that the Scottish authorities would wish to re-try someone who has already been tried in England. However, whilst the authorities may relate to an intra-UK situation, the pragmatic and intuitively just reasons for such an approach apply with equal force to trials held in foreign countries.

A similarity between Scottish and English international private law rules?

It has been argued that, in the areas discussed in this chapter, a constitutionalising or internalising solution has been eschewed, and instead Scots law has used the same international private law tools in cases with an English element, as it would in truly international cases. Specifically, most of the examples, it will have been noted, are of the use of choice of law rules. But, it may be objected, is not Scots international private law merely a mirror of English conflict of laws rules? Such a viewpoint does no justice to the Scottish international private law rules which, it is submitted, have no less a claim to being separate and special to their legal system than other areas of Scots law.

At the outset, it must be recalled that "the trans-border nature of the subject-matter and of underlying policy considerations has given rise to significant similarities in some areas"²²² of international private law. Across the legal systems of the world, therefore, there are many points of coincidence in their conflicts rules.²²³ This will account for some of the similarities between conflict rules in Scotland and England, and indeed other countries. Anton argues that not only did Scotland and England learn much from the international private law texts

in the circumstances the English sentence could be relevant in sentencing in respect of the Scottish offence.

²²¹ *Macgregor and Inglis* (1846) Ark 49 at 60. And see also *Clements v HMA* 1991 JC 62 per Lord Justice General Hope at 71.

²²² P.B. Carter, General Editor's Preface in Fletcher, *Insolvency in Private International Law*; see also Anton with Beaumont, *Private International Law*, p2.

²²³ For example, there has been widespread reliance on the brocard *locus regit actum* (see Collins, *Dicey and Morris on the Conflict of Laws*, para 32-173).

of mainland Europe, but that it was via Scotland that such material reached English lawyers.²²⁴

Moreover, it is not correct to suggest that Scots international private law resembles its English equivalent in every particular. They differed, for example, in their basic approaches to jurisdiction. In English law the ability to effect service was paramount in bestowing jurisdiction on the court, and mere presence could suffice. This was not a route favoured by Scots law, the exorbitant jurisdictions of the latter tending perhaps to be grounded by the presence of property in Scotland.²²⁵ Indeed, when the Brussels Convention required to be implemented by the UK, since "Scots law was already much closer to the civil law tradition which so influences the 1968 Convention, the provisions of Title II ... could be taken as the basis for a re-writing of the rules of jurisdiction in civil cases for Scotland".²²⁶ By contrast, there is no English equivalent in the Civil Jurisdiction and Judgments Act of the Scottish Schedule 8 on internal jurisdiction.

In the field of domicile, Lord President Clyde was unimpressed by the argument that there could be a place in the law of Scotland for the concept of Anglo-Indian domicile:

"it is clear that it was evolved and developed entirely in the Courts of England. In those same courts, since 1863, no one has had a good word to say for it ... I cannot see any reason why, in deciding it in Scotland, we should deliberately darken our minds by regarding as authoritative to-day an interpretation by the Courts of England of the judgment in *Bruces v Bruce*, which is now recognised to be a legal anomaly in the law of England ...".²²⁷

²²⁴ Anton with Beaumont, *Private International Law*, pp8-9. The development of a body of conflict rules in England is normally traced to the eighteenth century, and the editors of Dicey and Morris argue that it "came into prominence ... mainly because of conflicts between the laws of England and Scotland" (Collins, *Dicey and Morris on the Conflict of Laws*, para 1-014).

²²⁵ See Crawford, *International Private Law*, para 18.04.

²²⁶ Annotations by R.C.A. White & H. Currie to the Civil Jurisdiction and Judgments Act 1982, p27-5; and see also the comments of the Lord Chancellor, HL Debs, vol 425, col 1130.

²²⁷ *Grant v Grant* 1931 SC 238 at 249-250.

Turning to family law, in all the circumstances, a Scottish court might be unlikely to apply the rule laid down in the English case of *Sottomayor v De Barros (No. 2)*,²²⁸ which is that a lack of capacity to marry by the law of the domicile of a party to a marriage, which does not pertain under English law, will be ignored in the event of marriage to an English domiciliary.²²⁹ Furthermore, a Scots court will only find a person guilty of bigamy if he has attempted to re-marry in Scotland,²³⁰ whereas in England such an attempt by a British citizen will be a crime under English law, no matter where it is celebrated.²³¹ Also, as has been seen in this chapter, Scottish choice of law rules differed from those originally applied in England in matters of legitimacy and legitimation.²³²

In succession law, there is evidence of a slightly different approach on either side of the Tweed to the construction of wills. Thus under Scots law, the law of the testator's domicile will be used to determine, for example, who is an 'heir' of the testator.²³³ But if there is reference in the will to the 'heir' of some other person, it is the law of the latter person's domicile which is relevant.²³⁴ Furthermore, the *lex situs* is likely to have a role if heritage is being bequeathed.²³⁵ By contrast, in England, the identity of 'heirs' and such like is generally a matter for the testator's domicile, unless some contrary intention of the testator can be proved.²³⁶ The *lex situs* is not routinely applied even if immovable property is involved.²³⁷ Specifically, the 'heir' of a named person in the will (other than the testator) is still decided by the laws of the testator's domicile: much to the chagrin of the editors of Dicey and Morris, who favour the position of Scots law.²³⁸

²²⁸ (1879) 5 PD 94.

²²⁹ Crawford, *International Private Law*, para 9.18, cf Anton with Beaumont, *Private International Law*, p432. Clive takes the view that the rule can "hardly be regarded as firmly entrenched" (E.M. Clive, *The Law of Husband and Wife in Scotland*, 4th edn. (W. Green, 1997), para 09.061).

²³⁰ Crawford, *International Private Law*, para 9.09.

²³¹ Offences Against the Person Act 1861 (24 & 25 Vict), c.100, s57; Collins, *Dicey and Morris on the Conflict of Laws*, para 17-186.

²³² See pp127-130 above.

²³³ Anton with Beaumont, *Private International Law*, pp692-693; Crawford, *International Private Law*, para 17.30.

²³⁴ *Mitchell's Tr v Rule* (1908) 16 SLT 189; and *Smiths Trs v Macpherson* 1926 SC 983, are the authorities for this proposition: both are intra-UK cross-border cases.

²³⁵ *Murray v Earl of Rothes* (1836) 14 S 1049; Anton with Beaumont, *Private International Law*, p694; Crawford, *International Private Law*, para 17.30.

²³⁶ Collins, *Dicey and Morris on the Conflict of Laws*, paras 27R-054 to 27-055 & 27-061.

²³⁷ *Ibid.*, paras 27-063 to 27-064; Collier, *Conflict of Laws*, p273.

²³⁸ Collins, *Dicey and Morris on the Conflict of Laws*, para 27-061.

As was discussed above, there has also been a slight difference of approach in the conflict rules in delict.²³⁹ The common law double rule has not been interpreted in the same way in Scotland and England. The likelihood that Scottish courts will not avail themselves of any flexible exception in the context of the double rule, has also been noted.

Of course, just as there are such differences, there are also similarities between Scots and English international private law rules. As a small jurisdiction, it is always natural that Scotland will not accumulate the same breadth of authority, and so will have sometimes to look elsewhere for guidance in deciding a novel point of law. For much of the period when the subject was developing into the framework we recognise today, Scotland and England have been united into a British state,²⁴⁰ and thus English authorities may have been thought to spring from sufficiently similar circumstances to provide such guidance. However, in the field of international private law, the cross-border influences did not all flow in the one direction. As has already been hinted at, many key conflicts cases, regarded as so on both sides of the border, arose in Scots courts.²⁴¹ Furthermore, whilst initially there was "reluctance to equate English law with Scots law",²⁴² the doctrine of *forum non conveniens* was finally accepted by the English courts, and is now defended there with the zeal of the converted!²⁴³ It also has to be remembered that: "Borrowing ... does not by any means ensure similarity. A cat cannot sing just because it has swallowed a canary".²⁴⁴

²³⁹ See p133 above.

²⁴⁰ See Chap. 2. For Lord Reed, "Scots private law became heavily influenced by English law, after 1707, through the process of integration of the United Kingdom" (Lord Reed, "The constitutionalisation of private law", 70).

²⁴¹ See p117 above; and see *Lashley v Hog* (1804) 4 Paton 581; *Mackinnon's Trs v Lord Advocate* 1920 SC (HL) 171; *Administrator of Austrian Property v Von Lorang* 1927 SC (HL) 80.

²⁴² North & Fawcett, *Cheshire and North's Private International Law*, p335. See also the comments of Lord Diplock that "[i]t would not be consonant with the traditional way in which judicial precedent has played its part in the development of the common law of England, to attempt to incorporate holus-bolus from some other system of law, even so close as that of Scotland, doctrines or legal concepts that have hitherto been unrecognised in English common law" (*MacShannon v Rockware Glass* [1978] AC 795 at 811).

²⁴³ See, for example, *Airbus Industries GIE v Patel and Others* [1998] 2 All ER 257 *per* Lord Goff at 271; I. Karsten, "Brussels II - an English perspective" [1998] *IFL* 75 at 76.

²⁴⁴ Weir, "Divergent legal systems in a single member state", 574.

International private law in the lawyers' paradise

The veteran critic of devolution, Tam Dalyell said that his "fear is that the interaction between Holyrood and Westminster will be a lawyers' paradise".²⁴⁵ This is not the place to rehearse the political arguments for, and against, devolution. However, what is important in the context of this thesis is the effect of the new constitutional settlement on the Scottish rules of international private law.

It is submitted that the making of international private law rules is within the legislative competence of the Scottish Parliament, and the remit of the Scottish Executive. This seems to have been the view of the Scottish Office prior to the transfer of powers.²⁴⁶ Despite the 'international' tag, conflict rules are not, of course, "part of the law of a country or territory other than Scotland",²⁴⁷ nor are they a reserved matter,²⁴⁸ so the Scottish Parliament can legislate in this field. This is reinforced by the explicit inclusion of international private law in the definition of Scots private law laid down by the Scotland Act.²⁴⁹ As a consequence, international private law also falls within the powers of the Scottish Executive.²⁵⁰ The potential therefore exists for Scottish legislative change in this area.²⁵¹ Holyrood has been able to devote much greater time to Scottish affairs than Westminster had in the past, allowing reforms to be implemented more speedily.²⁵² There is therefore the possibility that Scots conflict rules could diverge further from their English counterparts.

At a more basic level, the advent of a legislative body elected by Scots also raises the prospect of a growing gulf between Scots and English private law, thus

²⁴⁵ Mr. T. Dalyell, HC Debs, vol 307, col 96.

²⁴⁶ J.L. Jamieson, "Devolution and the Scottish Law Officers" 1999 SLT (News) 117 at 118, referring both to private international law, and separately the recognition and enforcement of judgments.

²⁴⁷ Scotland Act 1998, s29(2)(a).

²⁴⁸ Although the conflicts aspect of a reserved matter, such as intellectual property, will be reserved.

²⁴⁹ Scotland Act 1998, s126(4)(a).

²⁵⁰ Ibid., s54.

²⁵¹ Indeed, the Scottish Executive may not act in contravention of EU legislation, which is increasingly important in international private law (ibid., s57(2)).

²⁵² For example, see annotations by A. Brown to Criminal Procedure (Amendment) (Scotland) Act 2002, asp 4, p4-1; annotations by M. Radford to Protection of Wild Mammals (Scotland) Act 2002, asp 6, p6-1; and see Himsworth, "Devolution and the mixed legal system of Scotland", 125; Himsworth & O'Neill, *Scotland's Constitution*, pp347-348.

creating more regular conflicts for international private law rules to police. The voting system adopted lends itself to coalition government,²⁵³ and this indeed has been the result of the first two Scottish parliamentary elections. Furthermore, in modern British political history the party with the majority of Scots votes has not always been the governing party at Westminster.²⁵⁴ It is therefore likely that there will at times be differences in the political make-up of the executives in Edinburgh and London, each with their own legislative agenda. Another product of the method of electing the Scottish Parliament has been the greater involvement of smaller parties and independents. Scottish MPs at Westminster are drawn from the Conservative, Labour, Liberal Democrats, and Scottish National, parties: currently the Scottish Parliament includes representation from these parties, but also the Scottish Green Party, the Scottish Socialist Party, the Scottish Senior Citizens Unity Party, and the Save Stobhill Hospital Party, as well as a number of independents. This broader spectrum of opinion has the potential to change the tone of the Parliament's legislative output.²⁵⁵

Thus far, the Scottish Parliament has been responsible for measures which deviate from the political programme for England and Wales pursued at Westminster. For example, certain forms of animal hunting have been banned in Scotland;²⁵⁶ measures have been passed to control further the physical chastisement of children;²⁵⁷ 'up-front' university tuition fees are not payable by Scottish students; and the legislative framework has been constructed to allow free personal care for the elderly.²⁵⁸ Freedom of information provisions relating to Scotland are thought to be more wide-ranging than the Westminster equivalent.²⁵⁹ Accordingly concerns over different approaches being taken on either side of the border, for

²⁵³ A. Myles, "The new electoral system" in Hassan (ed.), *A Guide to the Scottish Parliament*, p89 at 91.

²⁵⁴ B. Taylor, *Scotland's Parliament: Triumph and Disaster* (Edinburgh University Press, 2002), p298; R. McLean, "A brief history of Scottish home rule" in Hassan (ed.), *A Guide to the Scottish Parliament*, p21 at 27.

²⁵⁵ A good example of the power of a small party to exert influence on the introduction of legislation is the input of the Scottish Socialist Party to the Abolition of Poindings and Warrant Sales Act 2001, asp 1 (see annotations by S. Styles on Abolition of Poindings and Warrant Sales Act 2001).

²⁵⁶ Protection of Wild Mammals (Scotland) Act 2002.

²⁵⁷ Criminal Justice (Scotland) Act 2003, asp 7.

²⁵⁸ Community Care and Health (Scotland) Act 2002, asp 5.

²⁵⁹ See annotations by R. McInnes to the Freedom of Information (Scotland) Act 2002, asp 13, p13-4.

example, with respect to the nature of the Crown's right as *ultimus haeres*, may be less valid in the post-devolution UK. Arguably the statutes thus far produced by the Scottish Parliament may also reflect the importance of principles in Scots law.²⁶⁰ In the past, Acts of the Westminster Parliament might often commence with a definition, before setting out a number of technical legal consequences, or possible judicial remedies.²⁶¹ In any event, Scots law might simply be amended by the inclusion of some additional provisions in a statute on a topic, or by collecting a number of legislative reforms into a miscellaneous statute.²⁶² By contrast, a number of the Acts of the Scottish Parliament begin by setting out broad principles.²⁶³ Perhaps rather than approaching a subject from the perspective of the court remedies available, there may in future be a greater concentration on the actual content of the rights bestowed.

However, another matter which must be taken into account when attempting to predict how far Scots private law may differ from that of England as a result of devolution, is the Sewel Convention.²⁶⁴ It is generally accepted that the effect of constitutional doctrine is that the UK Parliament retains the power to legislate for Scotland in devolved matters. Despite some disquiet,²⁶⁵ this was explicitly stated in the Scotland Act.²⁶⁶ Reassurance was given that Westminster would not, in fact, so legislate without gaining the consent of the Scottish Parliament, and the procedure of obtaining this agreement has come to be known as a Sewel motion.²⁶⁷ The impression given by Donald Dewar both prior to, and after, his

²⁶⁰ Cf Himsforth & O'Neill, *Scotland's Constitution*, pp347-348. On the importance of principles in Scots law see N.R. Whitty, "From rules to discretion: changes in the fabric of Scots private law" (2003) 7 *EdinLR* 281; and note too Smits, *The Making of European Private Law*, p87.

²⁶¹ See, for example, Trusts (Scotland) Act 1921 (11 & 12 Geo V), c.58; Companies Consolidation (Consequential Provisions) Act 1985, c.9; Sale of Goods Act 1979; Conveyancing and Feudal Reform (Scotland) Act 1970, c.35; Family Law (Scotland) Act 1985, c.37. See too as to the level of detail, E. Clive, "Law-making in Scotland: from APS to ASP" (1999) 3 *EdinLR* 131 at 144-145.

²⁶² McDiarmid, "Scots law: the turning of the tide", 159-160; see also Mr J. Wallace, HC Deb, vol 241, col 379.

²⁶³ For example, see: Adults with Incapacity (Scotland) Act 2000, asp 4; Standards in Scotland's Schools etc. Act 2000, asp 6; National Parks (Scotland) Act 2000, asp 10; Mental Health (Care and Treatment) (Scotland) Act 2003, asp 13.

²⁶⁴ Although Munro has questioned whether it is properly a convention at this stage (J. Munro, "Thoughts on the 'Sewel Convention' " 2003 SLT (News) 194).

²⁶⁵ See Ashton & Finch, *Constitutional Law in Scotland*, para 8.04.

²⁶⁶ Scotland Act 1998, s28(7).

²⁶⁷ It initially seemed that this would also entail opposition to a Private Member's Bill purporting to legislate for Scotland on a devolved matter, but this does not seem always to have been done

election as First Minister, was that these motions would be rare,²⁶⁸ but this has not really been the case.²⁶⁹ This has caused concern, and certainly a number of constitutional law issues are raised. Does the system allow for adequate scrutiny of Westminster measures applying to Scotland?²⁷⁰ Does it needlessly complicate the legal system?²⁷¹ Does it allow circumvention of the courts' control on Scottish legislation which breaches the European Convention on Human Rights?²⁷² Centrally, does it affect the power of the Scottish Parliament to legislate on an area in the future?²⁷³ For many there is a worry that it gives away the opportunities presented by devolution for Scottish solutions to perceived problems.²⁷⁴ What is important in the context of the present analysis is the reasons for the greater than expected use of the Sewel Convention. One motive is the concern that a fragmented UK response will generate loopholes.²⁷⁵ As Burrows has noted, the Scottish Executive have prayed in aid the value of uniformity, without explaining precisely what that value may be in the areas concerned.²⁷⁶ Others have pointed to "a higher-than-predicted quest for uniformity of provision, whether because of high electoral expectation of similar rules, the need for regulatory equivalence, or because of the similarity of political commitment of governments in Edinburgh and London".²⁷⁷ However, as Himsworth has noted "when so-called anomalies are highlighted, they are often merely consequences of there being different legal systems".²⁷⁸ In debating a Sewel motion on the Civil Partnership Bill 2004, it was said that UK legislation

(N. Burrows, "This is Scotland's Parliament: let Scotland's Parliament legislate" 2002 *JR* 213 at 233-234).

²⁶⁸ *Ibid.*, 216 & 218-219.

²⁶⁹ *Ibid.*, 229 & 234; Taylor, *Scotland's Parliament*, p143; and see Himsworth & O'Neill, *Scotland's Constitution*, p197.

²⁷⁰ Burrows, "This is Scotland's Parliament", 218 & 231-232; Himsworth & O'Neill, *Scotland's Constitution*, p199.

²⁷¹ Himsworth & O'Neill, *Scotland's Constitution*, p199.

²⁷² L. Fabiani, SPOR, vol 2, no 6, cols 8955-8956 (3 June 2004). The concern here must be that whilst an Act of the Scottish Parliament incompatible with Convention rights could be struck down by the Scottish courts, if the matter is legislated on for Scotland by the Westminster Parliament, the only remedy is a declaration of incompatibility.

²⁷³ Himsworth & O'Neill, *Scotland's Constitution*, pp196-197; Munro, "Thoughts" 195-196; Burrows, "This is Scotland's Parliament", 235-236; Devolution Guidance Note 13, *Handling of Parliamentary Business in the House of Lords*, para 2.2.

²⁷⁴ See p104 above.

²⁷⁵ See Burrows, "This is Scotland's Parliament" 224 & 226.

²⁷⁶ *Ibid.*, 225

²⁷⁷ Himsworth & O'Neill, *Scotland's Constitution*, p198; and see also Burrows, "This is Scotland's Parliament", 235.

²⁷⁸ C.M.G. Himsworth & C.R. Munro, *Devolution and the Scotland Bill* (W. Green, 1998), p30.

was appropriate because the issue touched upon devolved and reserved matters, and that separate Scottish legislation "would not be in the best interests of consistency or clarity, and ... could lead to problematic cross-border issues".²⁷⁹ Whatever the potential criticisms or advantages, it seems that for the foreseeable future these attitudes dictating the use of the Sewel Convention might diminish the extent to which Scots law follows a radically different path.²⁸⁰

However, the difference wreaked by the passage of time in politics is legendary.²⁸¹ As has been argued above, it is quite possible that in the future a political party, or parties, may be in power in Holyrood, but not Westminster. Possible battlegrounds in these circumstances have already been identified by commentators, for example Westminster's control over the size of the block grant which forms the majority of the public funding open to the Scottish Parliament to allocate,²⁸² and the lack of decisive Scottish input into EU negotiations.²⁸³ Strained relations, together with ideological differences, could see further divergence between Scots and English law, resulting in an increased need to rely upon conflict rules within the UK.

Another factor which may be of some significance for Scots international private law is how far a stronger Scottish identity in terms of matters of status emerges: whether as a cause or an effect of devolution. For Taylor:

²⁷⁹ H. Henry, SPOR, vol 2, no 6, col 8946 (3 June 2004).

²⁸⁰ The extent to which most delegated legislation pertinent to Scotland may be made by the UK government rather than the Scottish Executive has also been the subject of investigation (C.T. Reid, "Who makes Scotland's law? Delegated legislation under the devolution arrangements" (2002) 6 *EdinLR* 380).

²⁸¹ It was Harold Wilson who first remarked that "A week is a long time in politics".

²⁸² Ashton & Finch, *Constitutional Law in Scotland*, para 8.25; Himsworth & O'Neill, *Scotland's Constitution*, pp394-398; C. Mair & B. McCloud, "Financial arrangements" in Hassan (ed.), *A Guide to the Scottish Parliament*, p73 at 78-80; Taylor, *Scotland's Parliament*, Chap. 13.

²⁸³ Ashton & Finch, *Constitutional Law in Scotland*, para 8.45; N. Burrows, "Relations with the European Union" in Hassan (ed.), *A Guide to the Scottish Parliament*, p125 at 130; T.StJ.N. Bates, "Devolution, the European Union and the Scotland Bill" 1998 *Scotland Forum* (Issue 2) 4 at 4; Taylor, *Scotland's Parliament*, Chap. 14.

"The history of devolution is that of a people who increasingly believed they had a particular national identity and wanted that identity expressed in political form. It is a history of political response, not political initiative".²⁸⁴

The Scotland Act does not supply a statutory definition of a Scot. However, it is necessary to define a Scottish taxpayer. This is, broadly, someone who is resident in the UK for income tax purposes, but has his closest connection with Scotland in that tax year.²⁸⁵ The latter concept is linked to the place of principal home and the days of residence in Scotland.²⁸⁶ The adoption of a different approach to the funding of university education has also seen the need to devise a definition of a Scottish student. It seems that this has been done by using the terminology of domicile, but providing specific rules to allow domicile to be determined by a simple rule in each case: the student must be UK resident in terms of the funding rules, and ordinarily resident in Scotland at the beginning of the university course.²⁸⁷ Therefore as well as the continued rôle for the common law concept of domicile in determining status for the purposes of, for example, succession or marriage, there may well be an increasing number of special statutory Scottish domiciles, such as those described above.

It is still too early accurately to assess or predict the full impact which all of the factors discussed in this section have had, and will have, on Scots international private law rules. Legislation on cross-border adoption has been left to Westminster by use of the Sewel motion procedure.²⁸⁸ There are also conflict measures in the Civil Partnership Bill 2004, which would apply to the whole of

²⁸⁴ Taylor, *Scotland's Parliament*, pp116-117; and see also Nairn, *After Britain*, pp217-220 & 303-305.

²⁸⁵ Scotland Act 1998, s75(1). The Adults with Incapacity (Scotland) Act 2000 utilises the concept of habitual residence (*ibid.*, Sch.3, para 1; but as we shall see this is derived from a Hague Convention: see p151 below). However, the court will also have jurisdiction over a British citizen with a closer connection to Scotland than another UK jurisdiction (*ibid.*, Sch.3, para 1(2)).

²⁸⁶ Scotland Act 1998, s75(2), (3).

²⁸⁷ See University of Strathclyde Student Finance Office, *Guidance for U.K. & E.U. Undergraduate Students: Session 2000/2001 and Beyond* (2000). Liability to the Graduate Endowment is, however, determined by, *inter alia*, ordinary residence in Scotland (The Graduate Endowment (Scotland) Regulations 2001, SSI 2001/280).

²⁸⁸ Sewel motion passed in respect of Adoption and Children Bill (SPOR, vol 11, no 11, cols 1181-1232 (4 April 2001)).

the UK by virtue of reliance on the Sewel Convention.²⁸⁹ However, the Scottish Parliament has ventured into the international private law field. The first point which should be made is that there appears to have been a change of terminology. Statutes passed by the UK Parliament tended to refer to a 'part of the United Kingdom'.²⁹⁰ However, the Adults with Incapacity (Scotland) Act 2000, and the Mental Health (Care and Treatment) (Scotland) Act 2003, which are a product of the Scottish Parliament, make reference to a "country other than Scotland"²⁹¹ or a "territory other than Scotland".²⁹² The Adults with Incapacity (Scotland) Act is of particular significance. Reform of this general area in Scotland had been considered by the Scottish Law Commission, and pressed for by a variety of bodies concerned in that field, but the UK Parliament was unable to find space for any such measures in its legislative programme.²⁹³ Accordingly, very quickly after its establishment, the Scottish Parliament passed the Adults with Incapacity (Scotland) Act 2000. Schedule 3 of the Act deals with jurisdiction, applicable law and also recognition and enforcement. Whilst the court may find a law other than Scots law applicable, mandatory rules having effect in Scotland cannot be evaded.²⁹⁴ The coming into force of the relevant Hague Convention was, however, awaited, before the Schedule would take effect.²⁹⁵ Excitingly, in 2003, for the first time, Scotland alone ratified the Hague Convention on the International Protection of Adults.²⁹⁶ Once the Convention is triggered by the requisite further ratifications, Scotland will participate in this international scheme, even although the Hague Convention rules may not yet apply in the other jurisdictions of the UK. This seemingly bold and independent approach to

²⁸⁹ The recognition provisions of the Bill have been discussed above at p105. The Bill will also prevent the treatment as a civil partnership of an overseas relationship entered into by a Scottish domiciliary under a certain age, or who is incapable of understanding the nature of the relationship, or which is within certain degrees of relationship (Civil Partnership Bill 2004, cl.209(3),(4)). Jurisdiction with respect to dissolution and annulment of a civil partnership is treated in clauses 217 and 211. It is explicitly said that sisting provisions similar to those contained in the Domicile and Matrimonial Proceedings Act 1973, c.45, Sch. 3, applicable to divorce, separation or nullity of marriage, may be made (Civil Partnership Bill 2004, cl.218).

²⁹⁰ For example, Civil Jurisdiction and Judgments Act 1982; Child Abduction and Custody Act 1985; Family Law Act 1986; Contracts (Applicable Law) Act 1990, c.36.

²⁹¹ Adults with Incapacity (Scotland) Act 2000, Sch. 3, para 3(2).

²⁹² Mental Health (Care and Treatment) (Scotland) Act 2003, s290(5)(a).

²⁹³ A.D. Ward, *Adult Incapacity* (W. Green/Sweet & Maxwell, 2003), paras 3-4 to 3-6.

²⁹⁴ Adults with Incapacity (Scotland) Act 2000, Sch. 3, para 5.

²⁹⁵ Ward, *Adult Incapacity*, para 3-20.

²⁹⁶ "Scotland makes history at the Hague", Scottish Executive News Release (SEJD349/2003), 4 November 2003, which also noted that Canada has adopted a similar course in allowing a Convention to be ratified in respect of one of its provinces.

conflict law-making may, however, still be tempered by consideration of the situation within the UK as a whole: Schedule 3 also provides that secondary legislation can be introduced allowing for the recognition and enforcement of orders from other parts of the UK, and these must not be any stricter than that applied with regard to orders from other signatories of the Hague Convention.²⁹⁷ The availability of more parliamentary time for Scottish matters in the new Scottish Parliament could also speed up the process of the transformation of conflicts of law into a largely statutory subject.²⁹⁸ But it cannot be said that the Scottish Parliament has thus far rushed to legislate extensively on international private law. Secondary legislation such as The European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001²⁹⁹ was necessitated by the Brussels II Regulation, which was an EU development, and as has been seen, the conflicts provisions of the Adults with Incapacity (Scotland) Act are tied in to a Hague Convention.³⁰⁰ Clearly it would be foolish not to bear in mind the intra-UK aspect when considering future legislation on international private law. As has been seen, differing jurisdictional rules in Scotland and England have in the past led to unhappy results. However, it has also been argued in this chapter that certain reforms of conflict rules may be desirable. It is submitted that if the case for such reforms is proven, the Scottish Parliament should act, and not be inhibited by a lack of UK-wide consensus.

"a good place to shop in, both for the quality of the goods and the speed of service"?³⁰¹

Thus did Lord Denning famously describe England in the context of choice of forum. Even within the UK market there are variations, both in the goods available, and in the speed of proceedings. Indeed, it has been submitted that following devolution, differences between the two jurisdictions might further

²⁹⁷ Adults with Incapacity (Scotland) Act 2000, Sch. 3, para 10.

²⁹⁸ See E.B. Crawford, "What happened to Indyka? A survey of developments in international private law 1958-1990" in A.J. Gamble (ed.), *Obligations in Context: Essays in Honour of Professor D.M. Walker* (W. Green, 1990), p151 at 153.

²⁹⁹ SSI 2001/36.

³⁰⁰ Although it must be remembered that there is no obligation to ratify Hague Conventions, in contrast to EU measures.

³⁰¹ *The Atlantic Star* [1973] 1 QB 364 per Lord Denning MR at 382.

increase. The subject of forum shopping within the UK therefore demands scrutiny.

The availability of remedies plays a large part in the preference of one possible forum to another, and this is no less a factor in cases as between Scotland and England. At a time when divorce in England was, practically, not possible, the nineteenth century writer Caroline Norton explored whether she might be able to obtain a divorce of her husband in Scotland:

"I tried the Edinburgh lawyers. I inquired if they could not prove my marriage a Scotch one, all Mr Norton's property being in Scotland, his father a Scotch Baron of Exchequer, and his mother of a Scotch family, - but without success".³⁰²

Some of the cross-border cases of this period illustrate concern being evinced that English couples were resorting to Scotland to avoid the effect of English domestic law. In *Morcomb v Maclelland*³⁰³ it was said by the Commissary Court that "the courts of one country ought not to be converted into engines, for either eluding the laws of another, or determining matters foreign to that territory".³⁰⁴ Despite this, as has been seen, some ostensibly English couples did manage to obtain decrees of divorce in Scotland.³⁰⁵

We have seen that a suspicion was entertained by the Court of Session that Mrs McElroy may have been attempting to evade the effects of a claim under English law being time-barred.³⁰⁶ A more modern, yet very clear, example of forum shopping is provided by *Sokha v Secretary of State for the Home Department*.³⁰⁷ This case was remarkable for its lack of any real link to Scotland, and seemed only to have been raised to take advantage of the Scots courts' greater readiness to grant a particular remedy. In *James Miller and Partners Ltd v Whitworth Street*

³⁰² Norton, "A Letter to the Queen", p49.

³⁰³ (1801) Ferg Cons 264.

³⁰⁴ Ibid. at 264; and see Hosack, *A Treatise on the Conflict of Laws*, pp271-272 & 284.

³⁰⁵ See p96 above.

³⁰⁶ *M'Elroy v M'Allister* 1949 SC 110 (see pp134-135 above).

³⁰⁷ 1992 SLT 1049 (see pp101-102 above).

Estates (Manchester) Ltd,³⁰⁸ an action was raised in England in which it was argued that an arbitration between the parties had been governed by English law, and thus a case might be stated to an English court. However, the court noted that in the arbitration "Scottish procedure was followed throughout without objection until the application was made for a case to be stated. Then for the first time, when it was realised that this procedure was not available in Scotland, was any attempt made to depart from what had previously been agreed".³⁰⁹ The arbitration was accordingly found by the court to be governed by Scots law and the attempt to utilise an English remedy unavailable in Scotland was rebuffed. Differences in the rules on financial provision on divorce also act as an encouragement to careful forum selection within the UK.³¹⁰ Another powerful motivation is money: in a variety of ways. Firstly, there is a perception, probably not ill-founded, that higher sums of damages are awarded in England than Scotland, particularly in defamation actions.³¹¹ This monetary advantage seems to have been the main reason for Scottish workmen bringing an action in England for injuries sustained in Scotland in *MacShannon v Rockware Glass*.³¹² And how else to explain *Foxen v Scotsman Publications Ltd*³¹³ and *Cumming v Scottish Daily Record and Sunday Mail Ltd*?³¹⁴ Both were defamation cases against Scottish newspapers. In the first the plaintiff was a Scottish domiciliary, and only ten per cent of the newspaper's circulation was in England. The plaintiff in the second was a Scottish student, and only about 7.5 per cent of the newspaper's weekly circulation of 850,000 was through distribution in England. This factor was quite explicitly discussed in *Lennon v Scottish Daily Record and Sunday Mail Ltd*.³¹⁵ The latter's circulation in England was 22,069, but in Scotland more than twenty-fold that figure. The defendant argued that:

³⁰⁸ [1970] 1 All ER 796.

³⁰⁹ Ibid. *per* Lord Hodson at 802.

³¹⁰ Both in Scotland and England the *lex fori* will be applied in divorce cases before their courts (on the effect of such rules on forum shopping see A.S. Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003), para 2.38), and for the differing cross-border approaches to financial provision on divorce see Editorial (2001) 50 *SLFB* 1; D. Hodson, "Brussels III; financial provision - the next generation" [2002] *Fam. Law* 30.

³¹¹ The quantification of damages currently being a matter for the *lex fori* under both Scots and English law.

³¹² [1978] AC 795.

³¹³ 1994 TLR 84

³¹⁴ 1995 TLR 333.

³¹⁵ [2004] EWHC 359 (QB).

"it is a well-known fact that awards for damages in defamation are higher in England than Scotland ... He submits that the English courts must thus be vigilant to ensure that they are not used as a vehicle to circumvent what claimants perceive to be the less 'remunerative' attitude to damages under Scots law. Any other approach ... would result in the English courts having a jurisdictional trump-card with respect to any defamatory Scottish publication involving a comparatively small cross-border publication".³¹⁶

Another way in which money impacts upon a pursuer's choice of forum is in terms of the cost of litigation. There seems to be a popular feeling that legal action in Scotland may be comparatively cheaper and quicker than in England. This appears to have been demonstrably the case in the distant past, as between Scottish divorces and English judicial separations.³¹⁷ In more modern times it was thought that this factor might cause one of the more notorious libel battles to be fought in Scottish courts.³¹⁸

If both the Scots and English courts have jurisdiction in a matter, the success or failure of attempts to choose the Scots forum depends upon the doctrine of *forum non conveniens*: a concept that, as we have seen, was eventually also adopted in England. Scottish courts do not seem to have applied the doctrine any differently whether the alternative forum was England or a foreign country.³¹⁹ In both cases, for example, the basing of jurisdiction on the arrestment of property *ad fundandam jurisdictionem* makes it more likely that a plea of *forum non conveniens* will succeed. In *Williamson v North-Eastern Railway Co*³²⁰ a widow attempted to sue an English company for the death of her husband (which had occurred in England) by founding jurisdiction on the arrestment of property in Scotland. It was recognised that the widow could not bring an action in England,

³¹⁶ Ibid. para 22.

³¹⁷ At the beginning of the nineteenth century, the cost of divorcing in Scotland was on average between £15 to £30, but an undefended judicial separation in England might cost from £120 to £140, and a divorce by private Act of Parliament around £700 (Leneman, *Alienated Affections*, p15).

³¹⁸ W. Tinning, "Legal views differ on Hamilton suing in Scotland", *The Herald*, 17 November 1997; K. Symon, "Hamilton to sue Fayed in Scotland", *The Sunday Times*, 16 November 1997.

³¹⁹ See, for example, *Robinson v Robinson's Trs* 1930 SC (HL) 20.

³²⁰ (1884) 11 R 596.

yet nevertheless the defenders' plea of *forum non conveniens* was upheld.³²¹ Anton believes that the ability to cite witnesses outwith Scotland, but within the UK, may account for the decision in *Munro & Co v Anglo-American Nitrogen Co*,³²² but this is not said explicitly in the report.³²³

The effect of EU Conventions and legislation on the existence of the plea of *forum non conveniens* will be discussed in another chapter.³²⁴ For the present it is recorded that it will be this author's submission that neither the Brussels I Regulation, nor the Brussels II Regulation prevent reliance upon the doctrine within the UK.³²⁵ It is submitted that in these areas, as well as in others, the doctrine continues to provide a useful protection. It seems inappropriate that a case which is most closely connected with one forum should be allowed to proceed in another. This is particularly so if this favours the more affluent pursuer able to manipulate the system in search of monetary gain. Such concerns have no less force within the UK.³²⁶ Giving evidence to the House of Lords Select Committee on the Brussels II Regulation, Clive argued that:

"Assuming that the grounds of jurisdiction are reasonable, and that all the countries involved will conduct the proceedings in a way which is in accordance with accepted principles of natural justice, a simple rule for the resolution of such conflicts is arguably better than a complicated set of rules. A mandatory system is arguably better than a discretionary system, which leaves open the possibility of two sets of proceedings continuing".³²⁷

³²¹ A decision applauded by Bell (Bell, *Forum Shopping*, para 2.12).

³²² 1917 1 SLT 24. This was an action by a Scots firm against an English company for breach of contract, in which the latter appeared to base their (unsuccessful) plea of *forum non conveniens* on the presence of witnesses in England.

³²³ See the first edition of Anton with Beaumont: A.E. Anton, *Private International Law: A Treatise from the Standpoint of Scots Law*, 1st edn. (W. Green & Son, 1967), p152.

³²⁴ See Chap. 6.

³²⁵ In the latter case, insofar as this is not prevented by the sisting provisions of the Domicile and Matrimonial Proceedings Act 1973, Sch.3. On the potential availability of a plea of *forum non conveniens* in a divorce action see P.R. Beaumont, "Conflicts of jurisdiction in divorce cases: *forum non conveniens*" (1987) 36 *ICLQ* 116.

³²⁶ Indeed, may have more force in a country with no political borders between its jurisdictions, which all have a common language.

³²⁷ E.M. Clive, Memorandum contained in Report of the House of Lords Select Committee on the European Communities, *Brussels II: the Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters* (HL Paper 19, Session 1997-98), p3.

That possibility is indeed undesirable, and is prevented by the operation of a system of *lis alibi pendens*. But with that certainty comes inflexibility. The grounds upon which Scottish and English courts can both legitimately have jurisdiction are still such that the prize in the race to litigate may be the selection of a forum which seems inappropriate, in all the circumstances of the case, to the impartial observer. It is submitted that the key to the benefits of a doctrine of *forum non conveniens* is that a choice between a number of forums is not resolved simply by rewarding the party who is fastest to act, but by dint of a more sophisticated mechanism, rooted in the concept of justice between the parties,³²⁸ and operated by an independent judicial body in the form of the court.³²⁹ As Bell observes, the idea of a natural forum gives:

"a neutral and objective solution to clashes between parties relating to the venue for the resolution of a transnational dispute - something of a tie breaker in cases of contested jurisdiction and at the same time a corrective to the phenomenon of forum shopping".³³⁰

The preservation of the *forum non conveniens* doctrine within the UK is to be commended as it allows the courts to continue to fulfil such a valuable rôle.

³²⁸ See Bell, *Forum Shopping*, paras 3.87-3.88.

³²⁹ The cynic may argue that a court seised, before which any arguments of *forum non conveniens* may be heard, cannot be totally impartial, as it already has an interest in the case. However, cases such as *Williamson v North-Eastern Railway Co.* (1884) 11 R 596; and *Sokha v Secretary of State for the Home Department* 1992 SLT 1049, are testament to the ability of Scots courts to decline jurisdiction where they conclude that England is the proper forum.

³³⁰ Bell, *Forum Shopping*, para 3.89.

6 THE IMPACT OF EUROPEAN UNION LEGISLATION ON INTRA-UK CONFLICT RULES

One of the most significant events for the UK in the development of modern international private law has been our entry into the (then) European Economic Community (now the EU) signalled by the European Communities Act 1972. Over the years the range of areas in which EU action is deemed necessary to support the Internal Market (and since the Treaty of Amsterdam of 1997 and the Tampere Conclusions of 1999, to create an area of freedom, security and justice) between member states has increased. The stated aim is greater convergence in civil law. As recently as 1989, a writer on succession matters in the international arena commented that this area of law "falls squarely within the zone of matters that are outwith the scope of the EEC Treaty, therefore international action in this field has to be taken in alternative fora".¹ Now Brussels IV, an EU Regulation on succession, is in contemplation.² Another important shift in EU involvement in conflicts law has been the move from the use of Conventions, which the UK would implement with domestic legislation,³ to the use of Regulations,⁴ which are directly enforceable in all member states, and which have been described as "the most invasive legal instrument that European law has at its disposal".⁵ Briggs has described the process as "the concreting over of the common law conflict of laws".⁶ But how does this endless construction work affect the regulation of international private law matters within the UK? And do Scotland and England share the same planning objections?

¹ Robertson, "International succession law", 377.

² C.M.V. Clarkson, "Brussels III - matrimonial property European style" [2002] *Fam Law* 683 at 683; Hodson, "Brussels III", 30.

³ Such as the Brussels Convention, implemented by the Civil Jurisdiction and Judgments Act 1982; and the Rome Convention, implemented by the Contracts (Applicable Law) Act 1990.

⁴ For example the Brussels I Regulation, and the Brussels II Regulation. There is also a proposal to convert the Rome Convention into a Regulation.

⁵ K. Boele-Woelki & R.H. van Ooik, "The communitarization of private international law" (2002) 4 *YPIL* 1 at 28. Contrast the shortcomings of Directives (L. Niglia, "The Non-Europeanisation of private law" (2001) 4 *ERPL* 575).

⁶ Briggs, *The Conflict of Laws*, p.v.

Choice of law in contract: the Rome Convention

Article 19(2) of the Rome Convention⁷ presented the UK with a clear choice, providing as it does that "[a] State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units". This brought forth an equally clear response in the UK implementing legislation. Section 2(3) of the Contracts (Applicable Law) Act 1990 provides that the Rome Convention provisions also apply to conflicts between the jurisdictions of the UK. Whilst the Bill was being debated, the then Lord Advocate stated that this was the government's intention, but did not explain the thinking behind the move.⁸ Anton, who assisted in negotiating the Convention,⁹ suggests that to do otherwise would have led to difficulties for lawyers.¹⁰ Similarly the editors of Cheshire and North ascribe the decision to "the obvious inconvenience"¹¹ of different rules dependent on whether the conflict arose within the UK, or in respect of a foreign country. Interestingly, however, arguments were made during parliamentary debates for the Convention not to apply with respect to foreign countries who were not contracting states, and it was not posited that this course would cause great difficulties.¹² The UK also decided to disapply certain Articles of the Convention.¹³ This would seem to suggest that the view was taken that the UK was, in the main, satisfied with the Convention rules, and thus content for them to apply within the UK, as well as with respect to foreign countries. Indeed, whilst it would be inaccurate to describe, and dangerous to regard, the Convention as a codification of the well-developed English choice of law rules in this area, there are undoubted similarities between the two.

⁷ More properly, the Convention on the law applicable to contractual obligations.

⁸ Lord Fraser of Carmyllie, HL Debs, vol 513, col 1258.

⁹ Ibid.

¹⁰ Anton with Beaumont, *Private International Law*, p314.

¹¹ North & Fawcett, *Cheshire & North's Private International Law*, p545.

¹² See HL Debs, vol 513, cols 1269-1270 & vol 515, cols 1474-1482. In the event, the Rome Convention does have universal application, and thus must be applied in the courts of all contracting states to qualifying disputes, even if the contending laws are not those of contracting states.

¹³ Namely Arts 7(1) & 10(1)(e). It is questionable whether the UK will be allowed to disapply these provisions if the Convention is converted into a Regulation (see p160 below) (E.B. Crawford & J.M. Carruthers, "Conflict of laws update" 2003 SLT (News) 137 at 140).

The Scots and English courts have not, however, necessarily adopted the same approach as each other to the interpretation of the Rome Convention. In *Caledonia Subsea Ltd v Micoperi Srl*,¹⁴ the Inner House appeared to place much emphasis on Article 4(2) of the Convention, the law thus indicated only being displaced if "the outcome of the comparative exercise referred to in para 5 ... demonstrates a clear preponderance of factors in favour of another country".¹⁵ This accorded with the Dutch approach to interpretation of the Article.¹⁶ Accordingly, Scots law having been identified by Article 4(2), this was not to be disregarded in a contract with the defenders (an Italian company subcontracted to an Egyptian company), for work in Egypt. This does not coincide with the views of the editors of Dicey and Morris,¹⁷ nor with certain English decisions which suggested that Article 4(2) was easily to be displaced by the law suggested by Article 4(5).¹⁸ Whilst this latter approach may have been modified in *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH*,¹⁹ it arguably still does not coincide with the Scottish view. Crawford and Carruthers sense a difference in interpretation within the UK.²⁰

When the Rome Convention was drafted, a mechanism was also put into place whereby differences in interpretation could be lessened by means of references to the European Court of Justice (ECJ).²¹ This Brussels Protocol never entered into force, but the same effect would be achieved if the current proposal to convert the Rome Convention into an EU Regulation were to succeed.²² ECJ jurisdiction over contractual disputes involving the law of a politically foreign country²³ caused concern at the time of the preparation of the Rome Convention.²⁴ What was much less clear was whether the ECJ could accept a reference from a UK

¹⁴ 2002 SLT 1022.

¹⁵ *Ibid.* per Lord President Cullen at 1029.

¹⁶ *Ibid.* per Lord Cameron of Lochbroom at 1031; per Lord Marnoch at 1032.

¹⁷ *Ibid.* per Lord President Cullen at 1029.

¹⁸ *Crédit Lyonnais v New Hampshire Insurance Co.* [1997] 2 Lloyds Rep 1 per Hobhouse LJ at 5.

¹⁹ [2001] 4 All ER 283; followed in *Ennstone Building Products Ltd v Stanger Ltd* [2002] 1 WLR 3059.

²⁰ Crawford & Carruthers, "Conflict of laws update" (2003), 138-139.

²¹ The first Protocol on the interpretation of the Rome Convention by the European Court ("the Brussels Protocol"), contained in Schedule 3 of the Contracts (Applicable Law) Act 1990.

²² See Crawford & Carruthers, "Conflict of laws update" (2003), 137.

²³ Because of the universal application of the Convention (see note 12 above).

²⁴ Tizzano Report [1990] OJ C219/1, para 23.

court in an intra-UK contractual conflicts case, had the Brussels Protocol been in effect. The terms of Article 19(2), and the Brussels Protocol itself, together with s2(3) of the Contracts (Applicable Law) Act, do nothing to suggest that this would not be possible. The editors of Dicey and Morris felt it likely that such a reference could be made, and that the ECJ would accept jurisdiction.²⁵ However, whilst the case of *Kleinwort Benson Ltd v Glasgow City Council*²⁶ clarified the ECJ's lack of jurisdiction over national legislation simply modelled upon European rules, it is not entirely clear whether the reference of internal matters directly to European legislation founds ECJ jurisdiction.²⁷ The binding nature of any ECJ judgment arising from such a reference was identified as being of importance.²⁸ Plender is of the view that the reliance on the Rome Convention itself for cross-border conflicts within the UK, together with the lack of any direction to treat ECJ cases differently in international or intra-UK cases, is currently sufficient for the ECJ to take jurisdiction in the latter type of case.²⁹ He admits, however, that this is "still an open question".³⁰

Thus, in terms of the choice of law rules applying to contracts, the UK response to the Rome Convention was to adopt, almost in their entirety, the Convention rules in the areas which it governed. In particular, the common law rules were not retained for choice of law issues in cross-border contracts within the UK, although as has been noted, there were similarities between the English Common Law (to which Scots conflict law owed a debt), and the Convention, rules. There may presently, however, be some difference in approach in Scotland and England to the implementation of the Rome Convention rules.

²⁵ Collins, *Dicey and Morris on the Conflict of Laws*, para 32-029.

²⁶ [1996] QB 57; the case concerned the interpretation of the 'Modified Convention' in the Civil Jurisdiction and Judgments Act 1982, Sch. 4.

²⁷ This practice was, interestingly, described as a renvoi (*Kleinwort Benson Ltd v Glasgow City Council* [1996] QB 57 *per* Advocate General at 70). The Advocate General was most hostile to the ECJ issuing rulings in such renvoi situations (*ibid.* at 73-80), but unfortunately the Court's own judgment is less clear.

²⁸ *Ibid.*, 82-83.

²⁹ R. Plender & M. Wilderspin, *The European Contracts Convention: The Rome Convention on the Choice of Law for Contracts*, 2nd edn. (Sweet & Maxwell, 2001), paras 2-28 to 2-32.

³⁰ *Ibid.*, para 2-32.

Choice of law in non-contractual obligations: Rome II

The proposed Regulation on non-contractual obligations³¹ (commonly referred to as "the Rome II Regulation") would govern choice of law in delict, and obligations characterised as unjust enrichment and agency without authority. As with the Rome Convention discussed above,³² the Rome II Regulation would apply not just in situations where the choice of law is between the laws of member states, but also where the law of a non-EU country is involved.³³ However, again as with the Rome Convention, member states comprising more than one legal system are explicitly allowed a choice as to whether to apply the Rome II Regulation in conflicts between the laws of those legal systems.³⁴

To choose to apply the Rome II Regulation within the UK would require amendment of the Private International Law (Miscellaneous Provisions) Act 1995. The Rome II Regulation lays great stress on the law of the country in which the delictual loss is sustained,³⁵ and also contains special rules for particular delicts.³⁶ The latter includes defamation, which currently remains subject to the common law double rule in Scotland.³⁷ In the field of unjust enrichment, the Rome II Regulation would replace the existing common law rules, such as they are. The final response to the Rome II Regulation with respect to intra-UK application will presumably be taken at Westminster level, with input from the Scottish Parliament:³⁸ what will the final decision be? The outcome in general, and in detail, is far from clear. The Rome II proposal made insufficient

³¹ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, COM (2003) 427 final; 2003/0168 (COD).

³² Rome Convention, Art. 2.

³³ Rome II Regulation, Art. 2.

³⁴ *Ibid.*, Art. 21(2); indeed Scotland is specifically mentioned in the accompanying discussion of Art. 21 (Rome II Proposal, p28).

³⁵ Rome II Regulation, Art. 3(1). This general rule can be displaced in favour of the law of the country where both parties are habitually resident (*ibid.*, Art. 3(2)), or the law of a country more closely connected with the delict (*ibid.*, Art. 3(3)).

³⁶ For example, in matters of product liability or unfair competition. For a detailed discussion of the Rome II Regulation, see J.M. Carruthers & E.B. Crawford, "Conflict of laws update" 2004 SLT (News) 19; A. Dickinson, "Cross-border torts in EC courts - a response to the proposed 'Rome II' Regulation" [2002] *EBLR* 369.

³⁷ See p133 above.

³⁸ Report of the House of Lords European Union Committee, *The Rome II Regulation* (HL Paper 66, Session 2003-2004), para 87. However, the Scottish Executive Justice Department seemed to suggest in the context of the Brussels I Regulation that amendment to Schedule 4 would be dealt with by Westminster, and to Schedule 8 by Holyrood (Civil Justice and International Division of the Scottish Executive Justice Department, "New rules on civil jurisdiction" 2002 SLT (News) 39 at 41).

progress in the EU parliamentary session now ended, and in the new session will be subject to the co-decision procedure. Moreover, the EU parliamentary Committee on Legal Affairs and the Internal Market has produced a draft Report on the Rome II Regulation³⁹ which suggests significant amendments to the proposal. In particular, it suggests a rule for all delictual and unjust enrichment matters, but with room for flexibility to take account of various factors, and of the special features of particular types of delict. There were many within the UK who questioned whether the Rome II Regulation (in its original proposed form) was necessary, or indeed legitimately a subject of EU legislation.⁴⁰ It is submitted, however, that it would be naïve to assume that the Commission can ultimately be dissuaded from its intention to see this project through: even if changes are made to the detail, a Rome II Regulation will come to pass. There are some who take the view that if a Rome II Regulation does come into force, it would be easier to apply the Regulation rules in intra-UK cases as in all other cases.⁴¹ Furthermore, as Carruthers and Crawford observe:

"Since it was a conscious decision that the 1995 Act should contain no special intra-UK rules, it would be ironic if the UK now should choose to disapply Rome II within its multi-legal system territory".⁴²

Jurisdiction, recognition and enforcement: the Brussels Convention and the Brussels I Regulation

In contrast to the reaction to the proposed Rome II Regulation, a modified acceptance is apparent in the UK response to the European rules on jurisdiction, recognition and enforcement in civil and commercial matters. Like the Rome

³⁹ Committee on Legal Affairs and the Internal Market (Rapporteur: Diana Wallis), *Draft Report (Revised Version) on the proposal for a European Parliament and Council regulation on the law applicable to non-contractual obligations ("Rome II")* (5 April 2004), ("The Wallis Report").

⁴⁰ Report of the House of Lords European Union Committee, *The Rome II Regulation*, paras 48-79; "Consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations: response of the Government of the United Kingdom", http://europa.eu.int/comm/justice_home/unit/civil/consultation/contributions/govern_uk_en.pdf, para 2; Dickinson, "Cross-border torts", 371-372; Carruthers & Crawford, "Conflict of laws update" (2004), 24. The amendments suggested in the Wallis Report might make the Rome II Regulation slightly more palatable to the critics.

⁴¹ Report of the House of Lords European Union Committee, *The Rome II Regulation*, para 89.

⁴² Carruthers & Crawford, "Conflict of laws update" (2004), 23.

Convention, the original Brussels Convention⁴³ applied between contracting states, although there was no equivalent to the Rome Convention provision which sharply points up the choice of applying, or not applying, the Convention within a member state.

Jurisdiction

With respect to jurisdiction, the UK adopted a tiered approach. The Brussels Convention applied to allocate jurisdiction in disputes involving Scotland (or England) and another contracting state.⁴⁴ A modified version of the jurisdiction rules applied in intra-UK cross-border cases.⁴⁵ As has been noted, because of the similarity of the Convention approach to existing Scots rules, it was also possible to include within the implementing legislation rules for jurisdiction in Scottish domestic cases.⁴⁶ Some of the differences between the Schedule 4 scheme and the Brussels Convention itself were necessitated by the structure of the UK. Thus, certain of the Convention rules favoured central offices, which in the UK may often be in London. Applied within the UK, these rules might have resulted in the English courts being allocated jurisdiction in circumstances where Scotland might be a more appropriate forum. Article 16(4) of the Convention, for example, was not adopted in Schedule 4, as otherwise no patent cases could have been brought in Scotland.⁴⁷ However, other omissions from Schedule 4 merely signal UK displeasure with the Convention rule in question, such as the provisions on insurance contracts.⁴⁸ Furthermore, certain bases of jurisdiction absent from the Brussels Convention were not banished from the intra-UK arena.⁴⁹ In the case of the majority of the Schedule 4 rules, which do coincide with the Convention provisions, it was intended that Convention cases would provide guidance.⁵⁰ As has been seen, there was some consideration in

⁴³ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

⁴⁴ Civil Jurisdiction and Judgments Act 1982, Sch. 1.

⁴⁵ *Ibid.*, s16, Sch. 4; and see P.R. Beaumont, *Anton & Beaumont's Civil Jurisdiction in Scotland*, 2nd edn. (W. Green/Sweet & Maxwell, 1995), paras 9.01-9.04.

⁴⁶ See p142 above.

⁴⁷ The Maxwell Report, para 13.124; annotations by R.C.A. White & H. Currie to the Civil Jurisdiction and Judgments Act 1982, p27-22.

⁴⁸ See the Maxwell Report, para 13.78.

⁴⁹ For example, the *situs* of moveables in actions relating to moveable property, or the *situs* of immoveables in actions relating to a security over the property.

⁵⁰ Civil Jurisdiction and Judgments Act 1982, s16(3).

*Davenport v Corinthian Motor Policies at Lloyds*⁵¹ of the possibility of a different course being taken in jurisdiction disputes within the UK, but the judges ultimately felt constrained to interpret Schedule 4 as they would the Convention itself.⁵² There is no evidence that provisions appearing in both the Convention and Schedule 4 have been interpreted differently by the Scots courts.⁵³

Although the Brussels I Regulation replaces the Brussels Convention,⁵⁴ it does not itself alter the arrangements for the allocation of jurisdiction within the UK. The Brussels I Regulation innovates upon the Brussels Convention to some degree, although the basic framework is unchanged.⁵⁵ The Schedule 4 scheme already provided for the taking of jurisdiction in terms of Article 5(3) when a wrong was merely threatened, but the Schedule has been amended to take account of the altered rules on consumer contracts, contracts of lease and employment contracts in the Brussels I Regulation.⁵⁶ The greater clarity of Article 5(1) of the Brussels I Regulation has not, however, been carried over to Schedule 4.⁵⁷ Nor was the opportunity taken to remove any of the remaining differences between the rules allocating jurisdiction amongst the various parts of the UK, and the rules which apply when the court of another member state is involved.

A further such difference is the availability of the plea of *forum non conveniens* within the UK. This was initially the subject of some confusion. It was clear that as between Scottish courts and courts in another contracting state, there was no

⁵¹ 1991 SLT 774.

⁵² See pp100-101 above.

⁵³ Beaumont, *Civil Jurisdiction*, para 9.06 and see, for example, the intra-UK cases of *Montagu Evans v Young* 2000 SLT 1083; *Universal Steels Limited v Skanska Construction UK Limited* (31 October 2003, unreported), OH. In the intra-UK cross-border case of *Liffe Administration and Management v The Scottish Ministers* 2004 SLT 2, the Court's power to make an order was reliant upon the proceedings being in respect of a matter which was within the scope of, previously the Brussels Convention, and now the Brussels I Regulation. This was determined by reference to ECJ case law.

⁵⁴ Although the Brussels Convention continues to apply in respect of Denmark.

⁵⁵ There is greater specification in Art. 5(1) to assist in determining the place of performance of the obligation in question; Art. 5(3) has been expanded to include actual as well as threatened wrongs; contracts of employment are separately dealt with; and there are also changes in the rules applying to certain contracts of lease, and to consumer contracts.

⁵⁶ Civil Jurisdiction and Judgments Order 2001, SI 2001/3929.

⁵⁷ Although it seems this may be reconsidered by the government in future (Civil Justice and International Division of the Scottish Executive Justice Department, "New rules on civil jurisdiction", 41).

place for the doctrine.⁵⁸ However, it was expressly provided in the Civil Jurisdiction and Judgments Act 1982 that the *forum non conveniens* doctrine was preserved where this was not inconsistent with the Brussels Convention.⁵⁹ Nor did Schedule 4 contain the *lis alibi pendens* rule adopted in the Convention. The stated intention of the government of the day, in drawing up the Civil Jurisdiction and Judgments Act 1982, was that *forum non conveniens* should remain available within the UK.⁶⁰ This result seemed to have been successfully achieved by the legislation, and this was the view taken by legal commentators.⁶¹ Matters were somewhat derailed by the English judgment of *Foxen v Scotsman Publications Ltd and Another*,⁶² in which it was held that the use of *forum non conveniens* in an intra-UK jurisdiction dispute "was inconsistent with at least the spirit and probably the letter of the Convention".⁶³ Somewhat unusually, the opportunity to correct this unfortunate authority fell to the same judge in the following year. *Cumming v Scottish Daily Record and Sunday Mail Ltd and Others*⁶⁴ accordingly confirmed that *forum non conveniens* was in fact available within the UK, the judge observing ruefully that were the case to be appealed:

"Whatever the Court of Appeal decided, his Lordship would be held wrong. However, he had the consolation that he would also be held right".⁶⁵

It is submitted that the advent of the Brussels I Regulation has had no impact upon the availability of the plea of *forum non conveniens* within the UK: Schedule 4 of the Civil Jurisdiction and Judgments Act, rather than the Regulation, continues to govern intra-UK jurisdictional matters, and s49 has not

⁵⁸ Brussels Convention, Art. 21.

⁵⁹ *Ibid.*, s49. It was held in an English decision that *forum non conveniens* could operate if a non-contracting state was the other possible forum (*Re Harrods (Buenos Aires) Ltd (No 2)* [1991] 4 All ER 334; although see now *Lubbe v Cape plc* [2000] 4 All ER 268 *per* Lord Bingham at 282).

⁶⁰ Lord Chancellor, HL Debs, vol 425, col 1132.

⁶¹ L. Collins & B. Davenport, "*Forum conveniens* within the United Kingdom" (1994) 110 *LQR* 325; A. Reed & T.P. Kennedy, "*Forum non conveniens* and the Brussels Convention" [1995] *NLJ* 1697; G. Amodeo, "Conflicts of jurisdiction within the UK" (1995) 40 *JLSS* 321.

⁶² 1994 TLR 84.

⁶³ *Ibid.* at 85.

⁶⁴ 1995 TLR 333.

⁶⁵ *Ibid.* at 333.

been repealed.⁶⁶ This was also the conclusion reached by the English court in the case of *Lennon v Scottish Daily Record and Sunday Mail Ltd.*⁶⁷

Recognition and enforcement

The UK government, however, chose not to mirror the Brussels Convention rules in the field of intra-UK recognition and enforcement of judgments. Instead, much more far-reaching recognition and enforcement provisions were enacted in the form of Schedules 6 and 7 of the Civil Jurisdiction and Judgments Act 1982. As an example of internalising rules, these have already been discussed in a previous chapter.⁶⁸

Jurisdiction, recognition and enforcement in family law matters: Brussels II and Brussels II bis

It is submitted that it is not unfair to say that the Brussels II Regulation provides an example of a somewhat muddled response in intra-UK matters to EU international private law legislation. As between member states, the Brussels II Regulation regulates jurisdiction, and the recognition and enforcement of judgments, in matters of divorce, legal separation and annulment.⁶⁹ There are also provisions on related parental responsibility matters. But what is the impact on cross-border jurisdictional disputes, or recognition, within the UK?

Jurisdiction

The trouble begins with the text of the Brussels II Regulation itself. Article 2, which sets down the general jurisdiction rules, must be read in accordance with Article 41, which is directed at member states with more than one legal system. Article 41 confirms that in this case, habitual residence in a member state should be read as habitual residence in a territorial unit with its own legal system.⁷⁰ References to domicile or nationality in a member state, are references to the

⁶⁶ Although it is unfortunate that it has not been amended to reflect the coming into force of the Brussels I Regulation.

⁶⁷ [2004] EWHC 359 (QB) *per* Tugendhat J. at paras 4-16.

⁶⁸ See pp94-95 above.

⁶⁹ The Scottish actions of declarator of marriage, and declarator of freedom and putting to silence thus fall outwith the scope of the Brussels II Regulation.

⁷⁰ Brussels II Regulation, Art. 41(a).

territorial unit identified by the member state's law.⁷¹ This may adequately reflect a federal approach, but is ill-fitted to the UK situation. There is no UK law to assign a Scottish or English domicile to a person. There is no explicit statement in the Brussels II Regulation (unlike the Rome Convention) that the Regulation is not intended to apply within member states. However, Article 7 provides that a person habitually resident within a member state, or a domiciliary of a territory of the UK, can only be proceeded against in other member states in terms of Articles 2 to 6 of the Brussels II Regulation. It is therefore submitted that whilst the Brussels II Regulation allocates jurisdiction as between the courts of Scotland and another member state, it does not do so as between Scotland and England.⁷²

However, another layer of confusion is occasioned by the domestic legislation. As a consequence of the devolved arrangements, the necessary amendments to existing legislation in the UK were made by secondary legislation passed by the Scottish Parliament with respect to Scots law,⁷³ and the Westminster Parliament in respect of English law.⁷⁴ In terms of the Scottish legislation, a Scottish court will have jurisdiction if it has jurisdiction under the Brussels II Regulation or if, in the case of excluded actions (in general terms), either of the parties is a Scots domiciliary.⁷⁵ It has been argued above that a Scots court would not have jurisdiction under the Regulation in an intra-UK dispute. But are such actions then excluded actions?⁷⁶ The definition of this term is two-pronged. Firstly, no court of a contracting state must have jurisdiction *under the Brussels II Regulation*,⁷⁷ and it has been argued that this condition is satisfied in intra-UK cases. Secondly, the defender must not be an Irish domiciliary,⁷⁸ or a national of

⁷¹ Ibid., Art. 41(b).

⁷² See Clive, "Memorandum", p4; insofar as Briggs suggest otherwise, it is respectfully submitted that he is wrong (Briggs, *The Conflict of Laws*, pp232-233).

⁷³ The European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001, SSI 2001/36.

⁷⁴ The European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310.

⁷⁵ Domicile and Matrimonial Proceedings Act 1973, s7(2A), (3A). The latter sub-section also contains provisions for founding jurisdiction in excluded actions of declarator of nullity of marriage if one of the spouses has died.

⁷⁶ McEleavy has identified this as a key issue (P. McEleavy, "Matrimonial jurisdiction and judgments - the new law" (2001) 50 *SFLB* 3 at 3).

⁷⁷ Domicile and Matrimonial Proceedings Act 1973, s12(5)(d).

⁷⁸ Ibid., s12(5)(d)(ii).

any other member state (excluding the UK and Ireland).⁷⁹ It would seem then that the defender could be a Scots or English domiciliary. Accordingly, matters of divorce, legal separation and annulment arising within the UK where parties are domiciled in Scotland or England will fall into the category of excluded actions. Jurisdiction is allocated in such cases on the basis of one of the parties' domicile, rather than through application of the Brussels II Regulation rules.

This conclusion might be thought to be confirmed by the fact that Article 11 of the Brussels II Regulation (the *lis alibi pendens* rule) cannot, in its terms, apply as between parts of a member state, together with the fact that the sisting provisions of Schedule 3 of the Domicile and Matrimonial Proceedings Act 1973 remain in place.⁸⁰ It is submitted, however, that it is regrettable that the legislation was not recast to make it clear, firstly, that Scotland and England were presented with a choice as to whether the Brussels II Regulation jurisdictional rules should apply within the UK, and secondly, that the decision taken was that they should not. This may be partly caused by the legislative method chosen by the EU. Since Conventions required statutory implementation in the UK, legislation would be needed to introduce the Convention, and such a statute could also contain intra-UK rules.⁸¹ However, since Regulations are directly effective, the only legislative action necessary by the Westminster or Holyrood Parliaments is the making of consequential repeals or amendments. The European Communities (Matrimonial Jurisdiction and Judgments) (Scotland) Regulations 2001 are an example of this - and also an example of the muddle which can thereby ensue.

Recognition and enforcement

Once again, it is not explicitly said that the Brussels II Regulation provisions on recognition and enforcement do not apply automatically as between Scotland and England. Fortunately the relevant Articles of the Regulations are more clearly

⁷⁹ Ibid., s12(5)(d)(i).

⁸⁰ These provide that, in certain circumstances, a consistorial action in Scotland must be sisted in favour of proceedings continuing elsewhere in the UK, and also allow the Scots court otherwise a discretion to sist consistorial actions (Domicile and Matrimonial Proceedings Act 1973, Sch. 3). Furthermore, the English legislation (as amended) can also be read so as to conclude that the jurisdiction provisions of the Brussels II Regulation do not apply within the UK (ibid., s5(2), (3)).

⁸¹ For example, the Civil Jurisdiction and Judgments Act 1982 and the Contracts (Applicable Law) Act 1990.

framed. A judgment is defined as one emanating from a court of a member state.⁸² Such judgments must be recognised in another member state.⁸³ Similarly, judgments concerning parental responsibility which are governed by the Brussels II Regulation are to be enforced in other member states.⁸⁴ It is provided, however, that to be enforced in the UK, such judgments have to be registered in the appropriate part, for example, in Scotland.⁸⁵ Furthermore, no amendment has been made to the provisions of the Family Law Act 1986 which deal with the recognition in Scotland of divorces, legal separations and annulments granted in the British Islands.⁸⁶ In contrast those relating to the recognition of overseas divorces, legal separations and annulments have been amended to take account of the Brussels II Regulation.⁸⁷ In its essentials, the intra-UK scheme for recognition and enforcement of custody orders is also unaltered. It is therefore submitted that whilst the recognition and enforcement in Scotland of judgments from other member states is governed by the Brussels II Regulation, the (internalising) rules on recognition and enforcement within the UK are unaffected. This also reinforces the similar conclusion reached with respect to the jurisdiction provisions of the Brussels II Regulation.

Brussels II is dead ... long live Brussels II bis

The Brussels II Regulation is not to be much longer with us. Council Regulation 2201/2003 has already been adopted, and will apply from 1 March 2005, on which date the Brussels II Regulation will be repealed.⁸⁸ Often referred to as "Brussels II bis" during the relevant negotiations, this new Regulation brings together the rules on jurisdiction, recognition and enforcement contained within the Brussels II Regulation, and also new rules on jurisdiction, recognition and enforcement relating to independent parental responsibility proceedings, and child abduction.

⁸² Brussels II Regulation, Art. 13.

⁸³ Ibid., Art. 14 (subject to the exceptions in Art. 15).

⁸⁴ Ibid., Art. 21(1).

⁸⁵ Ibid., Art. 21(2).

⁸⁶ Family Law Act 1986, ss44, 51 & 52.

⁸⁷ Ibid., s45.

⁸⁸ Council Regulation 2201/2003, Arts. 72 & 71.

Insofar as relevant, the Brussels II bis Regulation provisions with respect to the allocation of jurisdiction in divorce, legal separation and annulment echo those of the Brussels II Regulation.⁸⁹ Thus by dint of the same reasoning as set out above, it is submitted that the Brussels II bis Regulation does not govern jurisdictional disputes in these matters within the UK. Jurisdiction to make orders in respect of parental responsibility falls to the courts of the member state in which the child is habitually resident.⁹⁰ The effect of Article 66 is that habitual residence should be read as being habitual residence in a territorial unit of a member state which has its own legal system. In itself, this does not make for clarity. However, Article 8(1) is subject to Articles 9 and 10, which deal with continued jurisdiction of the courts of the child's habitual residence, and jurisdiction in child abduction, and these provisions seem designed to apply as between member states. Article 11 on the return of abducted children is also only of application between member states. Therefore, in all the circumstances, it is submitted that the Brussels II bis Regulation provisions on jurisdiction in parental responsibility proceedings are not intended automatically to apply to cross-border matters within a member state.⁹¹ The substance of the recognition and enforcement provisions of the Brussels II bis Regulation are the same as those in the Brussels II Regulation,⁹² and again, in terms of the argument made out above, it is thought that these rules are of no application within the UK.

With respect to divorce and related matters, presumably the Scottish Executive will again opt to retain the previous Scottish rules (as seems to have been the response to the Brussels II Regulation) rather than replicate the Brussels II bis Regulation rules, with respect to the allocation of jurisdiction between Scotland and England, and the recognition of English judgments. It is suspected by this writer that the current rules in relation to intra-UK custody cases might also survive. In truth, since both these and the Brussels II bis Regulation link jurisdiction primarily to habitual residence, and allow for recognition and enforcement with relative ease, it may not be of great consequence. However,

⁸⁹ Ibid., Arts 3, 6 & 66.

⁹⁰ Ibid., Art. 8.

⁹¹ Which may also be the conclusion of Jamieson (G. Jamieson, "The new law on parental responsibility" 2004 SLT (News) 51 at 53).

⁹² Council Regulation 2201/2003, Arts 21 (subject to Arts 22 & 23), 28; and see Jamieson, "The new law on parental responsibility", 53.

some further amendment to the Domicile and Matrimonial Proceedings Act 1973 and to the Family Law Act 1986 will, in any event, be required in order that the Acts refer to the Brussels II bis Regulation once that Regulation becomes applicable. The opportunity should be taken to ensure that the legislation explicitly deals with the grounds on which Scots courts may take jurisdiction in intra-UK divorces, legal separations and annulments. It is unsatisfactory that such important questions should be a matter of inference.

Insolvency

A previous attempt to introduce a Bankruptcy Convention by the (then) EC having failed, an EU Regulation on jurisdiction, recognition and enforcement in insolvency proceedings is now in force and applicable.⁹³ Article 3 of this Regulation allocates jurisdiction to open proceedings to the courts of a member state in whose territory the debtor has his "centre ... of main interests". The law of that member state will be the applicable law.⁹⁴ Provision is also made for secondary insolvency proceedings to be opened in another member state,⁹⁵ and for the law of that country to apply to those proceedings.⁹⁶ In these circumstances, it is submitted that the Insolvency Regulation does not itself allocate jurisdiction as between the Scottish and English courts. This had also been the view of the Scottish Law Commission when discussing a draft of the Bankruptcy Convention.⁹⁷ Provision is only made for judgments to be recognised in *another member state*,⁹⁸ and for liquidators to exercise powers in *another member state*.⁹⁹ Once again, the existing intra-UK rules are not displaced by virtue of the Insolvency Regulation.

It is interesting that the Insolvency Regulation contains no rule applicable to member states which consist of a number of legal systems. Accordingly, it

⁹³ Council Regulation 1346/2000

⁹⁴ *Ibid.*, Art. 4.

⁹⁵ *Ibid.*, Art. 27.

⁹⁶ *Ibid.*, Art. 28.

⁹⁷ Scot. Law Com. No 68, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (1982), para 6.13; see also Collins (gen. ed.), *Dicey and Morris on the Conflict of Laws: Third Cumulative Supplement to the thirteenth edition* (Sweet & Maxwell, 2003), para 31R-058.

⁹⁸ Council Regulation 1346/2000, Art. 16.

⁹⁹ *Ibid.*, Art. 18.

appears merely to allocate jurisdiction to courts in the UK, leaving it to UK legislation to specify whether, for example, the Scottish or English courts have jurisdiction. This may, however, reflect the high degree of harmonisation and internalisation in insolvency legislation within the UK.¹⁰⁰ It is therefore unsurprising that there has been little inclination to unpick intra-UK insolvency legislation in response to the Insolvency Regulation. The Scottish Law Commission was certainly not keen that the jurisdiction rules of the draft Bankruptcy Convention be applied within Scotland,¹⁰¹ although it is not explained why, and so it is unclear what the Commission's view on application within the UK may have been. As has been seen, automatic enforcement of insolvency orders is already provided as between Scotland and England,¹⁰² so in that particular regard the Insolvency Regulation offers little that is new.

A reluctant partner: the effect of European developments on intra-UK international private law

As has been seen, Conventions and legislation at European level may not directly require that international private law rules as between Scotland and England be altered. However, as can be appreciated from the above discussion, they do have an indirect effect on intra-UK rules. On some occasions the government has also chosen to adopt the new European rules for conflicts arising within the UK, and on other occasions, a modified version of the European rules has been introduced, whilst sometimes the existing Scots and English law has simply been retained.

It might have been thought that a likely result of increased EU involvement in international private law, would have been a corresponding increase in legislation dealing with the intra-UK aspects of the topics tackled by the EU. For example, the Maxwell Committee argued that it should not be the case that enforcement between the (then) EEC countries after the advent of the Brussels Convention

¹⁰⁰ See Chap. 4. Although lurking beneath this is a difference in the traditional common law approach, with Scots courts adhering to a theory of unity of bankruptcy, and English law preferring separate bankruptcies in different jurisdictions (Crawford, *International Private Law*, paras 16.01-16.02).

¹⁰¹ Scot. Law Com. No 68, *Report on Bankruptcy and Related Aspects of Insolvency and Liquidation* (1982), para 6.13.

¹⁰² See pp81-82 above; and see D. McKenzie, "The EC Convention on Insolvency Proceedings" (1996) 4 *ERPL* 181 at 190-191.

should be much easier than within the UK.¹⁰³ It may well be illogical if measures in place between Scotland and England were less comprehensive than those in force between the UK and other EU member states. However, taken to extremes, such arguments are less convincing. An assumption is made that the EU is a political grouping, and since the UK is a much closer political unit, rules within the UK must be more prescriptive, more automatic in effect, than those between EU member states. Political considerations are, therefore, uppermost. It is submitted that this would be the wrong perspective to adopt when considering an intra-UK response to European developments. Scotland and England have different legal systems, which do not spring from the same source. In some respects, Scotland and England may be no closer in their legal approach than Scotland and France (or other continental civil law systems).

Interestingly, however, the approach to intra-UK rules in the areas of international private law which have been the subject of EU attention is perhaps largely characterised by reluctance. A good example of what is meant by this is provided by the response to the Brussels Convention. The UK was unenthusiastic about certain aspects of the Convention, for example, the rules on insurance.¹⁰⁴ Having decided to participate in the Convention, the UK was obliged to implement its provisions for allocating jurisdiction between the UK and other contracting states, and recognising judgments emanating from the latter. However, lacking such a compulsitor at the intra-UK level, the rules on insurance were not introduced. The danger, of course, is that "it seems wrong in principle, and confusing to practitioners, to maintain in being two separate and slightly different sets of rules of jurisdiction".¹⁰⁵ The Brussels II Regulation was not universally welcomed by commentators in Britain,¹⁰⁶ and it has been argued that its terms have not replaced the existing rules applying as between Scotland and England. The Report prepared by the appropriate House of Lords Select Committee shows a marked

¹⁰³ The Maxwell Report, para 15.4.

¹⁰⁴ See p164 above.

¹⁰⁵ The Maxwell Report, para 2.16.

¹⁰⁶ For example, see Karsten, "Brussels II"; N. Mostyn, "Brussels II Regulation: impact on forum disputes in relation to the main suit and ancillary relief proceedings" [2000] *IFL* 162. The English President's International Committee and Solicitor's Family Law Association opposed the application of certain Brussels II rules to non-member states, insofar as the then draft Convention allowed (Report of the House of Lords Select Committee on the European Communities, *Brussels II*, pp22-23).

reluctance to be regulated by the Rome II Regulation, and doubts as to the wisdom of the UK's participation in the discussions thus far.¹⁰⁷ The impact this will ultimately have upon the choice of law rules applying as between Scotland and England in the field of non-contractual obligations remains to be seen.¹⁰⁸

But how far is this reluctance equally characteristic of the persons who operate within the Scottish and English legal systems? The political commentator, Taylor, has noted that:

"Perhaps the most persistent contemporary myth is that Scotland is intrinsically pro-European while England is anti, that Scotland adores the European Union while England abhors it. Again, myth does not mean straightforward falsehood. This collective self-image has something of a basis in fact. Opinion polls have occasionally suggested, for example, that Scotland might be more amenable to the single European currency. In Scotland, you will encounter less strident anti-European sentiments than might be overt in the south-east of England".¹⁰⁹

In addition, Scotland is a mixed legal system. A major difficulty in the project to harmonise the substantive private laws of Europe, is the perceived gulf between the civil and Common Law systems.¹¹⁰ This may also cause problems in attempts to harmonise conflict rules, which is the aim of the various EU Conventions and Regulations discussed above. Mixed legal systems, such as the Scots one, can do much to illustrate how this gap can be bridged, incorporating as they do, elements of civilian and Common Law thinking.¹¹¹ By the same token, it might therefore

¹⁰⁷ Report of the House of Lords European Union Committee, *The Rome II Regulation*; see also "Response of the Government of the United Kingdom", and compare the European Commission's "Follow-up of the consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations ("Rome II")", http://europa.eu.int/comm/justice_home/unit/civil/consultation/contributions_en.htm.

¹⁰⁸ This is not to suggest that our fellow Europeans are always uncritical of EU legislation: see, for example, the view of a Swedish professor on the Brussels II Regulation - M. Jänterä-Jareborg, "A European family law for cross-border situations - some reflections concerning the Brussels II Regulation and its planned amendments" (2002) 4 *YPIL* 67.

¹⁰⁹ Taylor, *Scotland's Parliament*, p267.

¹¹⁰ Smits, *The Making of European Private Law*, p73.

¹¹¹ *Ibid.*; MacQueen, "Discussion Paper"; cf Lord Reed, "The constitutionalisation of private law" 69. However, it has also been argued that the differences between Scots and English law show that harmonisation is not required in a common market (Weir, "Divergent legal systems

be thought that the Scottish legal system would be less resistant to European harmonisation than the English Common Law system.¹¹²

Certainly we have seen that Scots law was sufficiently compatible with the principles of the Brussels Convention to allow Scotland to adopt both intra-UK, and domestic, jurisdiction rules which were a variation on those applicable between the contracting states.¹¹³ England was not in a position to take this path. In preparing a response to EU research on a possible 'Brussels III' Regulation on matrimonial property, it proved necessary to draft different Scottish and English reports, since the current domestic rules were too diverse.¹¹⁴ In discussing Brussels III, an English lawyer, David Hodson, attempted to identify some of the differing civilian and English law principles of financial matters in marriage and on divorce.¹¹⁵ Interestingly, Scots law had much in common with the civilian rules highlighted by him. Furthermore, one of the concerns held by English lawyers about the Brussels II Regulation was that the *lis alibi pendens* principle was incompatible with new rules to slow the divorce process, and allow time for reconsideration and reconciliation.¹¹⁶ In giving oral evidence on behalf of the Scottish Courts Administration, Peter Beaton stressed that:

"one has to be careful in discussing the United Kingdom position in this regard because the position in England and Wales is rather different with the arrival of the new law in relation to divorce whilst the Scottish position remains as it was. I accept fully the point and I think there is a serious difficulty in philosophy and approach particularly when we come to discuss *lis pendens*. I think the negotiating position we adopt collectively does not depend on a unity of approach within the legal systems in the United Kingdom. I think we live

in a single member state"): business can be carried on successfully in a small geographical unit against a background of differing private laws, and perhaps similar, but unharmonised, private international laws.

¹¹² In terms of their conflict rules, there are similarities between Scots and English law, but see the discussion of this at pp141-144 above.

¹¹³ See p142 above.

¹¹⁴ Clarkson, "Brussels III", 684. Although this is not to underplay the differences between Scots law and those systems which favour community of property.

¹¹⁵ Hodson, "Brussels III".

¹¹⁶ Karsten, "Brussels II", 76; Report of the House of Lords Select Committee on the European Communities, *Brussels II*.

within that and the position in Scotland is perhaps not so acute but our position is that we find the present arrangement satisfactory".¹¹⁷

The relatively small number of published comments by Scottish practitioners and academics on the Brussels II Regulation does not lend itself to a scientific analysis. However, Clive was generally positive about the draft Convention,¹¹⁸ whilst Lord Rodger of Earlsferry (in providing written evidence to the appropriate House of Lords committee) simply raised two specific points regarding the parental responsibility provisions.¹¹⁹ Beaumont, however, was less convinced of the necessity of the draft Convention.¹²⁰ McEleavy accepted that there could be advantages to EU action in the family law field, although he had certain criticisms of how the agenda was pursued.¹²¹ Two practitioners called above all for uniformity, and this appears to have been of greater concern to them than any objections to the rules set out in the Regulation.¹²²

One of the main grounds of opposition to the Rome Convention arose from a specifically English concern. In the House of Lords debates on the Contracts (Applicable Law) Bill, Lord Wilberforce raised concerns about the effect on the English Commercial Court, and the London Court of International Arbitration. He considered that "[I]t is not an exaggeration to say that the United Kingdom is, I believe, the international centre for commercial dispute".¹²³ Although the reference is to the United Kingdom, it should more properly be to England, as it was English institutions, applying English law, which were thought to be under threat. Indeed it is perhaps one facet of the attitude described by Geeroms in the context of the rôle of foreign law in English courts:

¹¹⁷ Report of the House of Lords Select Committee on the European Communities, *Brussels II*, p46.

¹¹⁸ See generally Clive, "Memorandum".

¹¹⁹ Report of the House of Lords Select Committee on the European Communities, *Brussels II*, p73.

¹²⁰ *Ibid.*, pp54ff.

¹²¹ P. McEleavy, "The Brussels II Regulation: how the European Community has moved into family law" (2002) 51 *ICLQ* 883.

¹²² S. Barker & S. Smith, "A response to Brussels II - a view from Scotland" [2002] *IFL* 44; and see also the observation of Crawford and Carruthers on Rome II noted at p163 above.

¹²³ HL Debs, vol 515, col 1476; and see also Lord Goff of Chievely, HL Debs, vol 515, col 1482.

"English courts have also refused to take judicial notice of foreign law because they believed that English common law and its institutions were superior to other legal systems ... Today, English commercial courts still apply English law to international commercial disputes, in the belief that it is the better law".¹²⁴

This does not reflect Scottish thinking, nor is Edinburgh seen as an international commercial dispute resolution centre, in the way that has been claimed for London by those operating within the English legal system there.

Of course there are also areas where English and Scots lawyers might be thought to present a united front with respect to EU measures. Article 10(1)(e) of the Rome Convention which provides for the applicable law to govern nullity of contract, was not implemented by the UK, since English and Scots law did not approach this as a contractual matter.¹²⁵ *Forum non conveniens*, so staunchly defended by English commentators in the face of the EU preference for *lis alibi pendens*, was of course initially a Scottish concept, and has been applauded in this thesis.¹²⁶ Scotland and England (and also Ireland) remain loyal to notions of domicile, and thus are favoured with special provision in the Brussels II Regulation.¹²⁷ Carruthers and Crawford's suspicion of the inclusion of a Community public policy exception in the proposed Rome II Regulation is in line with English commentators and the examining House of Lords committee.¹²⁸

It is submitted, however, that the English and Scottish responses to harmonisation of international private law rules by the EU probably do not coincide completely, but rather fall on different parts of a spectrum. For one, as a mixed legal system, open in the past to influences from the continent, Scots law does not necessarily share certain of the fundamental objections held by English Common Lawyers. However, negotiations with other member states of the EU remains firmly a

¹²⁴ Geeroms, *Foreign Law*, para 3.25; see also Smits, *The Making of European Private Law*, p94.

¹²⁵ Annotations by C.G.J. Morse to the Contracts (Applicable Law) Act 1990, p36-33; and see *Baring Brothers & Co. Ltd v Cunninghame District Council* 1996 GWD 25-1405.

¹²⁶ See pp155-157 above; although see Clive, "Memorandum", p3

¹²⁷ Brussels II Regulation, Arts 2(1) & 7; although see Clive, "Memorandum", p2.

¹²⁸ House of Lords European Union Committee, "The Rome II Regulation", paras 163-168; see also Carruthers & Crawford, "Conflict of laws update" (2004), 23.

matter for Westminster. Whilst the Scottish Executive may be involved, there is no way for it to put forward a view in opposition to the final UK negotiating position.¹²⁹ Accordingly, for as long as there is reluctance by English lawyers to participate fully in EU legislative action, there are likely to be situations where EU Regulations are applied only insofar as is strictly required, and thus not in an intra-UK situation.¹³⁰ In this way, by accident rather than by design, different conflict rules may be applied between Scotland and England, from those applied in true international cases (at least as far as fellow member states of the EU are concerned).¹³¹ This is not to suggest that there might not be instances where a different, intra-UK, approach could be justified. The merits of the use of the *forum non conveniens* doctrine within the UK have already been discussed,¹³² as well as certain modifications necessary to allow the intra-UK application of the scheme of the Brussels Convention.¹³³ Equally, there are areas where uniformity of Scots conflict rules (irrespective of whether England, or an EU member state, is involved) may commend itself. However, at present the approach of the UK to European initiatives arguably may be driven by a reluctance to engage fully with the EU project,¹³⁴ rather than by principled consideration of any specialities of the intra-UK situation. This would, it is submitted, be most unfortunate.

Europeanisation: the beginning of the end for the conflict of laws?

EU harmonisation of conflict rules continues to ripple outwards from commercial matters directly connected with a European internal market, to those issues which seem more indirectly linked, such as family law. Fawcett has referred to the "Europeanization" of international private law,¹³⁵ and there has been recent

¹²⁹ See p149 above.

¹³⁰ It may, however, be open to the Scottish Parliament unilaterally to adopt laws modelled on EU legislation in respect of conflicts with England (on the powers of the Scottish Parliament, see p145 above).

¹³¹ And sometimes other states too, for example, under the Rome Convention, and the proposed Rome II Regulation (see note 12 and p162 above).

¹³² See pp155-157 above.

¹³³ See p164 above.

¹³⁴ This may be influenced by reluctance on a political level regarding the EU. This thesis is not the place for a detailed discussion of the strength of 'Euro-scepticism' in the UK, although Taylor in the quote reproduced at p175 above touches on the extent to which such feelings may not be uniform within the UK. Different attitudes to EU policies may cause tension in the relationship between Westminster and Holyrood in future (see p149 above).

¹³⁵ J. Fawcett, "Cross-fertilization in private international law" (2000) 53 *Current Legal Problems* 303 at 303-304; and see Boele-Woelki & van Ooik, "The communitarization of private international law".

discussion of what is perceived to be the Europeanisation of family law.¹³⁶ Harmonisation of conflict rules has been argued to be the first step towards substantive harmonisation in Europe:¹³⁷ certainly it is plausible that the former could provide the bridge to acceptance of proposals for a European private law. Such proposals find expression, for example, in working groups attempting to harmonise specific areas of law, as well as academic discussion of a corpus of European private law.¹³⁸ There is debate about how far this is driven by economic, or political, objectives.¹³⁹

Accordingly, some commentators argue that international private law will disappear.¹⁴⁰ Thus it has been said that "private international law is destined to fade into legal history, as uniform substantive law progressively rules the world".¹⁴¹ Full-scale harmonisation of private law within Europe would certainly remove the need for conflict rules as between Scotland and England, since their respective private law systems would no longer differ. However, talk of the death of international private law in general is overly dramatic. Europeanisation is geographically limited. No matter whether all European private laws are eventually harmonised, there will still be the need for rules to allocate jurisdiction when a non-EU member state could potentially hear the case, to decide whether the law of such a state should properly govern the dispute if litigated in Scotland, and to determine when judgments emanating from such states should be recognised and enforced within the EU.¹⁴² This is not unimportant. Into this category of non-EU member states fall former colonies such as Australia, Canada, and New Zealand, with which the UK still has congress; developing markets such as China; and of course the United States, a major commercial power, and a

¹³⁶ C. McGlynn, "The Europeanisation of family law" (2001) 13 *CFLQ* 35; H. Stalford & E. Donnelly, "Brussels II revisited - an overview of proposed amendments" [2002] *Fam Law* 904; and see McEleavy, "The Brussels II Regulation".

¹³⁷ McGlynn, "The Europeanisation of family law", 38-41.

¹³⁸ See MacQueen, "Discussion Paper"; Smits, *The Making of European Private Law*.

¹³⁹ Watt, "Harmonisation of Contract Law in Europe"; McGlynn, "The Europeanisation of family law"; House of Lords European Union Committee, "The Rome II Regulation", paras 57-59 & 66-72.

¹⁴⁰ See McGlynn, "The Europeanisation of family law", 40-41.

¹⁴¹ T. de Boer quoted *ibid.*, 41.

¹⁴² Fentiman, *Foreign Law*, p25. Although see the discussion on the EU's ability to sign up to, for example, Hague Conventions, and whether its member states remain able to do so (Boele-Woelki & van Ooik, "The communitarization of private international law", 12 & 18-24; and see McEleavy, "The Brussels II Regulation", 906-907).

country which has for many years held a (perhaps unhealthy) attraction for forum shoppers.¹⁴³ The possibility of achieving worldwide harmonisation seems too large and ambitious a project to constitute an inevitability. As Crawford notes:

"Upon harmonisation of domestic laws, and/or of conflict rules, the conflict lawyer will disappear, his task complete - but we think the day is far distant, and the conflict lawyer himself will be needed to bring it forth".¹⁴⁴

¹⁴³ "As a moth is drawn to the light, so is a litigant drawn to the United States"; *Smith Kline & French Laboratories Ltd v Bloch* [1983] 2 All ER 72 per Lord Denning MR at 74.

¹⁴⁴ Crawford, "What happened to Indyka?", 176.

7 PUBLIC POLICY IN INTRA-UK INTERNATIONAL PRIVATE LAW

Public policy is a nebulous, multi-faceted, concept which has a particularly important rôle in the conflict of laws, though the point is always made that our policy sensibilities should be less open to being shocked in a conflict context, by virtue of the nature of that context. It is necessary, in examining the Scottish international private law rules which apply in intra-UK conflicts, to identify what rôle public policy may play in this setting. How far can there be said to be a Scottish public policy which could be relied upon to exclude recognition of an English judgment or rule of law? Further, has the position been changed by Scotland's devolved status within the UK?

It is necessary to try to identify as exactly as possible what is meant by public policy. It is submitted that there are three, intertwined, levels of meaning, which can be described by the terms: underlying public policy; internal public policy; and external public policy.

Underlying public policy

Katzenbach perceptively notes that "[o]ne premise of contemporary positivism ... is that all law rests, in the final analysis, upon public policy - upon 'considerations of what is expedient for the community concerned' ".¹ This encapsulates what is meant by the term underlying public policy. It is those values, morals and perceived self-interest which inform the legislation passed by the lawmaking bodies elected by the citizens of the country, and the decisions reached by its judges.² Law is not a construct imposed upon society, but a set of rules created

¹ N. deB. Katzenbach, "Conflicts on an unruly horse: reciprocal claims and tolerances in interstate and international law" (1956) 65 *Yale LJ* 1087 at 1091; see also R. Leslie, "The relevance of public policy in legal issues involving other countries and their laws" 1995 *JR* 477 at 481-484; P.B. Carter, "The rôle of public policy in English private international law" (1993) 42 *ICLQ* 1 at 1.

² See Shears & Stephenson, *James' Introduction to English Law*, p235: "In one sense, all the principles of common law and of equity which have been evolved through the centuries are rules of public policy, for they have been created by the judges in the light of what they deem to be the public good".

by the people living and functioning within it. Every statute in force reflects (some more obviously than others) policies of the society.³ These policies are as varied as society itself, ranging in topic from the manner in which the estate of the deceased should be divided, or the ability to break the marriage bond, to the legal enforceability of contracts, or allowing businesses to limit their liability by trading through a company structure.

Internal public policy

The phrase internal,⁴ or domestic,⁵ public policy is used to signify a more specific legal concept, which operates only in the domestic sphere. It is a common law doctrine which can be used by a court to alter the normal legal consequences of a given set of facts. Through the use of this tool, for example, certain contracts can be robbed of their usual legal effects on the ground that the contract contravenes domestic public policy. Although this internal public policy is often contrasted with the doctrine of public policy which is operative in conflict cases, this misleadingly suggests that the former is a clear cut set of rules. In fact, internal public policy is a loose concept, and its boundaries are not easy to identify, except that they are often said to be wider than those within which external public policy operates.

Bell states that:

"The private interests and stipulations of individuals must yield, and their natural rights and powers suffer restraint, wherever they are inconsistent with the public interest".⁶

What constitutes the public interest, however, is rarely enunciated,⁷ and can only be divined by enumerating the commonly accepted instances of the application of

³ For an interesting discussion of how Lord Mackay of Clashfern was influenced by his Christian principles in reforming English family law, see: Lord Mackay of Clashfern, "Family law reform: a personal view" in P. Beaumont & K. Wotherspoon (eds), *Christian Perspectives on Law and Relationism* (Paternoster Press, 2000), p237.

⁴ Castel, *Introduction to Conflict of Laws*, p66.

⁵ Leslie, "The relevance of public policy", 479.

⁶ Bell, *Commentaries on the Laws of Scotland*, 7th edn., (ed.) J. M'Laren, (Butterworths, 1990 reprint of original 1870 edition) (i, 320).

⁷ Indeed most writers concentrate only on the rôle of public policy in contract.

internal public policy. The most widely documented rôle for internal public policy is in the field of contract law. It is clear that certain contracts, otherwise legally unimpeachable, will not be enforced in Scots law since their purpose, or terms, whether in whole or in part, are regarded as being contrary to public policy. In broad terms, such contracts appear to be those which involve corruption within the legal system (including compromising the neutrality of the professional adviser), or of government officers; smuggling; contracts which in some way frustrate or undermine government foreign policy; contracts which limit freedom; and contracts which involve the commission of a crime or delict.⁸ Traditionally it has been argued that the courts' unwillingness to adjudicate in gambling contracts was not in itself a tenet of public policy, but was because such agreements were "unworthy to occupy judicial time".⁹ It is submitted that this is a distinction without a difference. The approach of Scots law to gambling contracts is eloquent of a moral view on such agreements. But it is a viewpoint which is perhaps changing, as the courts become drawn into such matters. In *Ferguson v Littlewoods Pools Ltd*,¹⁰ the pursuers had given an entry in a football pools competition to an agent. Had the football pools coupons been duly submitted by the agent, the pursuers would have won around £2.3 million, but (disastrously) they were not. The Lord Ordinary dismissed the action brought by the pursuers against the football pools company for the prize money, as he felt bound by authority to find that the transaction was a *sponsio ludicra*, and thus not enforceable in the courts. The pursuers had argued that the nature of gambling, and the interest involved in enforcing gambling agreements, had altered over the years, but the Lord Ordinary felt that a change in policy could only be made by statute, or by the decision of a higher court.¹¹ In the later case of *Robertson v Anderson*,¹² however, the Inner House held that an agreement to share bingo

⁸ L.J. Dunlop *et al.* (eds), *Gloag and Henderson: the Law of Scotland*, 11th edn. (W. Green/Sweet & Maxwell, 2001), para 11.12; E.A. Marshall, *General Principles of Scots Law*, 7th edn. (W. Green/Sweet & Maxwell, 1999), para 9-58; T.B. Smith, *A Short Commentary on the Law of Scotland* (W. Green & Son, 1962), p798.

⁹ Dunlop, *Gloag and Henderson*, para 11.15; and see Smith, *Short Commentary*, p799. Such contracts are *sponsiones ludicrae*.

¹⁰ 1997 SLT 309.

¹¹ *Ibid.* per Lord Coulsfield at 312.

¹² 2003 SLT 235.

winnings of £108,000 was "related to gaming, but ... not in itself a gaming contract".¹³ However, the Court also stated that:

"We were not addressed on the question whether changes in the commercial and public significance of betting and lotteries, and in their acceptability, had any implications for the development of this common law doctrine. Nor were we addressed on the question whether a doctrine under which the court declines to entertain an action for the enforcement of contractual rights and obligations is compatible with Convention rights, in particular the right of access to a court guaranteed by art 6(1) of the European Convention on Human Rights. In view of the conclusion which we have reached on the applicability of the doctrine to the circumstances of the present case it is unnecessary for us to consider these questions *ex proprio motu*."¹⁴

Blom notes that in Canada:

"Over the last few decades, Canadian domestic law has moved from a criminal prohibition against all gambling to a prohibition that applies only if the gambling is not sanctioned by the federal or provincial government, with such sanction being granted to a wide variety of activities across the country, as long as they contribute to the public coffers. Whatever unease the courts might have felt earlier about enforcing foreign gambling debts has now evaporated in the face of the widespread acceptance in Canada of officially approved gambling".¹⁵

This may reflect the direction being taken in Scots law in a domestic context. Over recent years the restrictions on bookmakers have eased, with longer opening hours and no requirement for filled-in frontages. The state has also allowed the introduction and promotion of a nationwide lottery. In this context it is more difficult for the courts to express (implicit) disapproval of such pursuits. Perhaps in future the internal public policy based rule against the courts' adjudication in

¹³ Ibid. *per* Lord Reed (delivering the opinion of the Court) at 242.

¹⁴ Ibid. *per* Lord Reed (delivering the opinion of the Court) at 241.

¹⁵ Blom, "Public policy", 391.

gambling agreements will disappear altogether: the *dicta* reproduced above might suggest that the applicability of the European Convention on Human Rights in Scotland might allow the final coup de grâce thereby to be administered to the rule.

Outwith contract law the overt application of public policy is more difficult to identify. It has been said to be a matter of public policy that the court should not be denied a *locus* to intervene in the workings of private bodies exercising a function akin to a tribunal, to ensure that the rules of natural justice are respected.¹⁶ It would seem also that public policy objections will prevent the carrying out of contracts either to prevent someone from marrying, or arranging a marriage for payment, or which are "to the prejudice of sexual morality".¹⁷ In matters of succession, no effect will be given to a provision in a will which is illegal or impossible, or which attempts to prevent someone from marrying.¹⁸ Public policy can also act so as to strike down testamentary provisions for "excessive self-glorification by the testator without any benefit resulting to anyone",¹⁹ and this is most famously discussed in cases such as various attempted schemes of Mr McCaig and his sister.²⁰ These public policy restrictions are largely replicated in the field of trusts. Trust purposes must not contravene the law, morality or public policy.²¹ It can also be argued that the rule that a killer cannot benefit from his victim's will is grounded in public policy.²²

Can any general principles be drawn from these examples? One major strand seems to be that a person should not gain from criminal acts or wrongdoing. As well as signalling moral disapprobation, this has the practical result of removing an incentive to commit crime. Another aim of domestic public policy is the

¹⁶ *St. Johnstone Football Club Limited v Scottish Football Association Limited* 1965 SLT 171 per Lord Kilbrandon at 175.

¹⁷ Smith, *Short Commentary*, p798; and see *ibid.*, pp798-799.

¹⁸ *Ibid.*, pp421 & 798-799.

¹⁹ Macdonald, *Succession*, para 9.51; see *MacKintosh's Judicial Factor v Lord Advocate* 1935 SC 406.

²⁰ *McCaig v University of Glasgow* 1907 SC 231 (testator desiring the erection of towers topped by statues of himself and his family); *McCaig's Trs v Kirk-Session of United Free Church of Lismore* 1915 SC 426 (testator wishing erection of statues of family within McCaig's Folly in Oban).

²¹ Smith, *Short Commentary*, p562.

²² Leslie, "The relevance of public policy", 479-480; Macdonald, *Succession*, paras 2.02 & 2.05.

protection of impartiality, whether of judges or of public officials who take decisions affecting the community. A further principle appears to be the protection of liberty, whether that be a freedom to trade, or to marry whom you choose. Scots are often said to have a Calvinist character, and perhaps a dislike of waste, and lingering disapproval of certain sexual pursuits, and of gambling, may be ascribed to this. It has, however, been argued that "the potential reach of public policy has diminished with time as moral imperatives that were taken for granted in many societies have lost their force".²³ This observation is no less pertinent to Scotland.

External public policy

Definition

External public policy²⁴ describes the public policy considerations which are called upon in international private law cases. Whereas in the context of underlying public policy, moral values are used in the creation of law (which necessarily may include the prohibition of certain behaviour), external public policy is primarily a tool of exclusion. It can be used so as not to apply a foreign law which has been selected by the Scots choice of law rules, or to refuse recognition and deny enforcement to a judgment from outwith Scotland.²⁵ In the former case, the consequence is normally the application of the *lex fori*.²⁶ In the English case of *Royal Boskalis NV v Mountain*,²⁷ the defendants sought to rely upon French public policy, but did not plead the content of this. Accordingly French and English public policy were presumed to coincide.²⁸ Since by its very nature public policy is special to a country, this approach seems intuitively wrong. The rule that the a foreign law should be presumed to be the same as the *lex fori* in the absence of proof as to its content has already been criticised,²⁹ and it is submitted that the case of *Royal Boskalis NV v Mountain* provides an illustration of the shortcomings of such a rule.

²³ Blom, "Public policy", 391.

²⁴ The phrase is used by both Castel and Leslie (Castel, *Introduction to Conflict of Laws*, p66; Leslie, "The relevance of public policy", 477).

²⁵ See Carter, "Public policy", 1-2; Blom, "Public policy", 374-375.

²⁶ Leslie, "The relevance of public policy", 479; Blom, "Public policy", 375-376.

²⁷ [1997] 2 All ER 929.

²⁸ *Ibid.* per Stuart-Smith LJ at 943; per Phillips LJ at 976-977.

²⁹ See pp110-112 above.

However, public policy is something of a master of disguises. Thus, on one view, the application of Scots law as the *lex fori* to all divorces before the Scottish courts is done as a matter of public policy in a most sensitive area.³⁰ Public policy of the forum may also require the imposition of certain of its own rules (so-called mandatory rules), even if another law otherwise governs the matter.³¹ For example, *English v Donnelly & Anor*³² concerned a contract which contained a choice of law clause in favour of English law. The Court of Session held that section 2 of the Hire Purchase and Small Debt (Scotland) Act 1932³³ was nevertheless mandatory, and applied despite the agreement of the parties.³⁴

External public policy may be relied upon at common law by the court, or such an exception may be expressly provided for in a conflict statute: of late, this seems to be universal practice (specifically to mention that which we presume already exists).³⁵ It is commonly said that external public policy has a more limited scope than internal public policy.³⁶ This must indeed be so. Simply because a matter may be unacceptable to the forum in a domestic context does not automatically mean that it will also be contrary to external public policy in a conflicts case.³⁷ However, the impression given by such statements is that the content of external public policy is completely coincident with certain rules of internal public policy. In effect, it is suggested that a number of matters contravene internal public policy, but that in the interests of comity and tolerance of others, only some of these can also be relied upon to refuse to recognise laws, or judgments, of foreign countries. On this model, the content of internal, and external, public policy respectively could be represented as follows:

³⁰ See Carter, "Public policy", 3.

³¹ See Blom, "Public policy", 379-382.

³² 1958 SC 494.

³³ 1932 (22 & 23 Geo V), c.38.

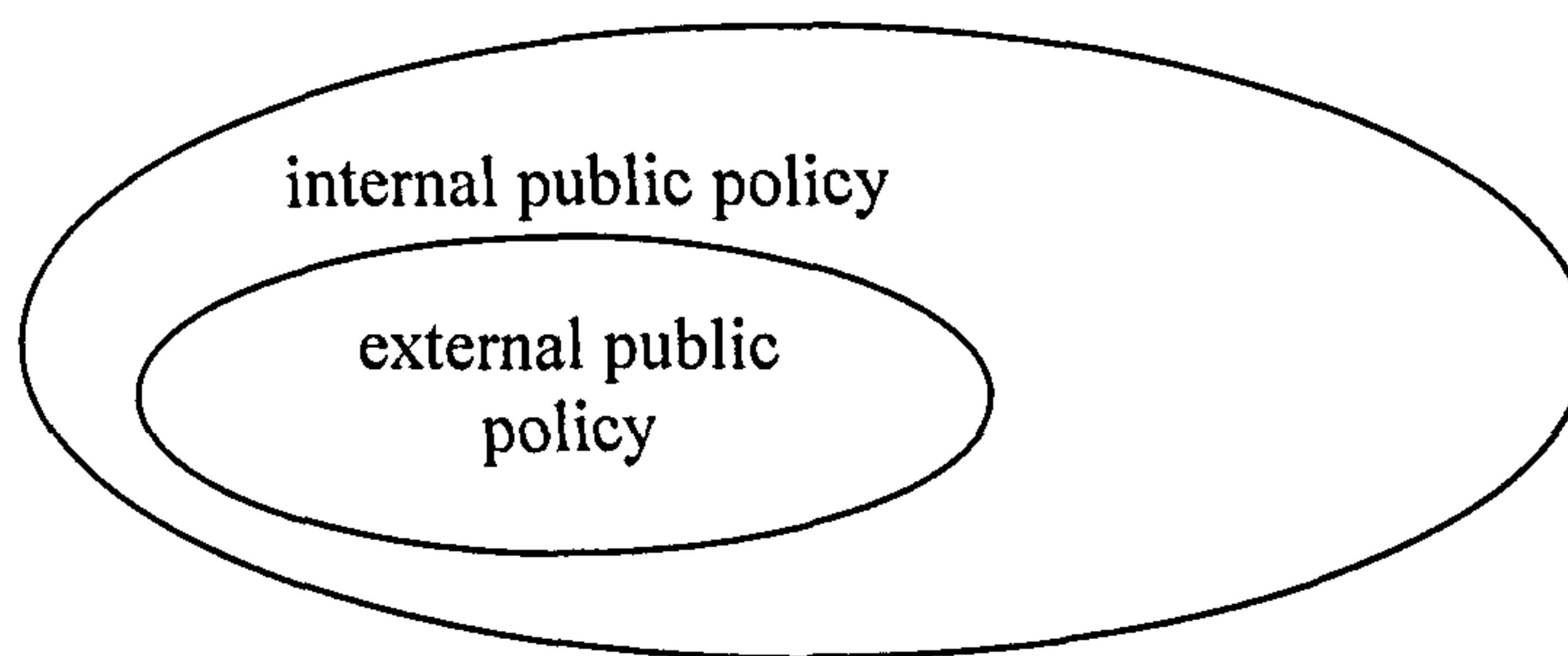
³⁴ See also Fawcett, "Evasion of law and mandatory rules", 57.

³⁵ For example, Private International Law (Miscellaneous Provisions) Act 1995, s14(3)(a)(i); Family Law Act 1986, s51(3)(c).

³⁶ For example, Leslie, "The relevance of public policy", 481. See also Anton with Beaumont, *Private International Law*, p102.

³⁷ P.B. Carter, "Rejection of foreign law: some private international law inhibitions" in R. Fentiman (ed.), *Conflict of Laws* (Dartmouth, 1996), p243 at 254.

Figure 7.1



It will be argued that this is not in fact an accurate representation of the relationship between internal and external public policy rules. This is important because the actual links between underlying, internal, and external, public policy are significant in ascertaining how far we can properly speak of a Scots doctrine of public policy in conflicts cases which could also operate on an intra-UK basis, as well as the likely long-term effect of devolution in this matter. It is to the former subject we now turn. It is helpful to analyse the situation in the context of Scotland prior to the passing of the Scotland Act 1998. The impact of devolution will then be examined in a later section of the chapter.

Similarities and differences between Scots and English rules of underlying public policy

Prior to the Union of the Crowns, there can be no doubt that the rôle of underlying public policy in shaping the law was in the context of a Scottish nation which was independent both politically and legally. It might be questioned how far that policy was unequally influenced by various sectors of the population, or the extent to which rules of law were borrowed and assimilated from other legal systems. However, the measures that were passed, and the law which was developed, was in response to the perceived needs of the Scottish nation.

The regnal union brought a slight change, in that those reigning, or ruling over, Scotland, also controlled England. As has been seen, at certain times there was at least a stated desire for the two countries to be united.³⁸ The underlying public

³⁸ See pp22-31 above.

policy might thus be altered, and one would expect that legislation passed in this period, and also in the time of the Cromwellian occupation, might reflect that.

A crucial development, however, is the passing of the Acts of Union. The preservation of the Scottish legal system by the Acts of Union meant that Scots law, as it had been shaped until that point, survived. Also Scottish judges, who would be guided by Scottish underlying public policy concerns, retained a large measure of control over the development of the law. Accordingly, there are many principles and rules of Scots law which can be said to spring from underlying public policy concerns special to Scotland. Into this category might fall the rules designed to prevent a testator from willing all his property away from his family; the principle that those granting a security over moveable property must give over possession of that property; or the importance of specific implement as a remedy. By contrast, concerns of underlying public policy in England have given rise in that legal system to a necessity for consideration in contracts;³⁹ the laying of great stress on the freedom of parties to contract or to test;⁴⁰ and the existence of a period for objections to be made to a divorce before it becomes final.⁴¹

An equally important effect of the Acts of Union was the uniting of the two Parliaments, since legislation then emanated from a UK, rather than a Scottish, Parliament. Thus the underlying public policy was British. Even when Westminster legislation relates only to Scotland, it will generally have to be promoted by, or have the support of, one of the parties at Westminster which considers itself to be a British political party.⁴² There is also nothing to prevent MPs representing English constituencies voting on Scottish measures. It would therefore be artificial to attempt to exclude 'Scottish' legislation passed at Westminster from the British underlying public policy concerns. The House of

³⁹ By contrast, lack of consideration will not prevent a foreign contract being enforced (*Re Bonacina; Le Brasseur v Bonacina* [1912] 2 Ch 394). Indeed one of the arguments put forward by parties in that case was that a Scottish contract with no consideration could be enforced in England (*ibid.*, at 396). Also, where England was the *lex loci contractus* the Scottish courts have respected the consequences of an absence of consideration (*Williamson v Taylor* (1845) 8 D 156).

⁴⁰ See C.H. Sherrin *et al.*, *Williams on Wills*, 8th edn. (Butterworths, 2002), para 34.12.

⁴¹ Thus explaining the existence of decree *nisi* and decree absolute (Shears & Stephenson, *James' Introduction to English law*, p442).

⁴² For example, the Labour Party, the Conservative Party or the Liberal Democrats.

Lords is also likely to be influenced by a British underlying public policy given its personnel and approach.⁴³

Similarity between Scots and English rules of internal public policy

As with Scotland, most of the discussion on internal public policy in English law concerns its application in the law of contract. An examination of the standard works on English law suggests that the grounds on which contracts will be struck down as a contravention of public policy are largely the same as those in Scotland.⁴⁴ Indeed, certain of the authorities relied upon by Scottish textbook writers in delimiting internal public policy are English. In England it is clear that a legal contract which is to be carried out in an illegal way would fall foul of internal public policy.⁴⁵ Whilst this was not explicit in Scotland, it was hard to see that a Scottish court would be any more likely to countenance such a contract, and indeed English authority seems to have influenced the recent decision in *Dowling & Rutter v Abacus Frozen Foods Ltd.*⁴⁶ The major difference between the two systems in their use of internal public policy in contract law, is that in England public policy has a rôle to play in determining what is valid consideration. The latter does not form part of Scots law at all. Outwith contract law, English law will not allow certain trust purposes,⁴⁷ or certain conditions attached to bequests in wills,⁴⁸ which are considered to be contrary to public policy. The prevention of a person benefiting from the will of someone he has unlawfully killed is clearly ascribed in English law to public policy.⁴⁹

The relevance of all this for Scots external public policy is twofold. Firstly, since it would seem that there may be little difference between the internal public policy rules of Scotland and England, it may be questioned how far there can be any difference in the scope of their external public policy. This is particularly so

⁴³ See pp61-63 above.

⁴⁴ G.H. Treitel, *The Law of Contract*, 10th edn. (Sweet & Maxwell, 1999), pp392-415; P.S. Atiyah, *An Introduction to the Law of Contract*, 5th edn. (Oxford University Press, 1995), pp341-345; J.C. Smith, *The Law of Contract*, 3rd edn. (Sweet & Maxwell, 1998), pp67, 70 & 242-243.

⁴⁵ Smith, *The Law of Contract*, p243.

⁴⁶ 2002 SLT 491.

⁴⁷ J. Mowbray *et al.*, *Lewin on Trusts*, 17th edn. (Sweet & Maxwell, 2000), paras 5-02 to 5-17.

⁴⁸ Sherrin, *Williams on Wills*, para 34.12.

⁴⁹ *Ibid.*, para 9.13.

if the relationship of external to internal public policy is that portrayed in the diagrammatic model (Figure 7.1) above.⁵⁰ This leads on to the second point, which is that if external public policy is merely a more limited refinement of internal public policy, and the rules of the latter are very similar on both sides of the border, then there should be very little room left for the intra-UK application of external public policy objections in conflict cases.

The foreign interests of the UK

One specific area of external public policy which is often differentiated from the generality of the doctrine, is "where the enforcement of the transaction in question would prejudice the interests of the United Kingdom or its good relations with foreign powers".⁵¹ Carter characterises this as the courts wishing "to protect the public or national interest or image of the United Kingdom".⁵² This is inextricably linked to the foreign policy pursued by the UK, and thereby infused with British concerns.

External public policy objections at common law in an intra-UK situation

Academic definitions of external public policy tend to fall into two quite distinct groups. On the one hand, Anton states that the "Scottish courts will not give effect to foreign law when to do so would be contrary to the fundamental policies of Scots law".⁵³ Similarly the editors of Dicey & Morris define such objections as striking at that which "would be inconsistent with the fundamental public policy of English law".⁵⁴ On the other hand, some writers adopt a slightly different approach. Thus Leslie states that external public policy acts so as to exclude that which "would be so unjust, immoral or, in some other way, contrary to the basic values or interests of the state or the community as to be unacceptable".⁵⁵ Akin to this is the belief that external public policy is the correct tool if a foreign law or decree "is regarded as repugnant to fundamental English concepts of morality,

⁵⁰ See p189 above.

⁵¹ Crawford, *International Private Law*, para 3.17; see also Carter, "Public Policy", 4-5; C.M.V. Clarkson & J. Hill, *Jaffey on the Conflict of Laws*, 2nd edn. (Butterworths, 2002), p562.

⁵² Carter, "Rejection of foreign law", p256.

⁵³ Anton with Beaumont, *Private International Law*, p101.

⁵⁴ Collins, *Dicey and Morris on the Conflict of Laws*, para 5R-001; see too Briggs, *The Conflict of Laws*, p44.

⁵⁵ Leslie, "The relevance of public policy", 477.

decency, human liberty or justice".⁵⁶ The first of these two approaches links external public policy firmly to a legal system, whether that be Scots law or English law. However, the second appears to concentrate on the moral values of a community, indeed a country. For Scotland, which has its own legal system but is not a politically independent country, the distinction is crucial. Are the values inherent in the very principles of Scots law protected by the concept of external public policy, or only generic British values such as justice or decency?⁵⁷ If the latter, there could then be no room for public policy objections in an intra-UK case.

In the early Scots case of *Edwards v Prescott*⁵⁸ the pursuer, an Englishwoman, was attempting to enforce a decree (which had been passed reliant on an English strict liability statute). The defender, who was also an Englishwoman, had fled from that jurisdiction to Scotland. The pursuer argued that the union of the countries meant that enforcement of decrees from the courts of each country should be automatic.⁵⁹ One of the defender's counter-arguments was that the English law in question was penal and "contrary to the constitution of the law of Scotland",⁶⁰ although this was disputed by the pursuer. Unfortunately the view of the court on this point is somewhat unclear: it found that the decree should be enforced "unless something competent in law or equity be objected against it".⁶¹

More guidance is provided by later cases. *Connal & Co v Loder & Others*⁶² concerned a bankruptcy with cross-border aspects. It was said that property had been transferred under English law by the simple expedient of delivering warrants, rather than the actual items. Lord Justice-Clerk Patton, however, was of the opinion that:

⁵⁶ Clarkson & Hill, *Jaffey*, p559; see also Carter, "Rejection of foreign law", 255.

⁵⁷ Leslie poses the question of whether public policy is Scottish or British, but does not record what he believes the answer to this question to be (Leslie, "The relevance of public policy", 485).

⁵⁸ (1720) Mor 4535.

⁵⁹ *Ibid.*, at 4538.

⁶⁰ *Ibid.*, at 4540.

⁶¹ *Ibid.*, at 4542.

⁶² (1868) 6 M 1095.

"Now, that is repugnant to the principle of our law, and it is quite obvious that it could not exist with our law, ... because it would then be no longer true that tradition was necessary; it would no longer be true that intimation was necessary, and therefore our law could not subsist. The adoption of the foreign law in that matter would be in direct antagonism to our own, and everybody knows that the fundamental principle upon which we introduce foreign law as law affecting the rights of contracts or otherwise, is only to the effect of introducing such law when it is not in direct contradiction to the principles upon which our law is governed, and according to which the rights of the subjects in this country must be determined".⁶³

The case of *Hamlyn & Co v Talisker Distillery*⁶⁴ arose out of a contract between a Scottish and an English company, which included a clause referring disputes on the contract to 'arbitration by two members of the London Corn Exchange, or their umpire'. An attempt was made by the Scottish firm to raise an action in Scotland. The First Division held that the law of the contract was Scots law, and thus the clause referring disputes to arbitration was void since the arbiters were not named.⁶⁵ On appeal to the House of Lords it was held that the proper law of the arbitration clause was English law (by which the clause was unimpeachable). In the words of Lord Chancellor Herschell:

"But then it is said that the Scotch court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted, the Courts in Scotland cannot be bound to enforce a contract which is against the policy of their law. I should be prepared to admit that an agreement which was opposed to a fundamental principle of the law of Scotland founded on considerations of public policy could not be relied upon and insisted upon in the Courts of Scotland; and if, according to the law of Scotland, the Courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which was urged by the respondents. But that is not the

⁶³ Ibid. at 1110.

⁶⁴ (1894) 21 R (HL) 21.

⁶⁵ Although this rule of Scots law was altered by the Arbitration (Scotland) Act 1894 (57 & 58 Vict), c.13, s1: another example of an internalised conflict?

case ... I have been unable to understand upon what fundamental principle of public policy the rule can be said to rest that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced".⁶⁶

In the twentieth century, we have seen that floating charges were judicially described as being "utterly repugnant to the principles of Scots law",⁶⁷ and that certain *dicta* in cases involving Romalpa clauses suggested that a Scottish court would find such a clause (even if enforceable in terms of the law selected by Scots choice of law rules) contrary to public policy.⁶⁸

This is a difficult area, and it has therefore been thought worthwhile to reproduce some of the relevant judicial *dicta* at length. The cases indicate that it is possible in Scots law to object to the application of rules of English law on the basis of public policy. The basis of that objection is that recognition of the rule would offend against the principles and policy of Scots law. It is submitted therefore that Blom is correct to identify an important manifestation of public policy as relying on:

"the fundamental values that underlie the domestic system of private law. According to this aspect of public policy, foreign laws and claims that are wholly out of keeping with those values must be rejected so as to protect the integrity of the system".⁶⁹

The cases discussed above may seem to relate to quite technical rules of law, but these rules were inspired at one time in history by underlying public policy concerns. The values beneath Scots law which are protected by the concept of external public policy range from such seemingly technical rules to those which owe more to the morals of the day, or to notions of natural justice. Whilst an

⁶⁶ *Hamlyn & Co. v Talisker Distillery* (1894) 21 R (HL) 21, at 23-24; see also *per* Lord Watson at 27: "There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy, that her Courts would be justified in declining to recognise them".

⁶⁷ *Carse v Coppen* 1951 SC 233 *per* Lord President Cooper at 239.

⁶⁸ See pp86-88 above.

⁶⁹ Blom, "Public policy", 385.

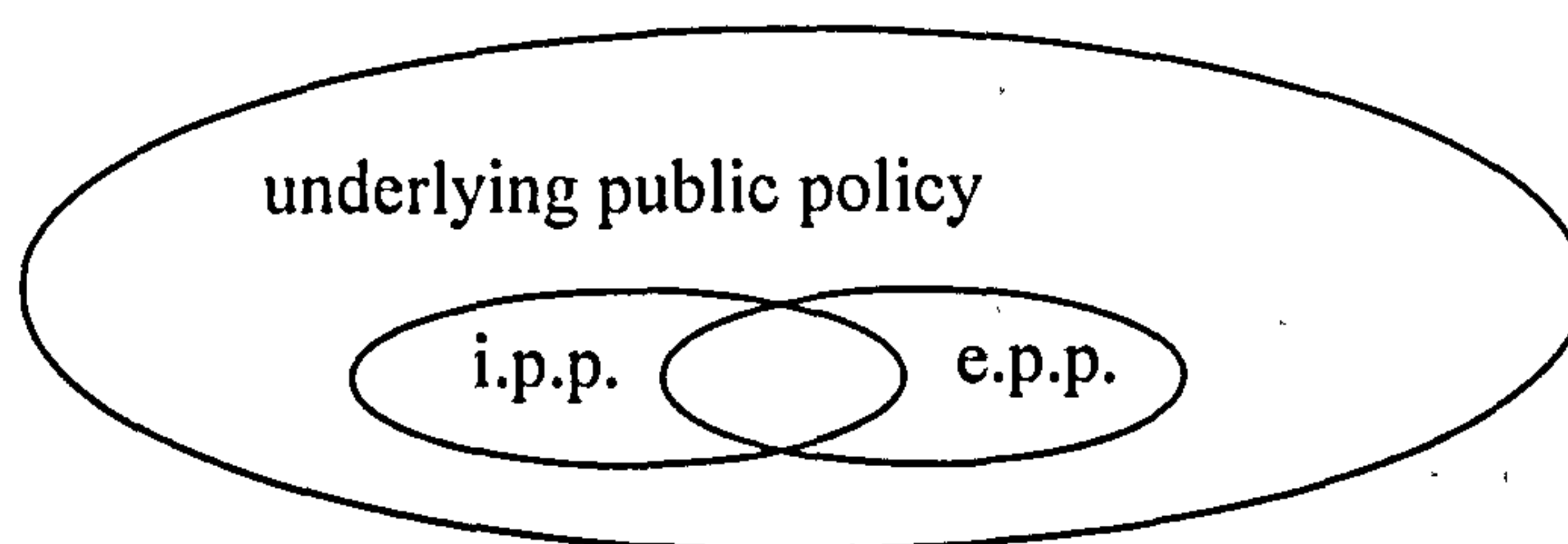
abhorrence of sibling marriage, or a sense of justice and fairness may be shared by Scots and English alike, it is submitted that this does not mean that these ideals are a matter of British, rather than Scottish, public policy. Such similarities of approach on both sides of the border may, however, explain why it is unlikely that public policy objections in Scotland to English law will be on the grounds of a contravention of moral standards or basic conceptions of justice: it is only to be expected that it is at the other end of the public policy spectrum that the doctrine will tend to come into play as between Scotland and England. In the Canadian context, Blom rightly recognised that external public policy is multi-faceted, and that the protection of morality is only one aspect of this. Accordingly there are areas where "even sister states in a federation may conceivably have legitimate differences",⁷⁰ and thus the ability of a court to avail itself of a public policy objection remains necessary in interprovincial cases. It is submitted that this same reasoning holds in the UK. It is therefore both possible, and desirable, for a Scots court to be able to refuse to apply English law, or recognise an English judgment, on the grounds that it would contravene public policy. By this is meant that the rule or judgment in question is contrary to certain essential principles which inform the Scottish legal system.

Accordingly, it is submitted that the correct analysis of the relationship between the three different levels of public policy identified at the outset is as follows. Underlying public policy contributes to the statutes which are passed by the law-making body (in this case the old Parliament of Scotland, followed by the new British Parliament), the tenets set down by institutional writers, and the development of both by judges. Certain public policy considerations are so strong that they also override the normal legal consequences of actings in domestic law, for example, to prevent persons profiting from a crime, or to protect morals. This is the application of internal public policy. We recognise that in applying foreign law, or recognising foreign judgments, we cannot baulk at rules simply because they are different from our own. However, certain of the moral objections which drive the concept of internal public policy are so deeply held, that we would also

⁷⁰ Ibid., 398.

refuse to recognise a foreign law on that basis.⁷¹ In addition to this, there are certain foreign rules or judgments which we consider would be so destructive of the fabric of our law (and the underlying public policy reasons for those legal rules) that we will refuse recognition to them.⁷² Together, this constitutes the doctrine of external public policy. We are as careful not to overuse the second kind of external public policy objection, as we are not to impose our moral beliefs inappropriately when utilising the first kind of external public policy exception. Thus in *Hamlyn & Co v Talisker Distillery*,⁷³ as we have seen, a clause valid under English law referring disputes to unnamed arbitrators was not void as a contravention of public policy since arbitration was possible in Scotland. However, if references to arbitration had been impossible in Scotland, then the contractual clause could legitimately have been struck down on this ground. It is therefore argued that a more accurate diagrammatic representation of the overlapping contents of the differing levels of public policy is as follows:

Figure 7.2



Key:

i.p.p. = internal public policy

e.p.p. = external public policy

⁷¹ For example, it has been noted that smuggling contracts are contrary to internal public policy. Moreover, Hume notes that contracts of smuggling entered into abroad may not be enforced in Scotland (G.C.H. Paton (ed.), *Baron David Hume's Lectures 1786-1822, Vol II* (Stair Society, Vol 13, 1949), pp28-31). By contrast, although the Scottish courts have (at least in the past) been loathe to become involved in gaming contracts, as early as 1937 the Court of Session allowed a proof in a dispute arising from joint purchase of a ticket for an Irish lottery (*Clayton v Clayton* 1937 SC 619), and see in England the case of *Saxby v Fulton* [1909] 2 KB 208. On both sides of the border, it was recognised early that the status and incidents of slavery should not be given effect (in Scotland by the case of *Knight v Wedderburn* (1778) Mor 14545; and in England by virtue of *Somerset v Stewart* (1772) 20 State Tr 1), but later an English court enforced a contract for the sale of slaves, valid by its Brazilian proper law (*Santos v Illidge* (1860) 8 CB(NS) 859). It is impossible to predict what a Scots court of that period would have done in this situation. Collier states that it is "inconceivable" that such a decision would be reached in England now (Collier, *Conflict of Laws*, p363), and this is undoubtedly true for Scotland also.

⁷² See *Connal & Co. v Loder & Others* (1868) 6 M 1095; *Hammer and Sohne v HWT Realisations Ltd* 1985 SLT (Sh Ct) 21 at 23.

⁷³ (1894) 21 R (HL) 21.

The above model (Figure 7.2) reflects the connection between the underlying public policy of the law, and both internal and external public policy. Changes in the former can accordingly alter the application of the latter two.⁷⁴ However, it also illustrates that although the content of internal and external public policy may overlap, they are not entirely coincident, and nor is external public policy merely a subset of internal public policy.

The availability of external public policy objections under statute in an intra-UK situation

External public policy as an exclusionary device has also been built into conflicts legislation. Whether this exception is available within the UK, or simply in respect of rules or judgments emanating from a politically foreign country, is a matter of construction of the individual statute.

In general, the parliamentary draughtsman has not disappplied public policy exceptions in the intra-UK context. Under Article 16 of the Rome Convention, a court may decide not to apply a rule of law of the country which governs the contract by virtue of the Convention's choice of law rules, if to do so would be "manifestly incompatible" with the forum's public policy. In terms of the Contracts (Applicable Law) Act 1990, the Convention also applies as between the UK jurisdictions, and there is nothing in that legislation to prevent reliance upon Article 16 within the UK. There is a similar public policy exception in the Convention on the law applicable to trusts and on their recognition.⁷⁵ Again, the legislation which allows the rules of the Convention to apply within the UK, does not disapply this public policy exception.⁷⁶ The Private International Law (Miscellaneous Provisions) Act 1995 permits the law chosen in terms of its provisions not to be applied if to do so "would conflict with principles of public

⁷⁴ For example, the statutory introduction of the concept of the floating charge in Scots domestic law both represented a change in the underlying public policy of Scots law, and removed the possibility that recognition of the effects of an English floating charge might be held by a Scots court to be contrary to external public policy. To take another example, changes in underlying public policy which reflect an alteration in how society views marriage and divorce, may make us more tolerant of certain foreign cultural norms, and thus less likely to use external public policy to exclude recognition of the status of, and consequences attendant upon, some relationships entered into abroad.

⁷⁵ Art. 18.

⁷⁶ Recognition of Trusts Act 1987, c.14.

policy".⁷⁷ Once more, there is nothing to prevent a Scottish court making use of this exception so as not to apply English law.

There are, however, certain exceptions. A judgment may be refused recognition under the Brussels Convention, and now Brussels I, if it involves a contravention of the forum's public policy.⁷⁸ The separate provisions for recognition and enforcement in Scotland of judgments from other parts of the UK allow only limited exceptions to the general right to recognition,⁷⁹ and traditional common law challenges based on public policy or fraud have not been preserved. An attempt was made in the case of *Clarke v Fennoscandia Ltd*⁸⁰ to circumvent the statutory provisions by seeking interdict against the taking of steps in Scotland to enforce an English judgment which was alleged to be tainted by fraud. However, this did not succeed. In terms of the recognition of divorces, annulments, and judicial separations, section 51 of the Family Law Act 1986 sets out the grounds on which such recognition may be refused. However, the public policy and fair notice objections set out therein are expressly said only to apply with respect to overseas divorces, annulments and judicial separations.⁸¹ The Law Commissions were of the view that natural justice concerns were more properly raised in the British court where the divorce action was heard.⁸² They confirmed this view when proposing the bringing of nullity within the same statutory framework as the recognition of divorces.⁸³ Although it was recognised that public policy in Scotland and England might sometimes differ with respect to nullity, it was not proposed that a public policy exception should be available in respect of intra-UK cases on the recognition of nullity decrees.⁸⁴ Similarly, it is not proposed that

⁷⁷ s.14(3)(a)(i).

⁷⁸ Art. 27(1) of the Brussels Convention; Art. 34(1) of Brussels I.

⁷⁹ Broadly, if the registration procedure was not correctly carried out, or if the subject-matter of the judgment for which recognition was sought had already been decided in another court (Civil Jurisdiction and Judgments Act 1982, Sch.6, para 10; Sch. 7, para 9).

⁸⁰ 1998 SLT 1014.

⁸¹ Family Law Act 1986, s51(3). British divorces can only be refused recognition in Scotland on the grounds of irreconcilability with a previous Scottish judgment in that case, or if Scots international private law dictates that there was in fact no valid marriage (Family Law Act 1986, s51(1), (2)).

⁸² Law Com. No 34/Scot. Law Com. No 16, *Hague Convention on Recognition of Divorces and Legal Separations* (1970), para 2 of Notes to clause 8 of draft Bill.

⁸³ Law Com. No 137/Scot. Law Com. No 88, *Recognition of Foreign Nullity Decrees and Related Matters* (1984), para 6.67.

⁸⁴ *Ibid.*

there be an intra-UK public policy exception with respect to the recognition of dissolutions and annulments of civil partnerships.⁸⁵

The Westminster Parliament has the power to remove the ability to rely on external public policy objections within the UK, and has sometimes done so when passing internalising rules. However, in many situations where statute provides that the Scottish courts may refuse to apply a rule of foreign law on public policy grounds, this option is equally open to the court where a rule of English law is involved. The paucity of occasions on which Scottish courts have required to do so⁸⁶ is testament not just to the reluctance of the courts to use such a powerful tool as public policy,⁸⁷ but also to the many similarities in the underlying public policy of the two countries. However, it is submitted that it is appropriate that the option remains open. It is always possible that as between two legal systems springing from different roots, recourse to public policy objections may sometimes be required.

The impact of devolution on public policy in Scotland

The establishment of a Scottish Parliament with wide-ranging legislative powers could lead over time to a change in the underlying public policy of Scots law. The influence of smaller parties on the Scottish legislative process, and the possibility that the Scottish Parliament is passing a different style of legislation in which principles have a more obvious place than heretofore, has already been discussed.⁸⁸ The new Parliament has not shied away from morally charged issues such as the hunting of foxes.⁸⁹ Accordingly, it is quite possible (particularly were radically different administrations to be in power in London and Edinburgh in the future), that the underlying public policy of Scots law might shift slightly. This could affect both internal and external public policy. How, for example, might a

⁸⁵ Civil Partnership Bill 2004, cl.228(3)(c).

⁸⁶ There appears to be no Scottish case in which a litigant has successfully invoked the public policy exception under the Contracts (Applicable Law) Act 1990, the Recognition of Trusts Act 1987 or the Private International Law (Miscellaneous Provisions) Act 1995, whether in respect of English law or any other foreign law. This is not to say that foreign law may not have been excluded by other means, but that apparently no judge has taken the bold step of refusing recognition to a judgment or rule of law on public policy grounds alone.

⁸⁷ W.E. Holder, "Public policy and national preferences: the exclusion of foreign law in English private international law" (1968) 17 *ICLQ* 926 at 929 & 937.

⁸⁸ See p147 above.

⁸⁹ Protection of Wild Mammals (Scotland) Act 2002.

Scottish court view an English contractual clause relating to fox hunting? What if an action was raised in Scotland for damages relating to the physical chastisement of a child which occurred in England? Over time wider chasms in attitude might open up,⁹⁰ giving rise to even more difficult intra-UK questions. This could also lead to judges being less reluctant to invoke external public policy objections based on moral values, in intra-UK cases.

The Scottish Parliament also has the power expressly to legislate in order to narrow or expand the scope of internal public policy. Furthermore, in passing statutes dealing with international private law, it has a choice as to whether external public policy exceptions should be available in respect of English rules of law and judgments. What course has been taken thus far? The Adults with Incapacity (Scotland) Act 2000 provides that a rule of law found to be applicable by virtue of the legislation need not be given effect to by the Scots courts if it would "produce a result which would be manifestly contrary to public policy".⁹¹ Furthermore, a measure taken in a country other than Scotland may be refused recognition if, for example, it involves a breach of natural justice,⁹² or of a mandatory rule of Scots law,⁹³ or if to do so would be incompatible with public policy.⁹⁴ These provisions could equally well be invoked if an English rule, or measure, was involved. However, as we have seen, the legislation also allows for special regulations to be introduced in future on the subject of intra-UK recognition.⁹⁵

⁹⁰ As Blom notes "[v]iewed abstractly, fundamental values like honesty and freedom do not change much over time, but perceptions as to what violates those values do change, sometimes quite swiftly" (Blom, "Public policy", 391). It is submitted that in future Scotland might see this type of change of emphasis not just on a temporal, but also on a geographical, basis. Belief in certain fundamental values may continue to be common to Scotland and England, however, there may be a greater divergence in the way in which those values are respected and upheld on either side of the Tweed.

⁹¹ Adults with Incapacity (Scotland) Act 2000, Sch. 3, para 6.

⁹² *Ibid.*, para 7(3)(a).

⁹³ *Ibid.*, para 7(3)(c).

⁹⁴ *Ibid.*, para 7(3)(b).

⁹⁵ *Ibid.*, para 10.

Foreign affairs, however, are one of the subjects reserved to the UK Parliament in terms of the devolution settlement.⁹⁶ Thus one of the aspects of external public policy, that of not damaging the UK's relationships with its allies, will remain singularly within the control of Westminster.

Constitutionalising external public policy?

In a dispute over the recognition of an American judgment in British Columbia, Tetley characterises the public policy challenge as an (unsuccessful) argument that recognition would be contrary to British Columbia, rather than Canadian, public policy.⁹⁷ Could therefore a judgment from a sister-province also be argued to contravene public policy? Judgments from outwith Quebec may be refused recognition within Quebec on public policy grounds,⁹⁸ and logically this would seem potentially to encompass those from sister-provinces. The Civil Code of Quebec also provides for an *ordre public* exception to the application of foreign laws,⁹⁹ and the text of the Code is arguably such that this could be relied upon to exclude the laws of Canada's Common Law provinces.¹⁰⁰ Legislation which would allow for the registration and enforcement of Canadian judgments has gone through some of the provincial assemblies, but has not yet been brought into force. To take those of British Columbia and Nova Scotia as an example, both allow for the courts of those states to refuse to recognise a judgment from a sister-province on the grounds of public policy.¹⁰¹ For the same reasons expanded upon when discussing the availability of an external public policy objection in the intra-UK situation, the inclusion of such an exception in the legislation seems both necessary and desirable.

⁹⁶ Scotland Act 1998, s29; Sch. 5, para 7. Furthermore, paragraph 9, which reserves defence matters, explicitly covers "trading with the enemy and enemy property" (Scotland Act 1998, Sch.5, para 9(1)(e)).

⁹⁷ It was not "contrary to British Columbia public policy, not being repugnant to any essential public or moral interest of the province or to B.C. conceptions of essential justice and morality" (Tetley, "On-going saga", 43 (discussing the case of *Old North State Brewing Co. v Newlands Services Inc* (1999) 58 BCLR (3d) 144, 46 OR (3d) 480 (BC CA))). This would seem to suggest that each Canadian province could possess a distinctive doctrine of public policy, rather than there being a pan-Canadian concept of public policy.

⁹⁸ *Civil Code of Quebec*, LQ 1991, c.64, art. 3155(5).

⁹⁹ *Ibid.*, art. 3081.

¹⁰⁰ *Ibid.*, art. 3077.

¹⁰¹ Enforcement of Canadian Judgments Act, RSBC 1996, c.115, s6(1)(d); Enforcement of Canadian Judgments and Decrees Act, RSNS 2001, c.30, s8(2)(c)(iv); see also Blom, "Public policy", 398.

However, as has been discussed in an earlier chapter, the Supreme Court of Canada has taken quite a different path.¹⁰² In terms of the choice of law rules in tort, La Forest J saw "a limited role, if any, for considerations of public policy in actions that take place wholly within Canada".¹⁰³ The Supreme Court has opined that there is, in the Canadian constitution, an implicit notion of "full faith and credit", meaning that judgments from other provinces properly seised of jurisdiction should be recognised within Canada.¹⁰⁴ The result of this constitutionalising of conflicts is, in Castel's view, that "in light of recent Supreme Court of Canada decisions, public policy should no longer be relevant on the interprovincial or interterritorial level".¹⁰⁵ It was noted in *Morguard Investments Ltd v De Savoye*¹⁰⁶ that between the Canadian provinces there could not properly be "concerns about differential quality of justice".¹⁰⁷ The basis for this was the control of Canadian central government over the appointment of judges, and the ability of litigants to appeal to the Supreme Court of Canada, which would enforce the same (constitutional) rules across Canada in respect of jurisdiction and recognition decisions.¹⁰⁸ It was also said that the existence of a Canada-wide standard on lawyer's ethics would militate against breaches of natural justice.¹⁰⁹ As has already been discussed, the House of Lords and the JPC are not analogous in terms of function and approach with the Supreme Court of Canada.¹¹⁰ The introduction of the European Convention on Human Rights might be thought to standardise minimum natural justice guarantees in Scotland and England. However, as has been seen, the method of implementation adopted in the Scotland Act 1998 and the Human Rights Act 1998 is not the same, which can lead to Convention articles having different effects north and south of the border.¹¹¹ In any event, a means to refuse recognition to judgments considered by the forum to breach rules of natural justice is only one aspect of the rôle played by

¹⁰² See Chap. 3.

¹⁰³ *Tolofson v Jensen* (1994) 120 DLR (4th) 289 at 308.

¹⁰⁴ *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077; *Hunt v T&N plc* [1993] 4 SCR 289; and see generally Chap. 3.

¹⁰⁵ Castel, *Introduction to Conflict of Laws*, p67. He specifically names *Hunt v T&N plc*, *supra* as an example of the Supreme Court decisions to which he refers.

¹⁰⁶ [1990] 3 SCR 1077.

¹⁰⁷ *Ibid.* per La Forest J at 1100.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ See pp59-63 above.

¹¹¹ See pp52-53 above.

external public policy. As has been argued above, external public policy includes a whole gamut of objections, ranging from contravention of fundamental moral beliefs or notions of fairness to protection of the fabric of our law and its fundamental legal principles. Furthermore, there is not the same centralisation or harmonisation of judicial appointments and the regulation of lawyers in the UK.¹¹² It is submitted that the approach of the Supreme Court of Canada to the availability of a public policy exception within Canada is irredeemably bound up with the constitutionalisation of conflicts described in an earlier chapter.¹¹³ As was argued there, it would be neither appropriate, nor desirable, for that approach to be followed within the UK.

In any event, the constitutionalisation of conflicts in Canada may not have been as successful as the judicial *dicta* might suggest in removing public policy from interprovincial conflict law. In *Hunt v T&N plc*,¹¹⁴ the Supreme Court of Canada found that the courts of one province could examine the constitutionality of legislation of a sister-province: "all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution".¹¹⁵ This case was an action for damages, based on exposure to asbestos fibres. The action was raised in British Columbia where the alleged exposure had taken place: the defendants (who had sold goods said to contain the asbestos fibres) were based in Quebec. The plaintiff attempted to recover certain documents in terms of the relevant British Columbia procedural rules. However, the defendants stated that they were unable to produce the requested documents since Quebec legislation forbade the taking of business records outwith that province on the strength of an order of a court in a sister-province. The Supreme Court made it clear that the British Columbia courts had the power to declare the Quebec statute to be unconstitutional.¹¹⁶ It is submitted that the ability to declare legislation from another province to be unconstitutional, is no more than an (admittedly uniquely Canadian) expression of public policy. It fulfils the same rôle as public policy, as it could act to exclude rules of law (or judgments based upon them) from other

¹¹² See p59 above.

¹¹³ See Chap. 3.

¹¹⁴ [1993] 4 SCR 289.

¹¹⁵ *Ibid.* per La Forest J at 314.

¹¹⁶ *Ibid.* per La Forest J at 307-317.

provinces. It says much for the resilience, and usefulness, of the doctrine of public policy that an analogue is still required in a system of constitutionalised conflicts.

Conclusion

External public policy embraces a range of objections to laws or judgments from outwith Scotland. It draws on some of our internal public policy objections, but also protects the essential structure of the Scots legal system with its underlying public policy roots. Because of this wide definition, it has been submitted that external public policy can be relied upon at common law by Scots courts to refuse recognition to an English judgment, or so as not to apply a rule of English law which would otherwise govern the matter under our choice of law rules. Such public policy objections are also explicitly allowed by certain statutes, although when passing legislation which internalises conflicts, the Westminster Parliament has also tended to remove the intra-UK public policy exception. Prior to the establishment of the Scottish Parliament, similarities in internal public policy and (to a lesser extent) underlying public policy, might suggest that, in practice, there would be few occasions on which external public policy would, in fact, be relied upon in the intra-UK context, and indeed the case law bears this out. However, this does not mean that there is no need for an external public policy exception in this particular cross-border situation. Blom has described public policy as "a safety valve",¹¹⁷ and this is an apt metaphor. No matter how close the relationship, there should always be such a safety valve. This is well illustrated by the introduction of a power to declare legislation from another province unconstitutional, even in the midst of a Canadian project to constitutionalise conflicts and remove the public policy doctrine from interprovincial disputes.

The advent of constitutional change in Scotland, in the shape of a devolved Parliament, simply reinforces the need for an external public policy exception to be open to Scottish courts in intra-UK disputes. The establishment of a Scottish Parliament may alter Scottish underlying public policy, and internal public policy, causing them to diverge further from that pertaining in England. This in turn

¹¹⁷ Blom, "Public policy", 398.

impacts upon the grounds on which a Scottish court might legitimately and properly feel unable to apply an English (or other foreign) law, or recognise a judgment from outwith Scotland. It is not thought, however, that Scots judges will abandon the restraint which they currently show in utilising such a potentially powerful weapon. A further issue in the future for Scots judges might be the addition of a further layer of public policy concerns. As Leslie has noted, the Giuliano-Lagarde report, which accompanied the Rome Convention, contained a reference to "Community public policy".¹¹⁸ The proposed Rome II Regulation would not permit punitive damages, on the grounds that this would contravene Community public policy.¹¹⁹ This has been much criticised.¹²⁰ However, could a breach of a concept of Community public policy be relied upon in an intra-UK conflict case? This is a question for the future.

¹¹⁸ Leslie, "The relevance of public policy", 485.

¹¹⁹ Rome II, Art. 24.

¹²⁰ House of Lords European Union Committee, "The Rome II Regulation", paras 164-168. See also Carruthers & Crawford, "Conflict of laws update" (2004), 23. Indeed, its deletion is proposed in the Wallis Report.

This thesis has sought to explore the effect of the constitutional relationship between Scotland and England on the Scottish approach to resolving competitions of jurisdiction with English courts, or cases where both Scottish and English law have a claim to applicability, as well as the Scottish attitude to decisions and orders emanating from English courts. What makes this particular constitutional relationship a good basis for such a study is its different permutations over time: from neighbouring independent nation states, to partners in a political but not legal union, then to a Scotland with its own devolved legislature but still remaining a part of the United Kingdom.

Anglo-Scottish conflict of laws prior to 1707

At the most basic level there is an essential interplay between the constitution and international private law. Constitutional law is concerned with the source of legal authority within a country, with the apparatus, and powers, of the nation state, and with defining that state. Once there are different nations subject each to their own system of law and each with their own central legal authority, it becomes necessary to formulate rules to settle their competing jurisdiction claims, to determine which (if either) of their laws should govern a set of facts, and/or to consider whether recognition should be afforded to judgments emanating from the other nation.

Between the eleventh and the sixteenth centuries the separate nation states of Scotland and England emerged from amongst the peoples of the island of Britain, and their laws and rules developed into recognisable systems of law with central courts. Even during times of hostility, there was contact between them at different levels of society, from royal marriages, and cross-border landholding, to the merchant or border reiver.¹ However, for Scotland, for quite a considerable time, many such types of contact took place in the context of supra-national bodies of law. Thus the law merchant provided regulation for traders, and the

¹ See Chap. 2.

importance of maritime law cannot be underestimated in a country which relied so much on sea travel. In addition, many matters of family law would have fallen within the domain of the canon lawyers. Even the Anglo-Scottish border lawlessness was controlled for a time by a special set of rules: the March Laws. The existence and operation of such supra-national bodies of law acted to dull the problems of jurisdiction and clashing laws which otherwise could have arisen in Scottish courts, with regard to both English law and other foreign laws. However, by the seventeenth century we can discern what we would now describe as choice of law questions arising involving Scots and English law. Courts can be seen to be concerned with questions of jurisdiction; and institutional writers with the concept of domicile.² Constitutional changes in the seventeenth century could easily have smothered the growth of these early international private law rules, in the British context. However, both the Union of the Crowns in 1603, and the Cromwellian occupation in the latter half of that century, failed to bring about either a harmonisation of Scots and English substantive law, or the imposition of one system wholly upon the other.³

Intra-UK conflicts and the UK constitution 1707 to 1999

Undoubtedly, one of the key constitutional events in the development of intra-UK rules of international private law is the union of the Scottish and English Parliaments in 1707. It is important not to underestimate how unusual was the accommodation arrived at by the two countries. Contemporaries saw the creation of the largest free, common, market of their times. Almost three hundred years later, the existence of different legal systems which had no separate legislatures, ensured that Great Britain possessed a constitutional system without parallel, although perhaps, as Nairn muses, what was different in the eighteenth century by virtue of being new and exciting, had in the twentieth century had become odd and anachronistic.⁴

Between the creation of Great Britain in 1707 and the advent of a devolved Scottish Parliament in 1999, this unusual constitutional arrangement prevailed

² See Chap. 2.

³ See pp22-31 above.

⁴ See Nairn, *After Britain*.

between Scotland and England. There was political unity, with one (supreme) legislature and executive.⁵ However, the separate systems of private law of Scotland and England survived the Union, although statutory change and development of these two different legal systems was carried out through the single, British, Parliament. The separate hierarchies of courts remained unmerged. The eagerness of litigants for a further avenue of appeal led quickly to the establishment of jurisdiction by the House of Lords in Scottish civil, but not criminal, cases. This did not act so as to create a unified court structure. Nor did it lead to the merging of the two systems of law, since the House of Lords must apply Scots law to Scots cases, and its decisions in English cases are not technically of binding effect on Scottish courts.⁶ However, the anomalous position of the House of Lords has, over the years, served to introduce a further complicating factor into the relationship between Scots and English law. One example of this is the ability of the House to call upon its judicial knowledge of English law when hearing a Scots appeal on an intra-UK choice of law issue.⁷

The terms of the Acts of Union which brought about the Union of the Scottish and English Parliaments had therefore created a situation in which persons could move freely between different territorial legal jurisdictions without altering their nationality; a common market whose members might be subject to different laws; and separate court systems which could issue conflicting judgments.

Lack of constitutionalisation of conflicts

The relationship between the various public law bodies within a state, such as legislature to executive, or federal legislature to central legislature, is regulated by constitutional law. Latterly, some of the Commonwealth countries such as Canada and Australia have experimented with the idea that the regulation of private law relationships within a country should also be referred to constitutional laws. Thus constitutional rules would dictate whether judgments issued by one provincial court should be afforded recognition by the courts of a sister province, and also delimit the occasions on which the court may choose to exclude the laws,

⁵ Despite Lord President Cooper's *dicta* in *MacCormick v Lord Advocate* 1953 SC 396 (see p44 above).

⁶ See pp61-63 above.

⁷ See p115 above.

or judgment, of a sister province. This method of approach is referred to in this thesis as the 'constitutionalising of conflicts'.⁸

How far did such reasoning find favour in the UK prior to the devolution settlement of the late twentieth century? It is true that there is a different approach to the subject of the applicability of statutes within the UK, than to the operation (extra-territorially) of statutes of (entirely) foreign sovereigns. Traditionally the reach of legislation of politically foreign countries has been prohibited (except in matters of status) by the application of the doctrine of extra-territoriality, which insists that a law-making body is only sovereign within its own territory. Attempts to legislate outwith those confines will not be afforded recognition by the Scottish, or indeed the English, courts. Within the UK, however, the Westminster Parliament holds sovereign power to legislate for the all of the territories which comprise it. The existence of separate legal systems and court structures means that the Parliament is obliged to legislate in a variety of different modes: either for England and Wales alone, for Scotland alone, latterly for Northern Ireland alone, or for a combination of these. Even when directing its legislative attention to, say, England, Westminster undoubtedly retains the power to make statutory provision for Scotland. Accordingly, the concept of extra-territoriality is of no application when determining the geographical reach of statutes within the UK. Instead it is a question of pure statutory construction: a matter of "constitutional practice, not ... international comity".⁹ Given that the theory of sovereignty also underpins the unwillingness of the Scots and English courts to give effect to the penal and revenue laws of a foreign state, it has been submitted that a Scottish court may not invoke this exception so as to exclude an English penal, revenue, or other public, law.¹⁰

However, these are isolated examples, not part of a wider trend. The creation of the British state in the early eighteenth century did not lead then, or at any other time in the years which followed, to the wide-spread constitutionalising of

⁸ See Chap. 3.

⁹ *R v Treacy* [1971] AC 537 *per* Lord Diplock at 564 (see pp45-48 above).

¹⁰ See pp48-51 above.

conflicts.¹¹ Part of the reason for this was the lack of a constitutional base on which such an approach could have been founded. Great Britain does not have a founding constitutional document in the style of the American Constitution, nor was one adopted on its enlargement into the United Kingdom of Great Britain and Ireland. Furthermore, although the Acts of Union which established the new state might have provided the necessary basis, their potential has never been developed. There have been many hints in Scottish cases over the years that the Acts of Union might be a type of higher law, limiting the power of the Westminster Parliament. However, there has been little agreement on how such power might be loosed, and certainly no Scottish court has successfully relied upon the Acts of Union to strike down legislation.¹²

The internalisation of conflicts

Whilst there was not a constitutionalisation of the conflicts of jurisdiction, laws, and judgments between Scotland and England in the British state, this is not to say that the constitutional arrangements of that state did not affect how such conflicts were handled. The existence of one Parliament made possible the phenomenon which has been described in this thesis as the 'internalising of conflicts',¹³ and indeed such internalisation is, by and large, the result of legislative, and not judicial, action. An early example of internalisation is provided by runaway marriages. Differences between Scots and English marriage laws had made Scotland a paradise for young lovers marrying against their parents' wishes: not just in the penny novel, but in real life. Both the Scots and English courts initially dealt with all the issues arising from this situation in terms of the fledgling rules of international private law. However, by 1856 legislation had been passed in an attempt to prevent such runaway marriages occurring at all.¹⁴

¹¹ See Chap. 3.

¹² See Chap. 3.

¹³ Which has been defined as including, firstly, the removal of a conflict by changes to the Scottish and/or English domestic rules which give rise to the conflict and, secondly, the introduction of special rules to regulate cross-border consequences as a replacement for the normal international private law rules.

¹⁴ See pp72-74 above.

The internalisation of conflicts has been most prevalent in two areas.¹⁵ The first of these is in what might be called 'UK common market law'. This includes such topics as company law and insolvency law, and the law of sale. The response of the common UK legislature has been to harmonise (for example, the law of sale),¹⁶ or to internalise the conflicts which could arise (for example, in insolvency).¹⁷ Internalisation of conflicts has also allowed the sublimation of property law principles where these were thought to hinder the UK common market. It is submitted that this underscores the nature of the union in which Scotland and England were the major partners. Matters of trade and access to an Empire, rather than legal integration, had been uppermost in the forging of the British state. This attitude is therefore reflected in the drive to internalise conflicts where they could occur in the operation of the British common market which had been created. It also coheres with the wider arguments which link the flourishing of Britain with the growth and existence of the Empire with all its opportunities for trade, and question whether the collapse of Empire led to Scottish discontentment with the UK partnership.¹⁸

The second field in which there has been much internalising of conflicts within the UK is 'recognition', in its very widest sense. A succession of UK statutes have replaced with special intra-UK rules the normal international private law rules on the recognition and enforcement of judgments, culminating in the near automatic intra-UK scheme contained in Schedules 6 and 7 of the Civil Jurisdiction and Judgments Act 1982. Registration of judgments in terms of the scheme is more akin to an administrative than a judicial procedure, and Parliament has also removed the ability to refuse recognition on the basis of public policy, fraud or other such objections. The recognition in Scotland of divorces obtained in England is subject to only very limited exceptions. After a fraught history of conflicting decrees on both sides of the border, the recognition and enforcement

¹⁵ See Chap. 4.

¹⁶ See pp77-79 above.

¹⁷ See pp79-84 above.

¹⁸ See Fry, *The Scottish Empire*, Chap. 38; Nairn, *After Britain*; Welsh, *The Four Nations*, p381; Urwin, "Territorial structures and political developments in the United Kingdom", p67; Colley, *Britons*, pp374-375; Devine, *Scotland's Empire*, p350; C. Lee, *Scotland and the United Kingdom: the economy and the Union in the twentieth century* (Manchester University Press, 1995), pp17-18; cf Devine, *Scotland's Empire*, pp62-63.

of custody decrees within the UK has also been placed by internalising legislation on an almost administrative footing. Furthermore, internalising statutes have eased 'recognition' in a wider sense. Thus a Scottish confirmation gives an executor sufficient title to deal with property belonging to the deceased but situated in England, without any need for resealing or the obtaining of a fresh confirmation. This applies in the reverse situation for an English personal representative. In the criminal law sphere, prosecutors may place in front of a Scottish court previous convictions from England, but not those of a politically foreign country. Provisions also exist allowing for the enforcement of warrants for apprehension and imprisonment within the UK. Implicit in all of these rules, it is submitted, is recognition in Scotland of the status and powers conferred upon a person by an English court, or the warrants granted under its authority, or the judgment reached by such a court in criminal matters. Furthermore, both in these examples and in the mainstream recognition and enforcement of judgments, recognition within the UK has become, at the legislator's hand, an administrative rather than judicial procedure.

The use of international private law rules in an intra-UK context

Outwith UK common market law and the intra-UK recognition of judgments and other court decisions, however, Scottish courts have generally called upon rules of international private law (usually) regardless of whether the other court claiming jurisdiction, or the potentially applicable law, is English or politically foreign.

Indeed English law, like any other law, must be introduced into an action in Scotland by the party who wishes to rely upon it. Contrary to what may commonly be believed, it has been argued that it is not even true to say that on exceptional occasions English law may come within the judicial knowledge of a Scots judge. As with any other foreign law, English law is a matter of fact requiring proof before a Scots court. This is not simply a result of the preservation of the Scottish legal system by the Acts of Union, but is essential to the maintenance of the distinction between the legal systems obtaining in the different territories of the UK. Furthermore, whilst in practice Scots lawyers might have acquired some knowledge of the English legal system and English law, the danger of falling into error as to the content of the law, or failing properly

to appreciate its structure or effect, is too great to allow evidence of English law to be led otherwise than with the involvement of an expert English practitioner. But it has been submitted that it would not be desirable to allow English lawyers to appear in the Scottish courts in a representative capacity, rather than simply as an expert witness. To do so would endanger Scots practices, and indeed the Scottish legal system itself. The terms of the British Law Ascertainment Act 1859 allow a remit from a Scots court to an English court to determine how English law would be applied to a set of facts, and this could provide a valuable method of accurately ascertaining the effect of English law in an important choice of law question involving difficult issues of English law. That aside, it has been argued that in all the circumstances there is no justification for allowing English law to be proved any differently from a politically foreign law, i.e., for example, by way of leading an expert witness or remit to a foreign lawyer.¹⁹

Another consequence of the lack of legal integration in the Acts of Union was that nationality could not be used in Britain as a connecting factor in matters of status, and it was necessary to make use of a concept of domicile.²⁰ The way in which the rules of domicile have developed owes much to Scotland's enthusiastic participation in the British Empire. Scotland contributed to the jurisprudence, cases which firmly establish the theories of the continuance, and revival, of the domicile of origin. Both of these doctrines reflect a desire to retain unbroken the bonds of an Empire administrator or merchant to his homeland, as well as the reality of an outward flow of emigrants. It is submitted that it is not true to say that it is easier to effect a change of domicile as between Scotland and England, than as between Scotland and a politically foreign country. Furthermore, the Polish experience of differing internal and external connecting factors in questions of status was never copied in Britain.²¹ Instead any variation in connecting factors over the years has been on a topical basis, particularly as concepts such as habitual residence have taken hold in certain areas of the law. Consequently it is possible in future that in a particular area Scots and English law might make use of different connecting factors. This has occurred in the past

¹⁹ See pp107-115 above.

²⁰ See p116 above.

²¹ See pp116-120 above.

in the field of child custody, although the result was somewhat unfortunate, resulting inevitably in conflicting decrees in some custody disputes with a cross-border element.²²

The extent to which disputes over property with a truly international element could arise in Scotland or England was diminished by the laws in place prior to the Naturalization Act 1870. There was, however, no limit on cross-border landholding within Britain. Rules required therefore to be devised to regulate potential clashes between the two very different systems of property law which obtained on either side of the Tweed, and the courts turned to principles of international private law. These rules could be applied with equal ease to international disputes, once the bar on foreigners acquiring British land was removed. The traditional absence of statute in the field of Scots property law has also spared it from internalising legislation.²³

There were also very different approaches, in both domestic and conflict rules, to legitimacy and legitimation in Scots and English law. This quickly gave rise to a study of the choice of law issues involved, and nothing over the years has shaken the hold of international private law rules as the optimum method of resolving conflicts in this area.²⁴

Criminal law is one of the areas where the English and Scots legal systems have always been most distinct, free even from the rather anomalous appellate rôle of the House of Lords. The strictly territorial nature of criminal law means that the only cross-border issues which can arise are those of jurisdiction. For the most part this difficult question has been approached and analysed in the same way irrespective of whether criminal conduct has taken place in England or in a politically foreign country.²⁵ Indeed, while crime may have taken on more of an international aspect in modern times, the issues of jurisdiction actually raised

²² See pp120-121 above.

²³ See pp122-124 above.

²⁴ See pp127-130 above.

²⁵ See pp138-141 above.

perhaps do not differ greatly from those presented in late nineteenth century intra-UK cases such as *HMA v Bradbury*²⁶ and *HMA v Allan*.²⁷

Delict is another area of law in which the selection of which set of rules should govern wrongdoing within the UK has been left to traditional choice of law rules, making no differentiation between intra-UK, and international, cases. This lack of a special intra-UK approach remains the position, even after the enactment of legislation by Westminster to reform the choice of law rules in both Scotland and England.²⁸ Given that the common law double rule had been interpreted somewhat differently by the English and Scots courts, it will be interesting to see whether the courts of the two countries interpret in the same way the new choice of law rules in the Private International Law (Miscellaneous Provisions) Act 1995. It has been argued that a Scottish court may prove to be more capable of resisting the homeward pull.²⁹

It has also been submitted that at common law, external public policy, that most powerful of weapons in conflicts cases, remains available to Scottish courts in intra-UK cases.³⁰ Internalising legislation has blunted its force with regard to English judgments, since public policy is not a valid ground of objection in intra-UK cases under either the Civil Jurisdiction and Judgments Act 1982 or the Family Law Act 1986. By contrast, however, the ability of a Scottish court to refuse to apply English rules of law on public policy grounds has been retained in the twentieth century legislation on choice of law.³¹ It has been argued that the ability to exclude English law on grounds of public policy is desirable. Although the moral backdrop in Scotland and England prior to the devolution settlement may have been similar, external public policy also has a rôle to play in protecting underlying public policy values expressed in the very fabric of Scots law, and which have no English equivalent.³² Undoubtedly the existence of an external public policy objection has been asserted, more often than it has been utilised, in

²⁶ (1872) 2 Couper 311.

²⁷ (1873) 2 Couper 402.

²⁸ See pp131-133 above.

²⁹ See pp135-136 above.

³⁰ See Chap. 7.

³¹ See pp198-199 above.

³² See Chap. 7.

intra-UK cases. In this there is a parallel with the power of a Scottish court to strike down legislation as contrary to the Acts of Union: a power hinted at, but never effectively accessed. Although the latter is a facet of constitutional law, and external public policy is a tool of the conflict lawyer, they can both perform the same function, viz., protection of the legal system which both helps to define the Scottish community and has been greatly shaped by it.

To sum up, the degree of harmonisation and internalisation in that area of law which can be described as 'UK common market law' is unusual, and in areas such as delict and succession, for example, conflict rules accordingly remain relevant on an intra-UK basis. Jurisdiction, choice of law, and the recognition and enforcement of judgments, can be described as the three pillars of international private law. The traditional conflict rules on recognition are now, however, of little relevance in an intra-UK context. 'Recognition', in its widest sense, of orders or judgments emanating from English courts is so often automatic, and achieved by procedures so akin to administrative rules, that the relevant legislation can accurately be described as internalising in its nature.³³ Special intra-UK rules also exist for many questions of jurisdiction in terms of the Civil Jurisdiction and Judgments Act 1982, although the extent to which these were a modified response to the Brussels Convention (and the reasons for the modifications) have been discussed.³⁴ In family law matters, by contrast, there are generally not special jurisdictional rules as between Scotland and England.³⁵ The connecting factors in matters of status vary on a topical, rather than a geographical, basis.³⁶ Nor are the difficult questions of jurisdiction in criminal law usually answered any differently whether England, or a politically foreign jurisdiction, is involved.³⁷ Rules of international private law continue to constitute the main method of solving questions of choice of law, irrespective of

³³ See pp91-100 above.

³⁴ See pp163-167 above.

³⁵ See pp96-97 above, and discussion of the connecting factor in matters of status at pp115-122 above, and see, for example, Domicile and Matrimonial Proceedings Act 1973, s7, and Family Law Act 1986, s9 (although see pp167-172 above on the effect of EU legislation in this area). However, note that the secondary base of custody jurisdiction in the Family Law Act 1986, s10, of presence in Scotland, is not available if the child is habitually resident in another part of the UK.

³⁶ See p120 above.

³⁷ See pp138-141 above.

whether those questions arise in an intra-UK, or international, context. Furthermore, there would appear to be no special intra-UK choice of law rules.³⁸ This is fortified both by the continued treatment of English law as any other foreign law in terms of the necessity for (and the method of) proof,³⁹ and also by the continuing availability of an external public policy objection in respect of English law.⁴⁰

Existence of a separate Scottish international private law

It is submitted that international private law rules have been invaluable in providing a mechanism to ease potential conflicts in areas where the approach of Scots and English domestic laws may differ sharply, and in regulating the attempts of litigants to exploit the variation in available remedies, and costs.⁴¹ It might be thought that the conflict rules of the two countries are themselves very similar, but different paths have sometimes been taken in Scots and English conflict rules over the years.⁴² It would be inaccurate to suggest that international private law rules are any less Scottish than the other areas of Scots law. Nor should it be thought that similarities between the two systems must always be put down to slavish Scottish copying of the English conflicts approach. There is, internationally, an underlying correspondence between many of the rules of international private law, and it could not be expected that Scots law would be an exception to this. Furthermore, cross-border borrowing within the UK has not been all one way: English law, for example, adopted the Scots doctrine of *forum non conveniens*.⁴³ It must also be remembered that even the use of the same conflict rule on both sides of the border will not produce uniform effects throughout Britain if the approach to characterisation differs, or if the domestic rules themselves differ significantly. This is illustrated by the scission principle, which is utilised in conflict cases involving succession to property in Scotland and England. The Law Commissions have observed how this may, in their view,

³⁸ See Chaps 4 & 5.

³⁹ See pp107-115 above.

⁴⁰ See pp192-198 above.

⁴¹ See pp152-157 above.

⁴² See pp141-144 above.

⁴³ See pp62 & 144 above.

act to frustrate the policy of both sets of succession laws in an intra-UK cross-border case.⁴⁴

Intra-UK conflicts and Scottish devolution

The establishment of the devolved Scottish Parliament has been one of the most significant constitutional events in Scotland's history. However, it is submitted that it is also an important event for the Scottish conflicts lawyer.

Undesirability of the constitutionalisation of conflicts on the basis of the Scotland Act 1998

Very quickly, the Scotland Act 1998 became seen as providing at least a partial constitution for Scotland.⁴⁵ Could this, and indeed should this, trigger the constitutionalising of conflicts in Scotland? After all, the Canadian constitutionalisation of conflicts was not built on a traditional or orthodox constitutional document. In truth, however, the existence of a constitutional document of sorts came too late to provide a basis for the constitutionalising of conflicts in Scotland. The legacy of the Acts of Union meant that the variety of legal systems in the UK was more marked than in Canada, where Quebec is merely a pocket in a Common Law whole. The jurisdiction of the House of Lords springs more from the exploitation of a loophole in the Acts of Union, than from an express grant in those Acts. Even when taken together with the new functions of the JCPC under the Scotland Act, there is not such a strongly and avowedly unifying central court in the UK as there is in Canada, in the form of the Supreme Court of Canada. Most important of all, is the difference in political direction between the UK and Canada. Whilst Canada is becoming more closely unified under a Canadian 'brand', the UK is fragmenting, with its constituent parts such as Scotland gaining more control over their own affairs. It has therefore been submitted that the passing of the Scotland Act 1998 is unlikely to lead to the widespread constitutionalising of conflicts in Scotland.⁴⁶ This conclusion should not be a cause for lament. The very purpose of international private law rules is

⁴⁴ See pp126-127 above. Whilst, in that particular circumstance, it may be doubted whether that is the case, conflict lawyers must always be alert to the possibility of 'false conflicts', whether in an intra-UK, or international, sphere.

⁴⁵ See pp52-56 above.

⁴⁶ See pp57-68 above.

to provide a means of resolving conflicts between jurisdictions, and it is submitted that they are equally well-suited to the resolution of such disputes even within one political country. By contrast, the 'conflict' rôle is not a natural, far less principal, function of constitutional rules and trying to stretch them to perform such a function is as undesirable as it is unnecessary. Proponents of the constitutionalising approach are often driven by political concerns. They wish to stress the political unity of the country, and see the use of international private law rules as a threat to that union. But this is a fundamental misunderstanding. Conflict rules do not create disharmony: they merely recognise it, and aim to provide a solution.

Internalisation of conflicts after Scottish devolution

As has been seen, one approach which has heretofore been possible in the UK, and which has been adopted in certain areas, is the internalising of conflicts. It has been submitted that devolution will bring a number of factors to bear on this practice.⁴⁷ On the one hand the fragmentation of legislative power inherent in the devolution settlement could act to inhibit further internalisation of conflicts, particularly since legislation is generally the medium through which internalisation has occurred. On the other hand, the greater than expected use of the Sewel Convention means that the Scottish Parliament could allow Westminster to continue to pass internalising legislation, even though such legislation concerns areas of law now devolved. It must be borne in mind that this may only be a short-term consideration, since the current scale of use of the Convention may owe much to the similarity in the policies of the administrations now governing in Scotland, and the UK as a whole. Thus a change in government in either Edinburgh or London could result in a reduction in the occasions in which the Sewel Convention is invoked. More significant in the long term is the reservation, under the Scotland Act 1998, of 'UK common market law' to the UK Parliament in Westminster. This has been an area where there has always been a great deal of internalisation. Not only does the passing of such measures remain possible after devolution, but the very fact that UK common market law has been reserved may persuade those in power at Westminster that internalising

⁴⁷ See pp103-105 above.

legislation is singularly appropriate. Perhaps once again this illustrates the extent to which the economy, rather than legal integration, is of the greatest importance in the Anglo-Scottish union.

International private law rules after Scottish devolution

The Scottish Parliament has the power to legislate in a variety of areas. The voting system currently in use has involved many smaller parties and independents in the legislative process, on a scale unknown in Westminster. It has also been argued that the Edinburgh Parliament may have stressed principles and rights in its legislative output, rather than adopting a pragmatic, remedy-driven approach. Some controversial issues have been tackled, such as fox hunting.⁴⁸ For all of these reasons the new devolutionary situation may encourage the emergence of greater differences between the laws which apply in Scotland and England respectively. This is particularly so if different administrations were to be in power at Holyrood and Westminster in the future. Thus the introduction of a concept of civil partnerships is a radical reform, but it would appear currently that internalising legislation will be used to ensure uniform rules throughout the UK.⁴⁹ This was made possible by the passing of a Sewel motion in the Scottish Parliament.⁵⁰ However, it is possible that in the future there may be occasions (particularly if different political parties are in control in Edinburgh and in London) where such radical changes will be made in the law of England, but not Scotland, and no consensus for internalising legislation will exist. It would then be necessary to utilise international private law rules to deal with the intra-UK conflicts which would be bound to arise. In this way, devolution may give rise to new conflicts, and accordingly to an increased need to rely upon rules of international private law within the UK.

All the factors set out above could also result in a shift in the underlying public policy in Scotland, or even express changes in the rules of internal public policy applying in the Scottish legal system. In itself, this could produce consequent changes in the external public policy which, in an intra-UK context, can be relied

⁴⁸ See p146 above.

⁴⁹ See pp105 & 150-151 above.

⁵⁰ See p105 above.

upon mainly for the purpose of excluding rules of English law which are otherwise indicated to apply by Scots choice of law rules. Furthermore, whereas at present a Scottish court would be unlikely to use, or even threaten to use, an external public policy objection based on what could be described as 'moral' grounds in an intra-UK case, this may subtly change over time.⁵¹

The Scottish Parliament also has the power to legislate for the conflicts aspect of any of the devolved areas of law.⁵² Thus far, it has been necessary to define such entities as a Scottish taxpayer and a Scottish student, and it has been argued that there may be an increase in statutorily defined domiciles, or similar concepts, as a result. A most significant event has also taken place on the Scottish Parliament's watch, with Scotland signing up alone to a Hague Convention, and passing the appropriate legislation.⁵³ This is an important precedent. When considering the making of a change to Scottish conflicts rules, it is of course important to bear in mind the practical consequences which would follow in both the intra-UK and the international arena; a different approach to jurisdiction in custody cases in the past produced unfortunate results. However, if the case for reform of a conflicts rule is convincingly made out, the Scottish Parliament should be prepared to act, alone if necessary.

In the course of this thesis, a number of areas have been highlighted where, it is submitted, reform could be beneficial. For example, it has been suggested that the invocation of rules of international private law, and consequently of foreign law, should not be a matter of choice by the litigants. It has also been noted that convincing arguments can be made out for judges to insist that foreign law is introduced into an action in appropriate circumstances and properly proven. This would end any reliance on presumptions that Scots law applies, or that the content of Scots and foreign law are the same, in the absence of argument to the contrary.⁵⁴ In the field of succession law, the basis upon which property falls to the Crown in Scotland should be altered to bring it into alignment with the mainstream continental analysis. In the context of the new constitutional

⁵¹ See Chap. 7.

⁵² See p145 above.

⁵³ See pp151-152 above.

⁵⁴ See pp111-112 above.

settlement now obtaining in the UK after devolution, it is no longer valid to object to a change in the law simply because it would mean that the basis of Crown acquisition differs north and south of the Tweed.⁵⁵ Finally, it has been noted that there are advantages to the treatment of the quantification of damages in certain delictual actions as a matter for the *lex causae*, which in an intra-UK setting at least, may appear to outweigh the disadvantages.⁵⁶ It is submitted that this area in general is therefore one which deserves further study.

One of the benefits of the establishment of a Scottish Parliament has been the speed with which it has been able to react to Scottish problems, and the ability to give Scottish legislation more time and consideration than had been possible in Westminster. Cheshire once famously described the conflict of laws as "only lightly touched by the paralysing hand of the Parliamentary draftsman":⁵⁷ a statement which became less and less accurate as the twentieth century progressed. If the Scottish Parliament is prepared to grasp the nettle (or perhaps more properly the thistle), this may serve to hasten the trend towards a statutory basis for international private law rules.

The effect of the European Communities Act 1972 on intra-UK international private law

A further constitutional change of enormous importance which occurred in the twentieth century has been the UK's entry into what was then the European Economic Community, and is now the EU. Parallels can perhaps be drawn between the UK and the EU, with respect to the importance of economic factors in bringing countries together into a union, and the drive to harmonisation of laws, or the internalisation of conflicts, where this would assist the development of a common market.

The significance of this constitutional event for international private law cannot be underestimated. North has commented: "I believe it fair to say that, for half a century, the agenda for change in this area of the law has been very substantially

⁵⁵ See p130 above.

⁵⁶ See pp137-138 above.

⁵⁷ Quoted in P. North, "Private international law: change or decay?" (2001) 50 *ICLQ* 477 at 477.

set abroad and not in this country".⁵⁸ The EU has overseen the introduction of legal instruments dealing with jurisdiction and recognition, insolvency and choice of law in contract.⁵⁹ Further measures on choice of law on non-contractual obligations, matrimonial property and succession, remain on the agenda. Indeed, concern has been expressed that the EU is now branching out beyond economic matters.⁶⁰ No less significant is the way in which the EU agenda is carried out. Initially the measures took the form of Conventions to which the consent of countries was required, and which in the UK needed parliamentary legislation to be effective. Increasingly now, Regulations are used: this is a form of legal instrument which will affect the laws of all countries which have not been allowed to opt out, and the provisions of which can be relied upon directly without any domestic legislation being required.⁶¹

Whichever form they take, these EU measures raise a stark question in the UK. Should the provisions of the Convention or Regulation be replicated for intra-UK conflicts, or should their effect be confined to questions arising between Scotland (or England) and other EU member states? It is disappointing that there seems to have been no overriding methodology or serious thinking applied to the UK approach. Indeed sometimes, it seems, there has been no clear legal opinion at the outset upon the legal effect of participation in negotiations: 'opting-in' to a conflict measure may be seen as less far-reaching than participation in the drafting of measures to harmonise substance.⁶² With respect to the recognition rules contained in the Brussels Convention, the opportunity was taken to improve upon internalising rules which had previously applied in Britain. Thus Schedules 6 and 7 contain an internalising scheme more far-reaching than the recognition rules applying as between EU member states.⁶³ In general, however, the UK approach so far has been shaped somewhat by tension between the admitted convenience of uniform rules, and a reluctance to adopt EU measures more fully than is required. The Rome Convention, which contained rules not greatly

⁵⁸ North, "Private international law: change or decay?", 505.

⁵⁹ See Chap. 6.

⁶⁰ See Chap. 6.

⁶¹ See Chap. 6.

⁶² See Report of the House of Lords European Union Committee, *The Rome II Regulation*, paras 80-81.

⁶³ See pp94-95 above.

dissimilar to those obtaining in Scotland and England at common law, was adopted on an intra-UK basis, seemingly on the grounds of convenience.⁶⁴ However, some of the differences between the Brussels Convention, and the Modified Convention in Schedule 4 of the Civil Jurisdiction and Judgments Act 1982, arguably serve simply to signal discontent with aspects of the Brussels Convention scheme. It has also been posited that the Brussels II Regulation, which was thought by many commentators in the UK to be unnecessary, does not apply to regulate either jurisdiction or recognition in matrimonial and related custody matters as between Scotland and England.⁶⁵

In the past one might observe ever-decreasing ease of enforcement and ever-increasing availability of forum discretion and objections, as one moved out from the intra-UK, to intra-Empire, to international, arrangements (for example in the recognition of judgments, or in the administration of a succession). Such a clear pattern does not emerge in the UK response to EU instruments. Partially this may be due to a lack of control. As the centre of Empire, the UK took the lead not just in devising intra-UK schemes, but also those which applied in the Empire. Within the EU, the UK is required to submit to closer co-ordination with its attendant advantages and disadvantages. The UK is simply one voice among many (and a voice moreover from beyond the Franco-German power axis) asking for a compromise solution. It has been suggested that Scotland may perhaps be rather less sceptical of the European project than her southern neighbour. In terms of the law, the Scottish mixed legal system may be more amenable to European harmonisation of conflict rules, and of substantive law, than the English Common Law system. However, there is also some common ground in Britain. In truth, the Scottish and English responses to harmonisation of international private law rules by the EU may well fall at slightly different parts of the same spectrum.⁶⁶ Despite the establishment of a devolved legislature, however, negotiations with the EU are a matter for the UK Parliament. Indeed many

⁶⁴ Although as has been seen, there has not been a uniform 'British' interpretation in the courts (see p160 above).

⁶⁵ See pp167-170 above.

⁶⁶ See pp173-179 above.

political commentators are concerned that this will be a future source of friction between the Holyrood and Westminster Parliaments.⁶⁷

It is not being suggested that the UK reaction to EU measures in the field of international private law must always be a full-scale adoption of the rules on an intra-UK basis. Nor is it being argued that it would be unreasonable to have concerns about some aspects of EU legislation in the field of international private law. For example, elsewhere in this thesis it has been argued that *forum non conveniens* is a valuable doctrine which should continue to be utilised on an intra-UK basis, in preference to the *lis alibi pendens* rule currently favoured by the EU.⁶⁸ It is, however, submitted that at present the UK response is typified more by the desire to apply EU measures only insofar as is strictly necessary, rather than by a principled and methodical consideration of whether or not it would be valuable to adopt any of the EU rules on an intra-UK basis, or whether it would be permissible (or desirable) to have separate intra-UK rules operating in parallel with EU measures.⁶⁹

In the long term, the effect on intra-UK conflict rules of becoming a member of the EU could be far-reaching, if not apocalyptic. The scope of EU legislation has moved beyond matters directly concerned with economic union, and a Community public policy has been mooted. The fast-paced harmonisation of conflict rules is seen by many merely as preparatory to the harmonisation of substantive law itself. There are currently groups working on such a project. It has been noted that international private law would survive to regulate the conflicts arising between this new European law, and the law of other nations outwith the EU. However, any replacement of Scots and English law, along with all the other European systems, with a uniform European law would remove the need for conflict rules in the intra-UK context.⁷⁰

⁶⁷ See p149 above.

⁶⁸ See pp155-157 above. It is worthy of note that Article 15 of the Brussels II bis Regulation will, exceptionally, allow a case involving matters of parental responsibility to be transferred to a court in another member state which is "better placed to hear the case", than the court otherwise indicated by the Regulation's jurisdiction provisions.

⁶⁹ See Chap. 6.

⁷⁰ See pp179-181 above.

Conclusion

There is an important interaction between constitutional law and international private law within the UK. The growth of Scottish and English nation states set the scene for the development of conflict rules to regulate questions as to which court should take jurisdiction in a case and which law should be applied, as well as the related issue of what effect a judgment from a court of the neighbouring country should have. Crucially, the constitutional settlement reached in the early eighteenth century embraced legislative unity, but eschewed legal integration. This quite novel system had the effect, over time, of leading to the internalising of certain conflicts, and their removal from the scope of traditional international private law. Such internalisation has, however, been dictated, to a large extent, by economic imperatives, although it is also clear that the Westminster Parliament has sought to achieve near-automatic recognition of judgments and court orders throughout the UK. Furthermore, certain conflicts concepts (such as extra-territoriality) were rendered irrelevant on an intra-UK basis by constitutional rules, although there was no widespread constitutionalising of conflicts within the UK. However, in many other areas, such as property law, delict and substantive succession law, the questions of choice of law, and sometimes jurisdiction, arising between the Scots and English legal systems have been settled by the use of international private law rules with no discrimination between intra-UK, and truly international, conflicts. The concept of domicile has also been of service in providing a connecting factor to the Scots or English legal system in matters of status. External public policy has provided the comfort of a safety valve in the relationship between the two legal systems bound together in a political whole. But fortunately, not unlike the threat of relying on the Acts of Union themselves as a fundamental law, it is a power which has very rarely required to be drawn upon.

The devolution settlement of the late twentieth century is another key constitutional event for Scotland. Given the interplay between constitutional law and international private law, it is necessary to re-assess the rôle of conflicts law in this new Scottish constitutional landscape. It has been submitted that the constitutionalising of conflicts, which has been thought appropriate in some other countries, is of no value in the context of a devolved Scotland within a UK state.

The nature of the constitutional settlement will, however, as has been seen, result in a continued potential for the internalisation of conflicts within the UK. However, the significance of Scottish international private law rules in a UK setting is heightened by devolution, as such rules may increasingly require to be called upon to deal with difficult cross-border issues. They are ideally suited for this task, their very purpose being the provision of a mechanism for resolving conflicts of jurisdiction, laws or judgments, arising between different legal systems. Devolution also brings with it the real potential to alter the content of Scots conflict rules, and the opportunity should be taken to hone the tools available to us for the task in hand.

It is perhaps ironic, however, that quite the most crucial constitutional change for the use of international private law rules within the UK, may be one which goes much further than simply a regulation of the relationship between Scotland and England. As we have seen, entry into the European Economic Community may have been the first step to a uniform European substantive law. Just as supra-national bodies of law slowed the development of international private law in Scotland in earlier centuries, the return to supra-national rules in the future may remove the need for any conflicts mechanism within the UK. But that is a long journey, whose end is not yet in sight. In the meantime, international private lawyers must be alert to recognise, and skilful in treating, the conflict issues to which in the twenty-first century, the constitutional system within the UK may give rise.

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