EQUITABLE OBLIGATIONS IN PRIVATE INTERNATIONAL LAW: THE CHOICE OF LAW

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As is now well known in 1978 Mr. Blackman owned and controlled a company which was the New York distributor for United States Surgical Supply Corporation ("USSC").[1] In November of that year, at a restaurant in Connecticut, he told the principals of USSC that he wished to emigrate to Australia and proposed that he be appointed as the exclusive Australian distributor for USSC. Discussions on the proposed distributorship then took place in Connecticut and New York. The agreement was entered into in one or other of those States and was governed either by the law of New York or of Connecticut.

Mr. Blackman came to Australia. A company owned by him was substituted as distributor and it breached the distributorship agreement and, so it was alleged, acted in breach of fiduciary obligations owed to USSC.

At first instance McLelland, J. found that the law of New York and Connecticut so far as it related to the existence of fiduciary relationships and duties and the consequence of breaching such duties was the same as the law of New South Wales. Accordingly, it did not fall to be decided whether New York or Connecticut law rather than the law of New South Wales should determine the existence of fiduciary obligations and the consequences of their being breached. However the matter was discussed by Mr. Justice McLelland although not in the subsequent judgments on appeal. His Honour cited a number of cases in which courts of equity enforced equitable obligations by acting in personam on the conscience of the defendant resident within the jurisdiction and in doing so administered the principles of equity according to law of the forum. His Honour said:

> In some circumstances a court of equity will apply equitable principles as administered by itself to found relief against a defendant subject to its jurisdiction in relation to a transaction governed by a foreign law, even if similar principles form no part of that foreign law . . . .

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[1] *United States Surgical Corporation* v. *Hospital Products International Pty. Limited & Ors.* [1982] 2 N.S.W.L.R. 766; [1983] 2 N.S.W.L.R. 157; *Hospital Products Limited* v. *U.S. Surgical Corp.* (1984) 58 A.L.J.R. 587.

> An examination of the instances among these cases of the enforcement of equities other than in respect of the performance of contracts, reveals no precise statement or extended discussion of the conditions (apart from the amenability of the defendant to the process of the court) which attracts the principle that the court will grant relief in accordance with the equitable principles as administered in the forum.
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> However, since the rationale of the availability of relief in such cases is that the court acts in personam to regulate the defendant's conscience, it would seem sufficient that the defendant while resident within the forum was guilty of conduct which, by offending against those principles, gave rise to the occasion for such regulation.[2]

Because of his Honour's finding that there was no material difference between the laws of the various interested jurisdictions the discussion of the principles involved although useful was inconclusive. His Honour recognised various possibilities: that the existence of a fiduciary obligation depended upon New South Wales law as the conduct which was fraudulent or otherwise unconscionable under the law of the forum took place in New South Wales; that the existence and scope of a fiduciary duty should be determined by the law of New York or Connecticut but that the question of the appropriate remedy for a breach of the fiduciary obligation should depend on New South Wales law; or, that it would be sufficient to establish a breach of a fiduciary obligation by either system of law. His Honour took the view that only New South Wales law could apply to determine the question of the existence of constructive trusts affecting property in New South Wales if there had been a breach of fiduciary obligations.

His Honour cited the judgment of Holland, J. in an unreported case of *National Commercial Bank* v. *Wimborne.*[3] In that case a Saudi-Arabian bank gave a guarantee to a Swiss bank of the obligations of a New South Wales debtor. The guarantee and the contract giving rise to the principal debt were governed by Swiss law. The plaintiffs (the Saudi bank and a Saudi prince) alleged, and *prima facie* proved, that the monies were borrowed to be used in constructing a building in Jeddah and were misapplied by the defendant by being used for its own purposes. Part of the money was lent or otherwise made available to other defendants and applied in the purchase of land in New South Wales. The plaintiffs sought interlocutory orders to require the defendant to provide security for the payment of the debt to the Swiss bank to ensure that the Saudi bank was not called on to pay under its guarantee. The plaintiffs also claimed that the loan funds were held on a trust that the monies be returned to the provider, and claimed that being trust monies they could be traced into assets held by the various defendants.

Holland, J. held that it was, *prima facie*, a complete answer to the defendants' argument that the parties had adopted or submitted themselves to Swiss law that the plaintiffs were claiming equitable rights and equitable remedies. His Honour said:

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[2] [1982] 2 N.S.W.L.R. 797, 798.
[3] Unreported, 28/4/1978.

> The Equity Court has long taken the view that because it is a court of conscience and acts in personam, it has jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court wherever the subject matter and whether or not it is possible for the court to make orders in rem in the particular matter. In short, if the defendant is here, the equities arising from a transaction to which he is a party as ascertained by New South Wales law and the equitable remedies provided by that law will be applied to him.[4]

There is ample authority in the cases for these propositions at least where the defendant is resident in the jurisdiction. In *Angus* v. *Angus*[5] Lord Hardwicke, L.C. said that the Court of Chancery had jurisdiction to order the defendant who was resident in England to convey lands in Scotland obtained through fraud. There was no question of the application of any but English law. His Lordship said that if the defendant had been resident in Scotland he could have objected to the jurisdiction. In *Lord Cranstown* v. *Johnston*[6] and in *Re Courtney ex parte Pollard*[7] it was held that in the exercise of the Court of Chancery's jurisdiction over persons resident in England and in respect of contracts made in England the Court applied equitable principles according to English law.

The application of these rules today has some curious consequences. It is curious enough that the existence of fiduciary obligations between a manufacturer and distributor whose agreement is governed by New York or Connecticut law might fall to be decided by New South Wales law. There can be no logic in saying that New South Wales law determines whether a fiduciary relationship exists if a defendant while resident in New South Wales is guilty of conduct which would be a breach of fiduciary duty. And what of a case where money is advanced under, say, German law and it is provided that the interest rate shall be 12% but if there is default, 14%? Does the court say that this is a penalty which it is unconscionable to enforce? Are the equitable rules for relief against penalties to be applied by the *lex fori* irrespective of the proper law of the contract? Does it matter whether the lender is resident within the jurisdiction or whether the agreement is made in New South Wales? If so, why? Take another case. It is no defence to an action on a guarantee governed by German law that the creditor has extended the time for the principal debtor to pay the guaranteed debt. If the guarantor is sued in New South Wales can he say that it is unconscionable in equity for the creditor to seek to enforce the guarantee? If there has been an express choice of German law in the guarantee does that amount to an agreement to exclude the equitable rule? If so is the position different if there is no choice of law but the court determines objectively that German law is the proper law of the contract? What of the assignment of part of a debt? Does its validity depend on its proper law, or do we say that the assignment is necessarily equitable and therefore governed by the *lex fori*? Or again: if money is paid under a mistake of fact the obligation to repay may depend on the

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[4] At p. 41 of judgment.
[5] (1737) West temp. Hardwicke 23.
[6] (1796) 3 Ves. 170.
[7] (1840) Mont & Ch. 239.

law of the country in which the enrichment occurs.[8] Is the existence of an equitable right to trace that money dependent on the same law or is the equitable right to depend on the *lex fori*?[9]

When reading cases such as *Lord Cranstown* v. *Johnston* and *Re Courtney ex parte Pollard* the modern reader is faced with an immediate problem. These cases speak of the Court of Chancery's jurisdiction over persons resident in England and in respect of contracts made in England. We all know that except in so far as their jurisdiction is extended by statute or by Rules of Court authorized by statute the jurisdiction of the Superior Courts depends upon the presence of the defendant within the jurisdiction or upon his submission. His presence may be fleeting. The fact that the defendant is ordinarily resident in the jurisdiction or that a contract is made within the jurisdiction or that the cause of action arises there is nothing to the point to establish jurisdiction at common law. Why then does the Court of Chancery talk of exercising jurisdiction over residents and over contracts made in England? What is the position of a defendant who is not a resident but is served, say, under the provisions of Part 10 of the New South Wales Supreme Court Rules?[10] Above all what was the reason for the Court of Chancery's insistence on applying English Law and its refusal to apply choice of law rules?

The answer to these questions it is suggested is that the Court of Chancery insisted that there be sufficient connection between the parties or the cause of action and England before it would exercise jurisdiction. In other words it applied jurisdiction selecting rules rather than choice of law rules. If this suggestion is right it might account for the marked absence of equity cases in the conflict of laws outside of the areas of the enforcement of personal equities over foreign land, the administration of deceased estates and the validity and administration of express trusts.

We are accustomed to regard jurisdiction over the defendant as a sufficient basis for the court exercising jurisdiction. In a limited class of matters it is recognised that as well as having jurisdiction over the defendant it is necessary to have jurisdiction over the subject matter of the suit. Cases involving the custody of a ward of the court form one such class.[11] In the Court of Chancery this distinction was more generally drawn and at least at the time the principle was established that equitable rights are determined by the *lex fori*, it was jurisdiction over the subject matter of the suit or over English residents which went to the foundation of the Court of Chancery's right to dispose of a matter. The defendant's presence in England was simply material to enable the court to serve him with the court process and thereby give him notice of the suit.

Principles of Jurisdiction

The theory of jurisdiction which regulates the New South Wales Supreme Court is that at common law the foundation of jurisdiction in actions *in personam* is that the defendant be served while present in the State. This principle is said to be an inheritance from the principles of

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[8] Dicey and Morris, *The Conflict of Laws*, 10th ed. Chapter 30.

[9] *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Limited* [1981] Ch. 105.

[10] See *Duder* v. *Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132.

[11] See *McManas* v. *Clouter* (1980) 29 A.L.R. 101.

jurisdiction applicable to the Superior Courts before the Judicature Act 1873, and it is almost always assumed that all of the Superior Courts at Westminster acted on the same principle of jurisdiction. In fact this principle applied only to the Courts of Common Pleas, King's Bench, and (on its common law side) Exchequer. The Court of Chancery exercised jurisdiction on different principles.

The principle derived from the practice of the Courts of Law is that the foundation of jurisdiction was the amenability of the defendant to the command of the summons in the originating writ, which depended primarily on his presence in England.[12] That principle applies to the New South Wales Supreme Court and if a defendant is properly served within the State it is of no consequence to the existence of jurisdiction that he is present on a mere fleeting visit, nor that the plaintiff has no particular connection with the State, nor that the cause of action arose outside the State.[13] These matters will be relevant to the exercise of the Court's discretion to stay proceedings but will not affect its competence over them. Conversely if the defendant cannot be served within the State and does not submit to the jurisdiction of the Court, at common law the Court has no jurisdiction over him. In such a case the plaintiff must obtain leave to serve the defendant outside the State under Part 10 of the Supreme Court Rules or must serve him under Part II of the Service and Execution of Process Act 1901 (C'wealth), if the case falls within the terms of those Parts.

These principles of jurisdiction are so well established that it is scarcely realised that different principles prevailed in the Court of Chancery. In the Court of Chancery the mere presence of the defendant in England was neither a necessary nor a sufficient criterion for the assumption of jurisdiction over him. Jurisdiction depended upon the residence or domicile of the defendant within England, or on the cause of action arising, or the subject matter of the suit being situated, in England.

The usual process that was issued out of the Court of Chancery and served on the defendant was a copy of the plaintiff's bill and a subpoena requiring attendance.[14] The subpoena could only operate within the territorial jurisdiction over which the Sovereign held command. Before service out of the jurisdiction was authorized by statute or rules of court a subpoena could be and was served out of the jurisdiction, but if the defendant ignored it and failed to enter an appearance, service was rendered nugatory. The plaintiff could not compel his appearance, by, for example, attaching him if ever he came within the jurisdiction; nor could the plaintiff proceed in the cause against the absent defendant.[15]

Thus far the practice of the Court of Chancery was consistent with the established view of jurisdiction. However, there were exceptions to

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[12] *Mayor of London* v. *Cox* (1867) 2 H.L. 239 *per* Willes J. at 270; *John Russell & Co. Limited* v. *Cayzer Irvine & Co. Limited* [1916] 2 A.C. 298 at 302; *Laurie* v. *Carroll* (1958) 98 C.L.R. 310 at 327-8.

[13] *Colt Industries Inc.* v. *Sarlie* [1966] 1 W.L.R. 550; *Maharanee of Baroda* v. *Wildenstein* [1972] 2 Q.B. 283.

[14] The procedure was streamlined in 1852 when instead of taking out a writ of subpoena the plaintiff endorsed the copy of the bill with a note directing the defendant to enter an appearance. This did not alter the principles under discussion. Improvement of Jurisdiction of Chancery Act 1852, 15 and 16 Vic. c.86, ss. 2-5.

[15] *Drummond* v. *Drummond* (1866) L.R. 2 Ch. App. 32 at 38-9.

the general rule that if the defendant were outside the jurisdiction and did not enter an appearance, the Court could not proceed against him. The strict rule in Chancery was that all persons interested in the suit had to be joined as parties. The rule was relaxed where persons who would otherwise have been necessary parties were outside the Court's territorial jurisdiction.[16] Usually this was so only where the absent person's interest was only incidentally affected by the decree sought, and if he were principally and adversely affected the Court would not proceed in his absence.[17] But that was not always the case.

> The question is simply this: where there is a first mortgagee and a second mortgagee, and the first mortgagee will not take possession, but leaves the mortgagor in the receipt of the rents and profits, has this Court the means of giving the possession to the second mortgagee, notwithstanding that the mortgagor has not appeared to the suit, and is out of the jurisdiction?[18]

Lord Eldon appointed a receiver, lest the second mortgagee "be delayed to all enternity" by the residence of the mortgagor out of the jurisdiction and consequent freedom from compulsion to enter an appearance.

This case illustrates that for the Court of Chancery jurisdiction was not defined by the amenability of the defendant to service. As a general rule the Court would not entertain the proceedings if the defendant did not have adequate notice of them, and the adequacy of notice was secured by the defendant being properly served. The subpoena could not be served effectually outside the territorial jurisdiction, and therefore the Court generally could not entertain proceedings over a defendant abroad. But this was so for reasons of natural justice, not jurisdiction. Although service was subject to territorial limits, jurisdiction was not founded on amenability to service.

> The Master of the Rolls, in the case of *Cookney* v. *Anderson*, seems to give an accurate description of the earlier practice. He says: "Before the Acts, the power of serving a subpoena on a dependent abroad existed, but it was simply useless, because, unless the defendant voluntarily appeared, no further steps would be taken against him." It was, as Lord Cranworth said in *Hope* v. *Hope*, "not that there was a want of jurisdiction, but a want of the power of enforcing it" per Lord Chelmsford L.C. in *Drummond* v. *Drummond*.[19]

So as Lord Eldon considered that the greater injustice would be for the second mortgagee to be defeated of his rights by the absence of the mortgagor abroad, his Lordship exercised the Court's jurisdiction. For the same reason, the Court of Chancery exercised jurisdiction if the defendant had gone abroad to avoid the proceedings.[20]

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[16] *Cockburn* v. *Thompson* (1809) 16 Ves. 321.

[17] *Browne* v. *Blount* (1830) 2 R. & M. 83; *Stratton* v. *Davidson* (1830) 1 R. & M. 484.

[18] *Tanfield* v. *Irvine* (1826) 2 Russ. 149 at 151.

[19] (1866) L.R. 2 Ch. App. 32 at 38-9. For citations to *Cookney* v. *Anderson* and *Hope* v. *Hope* see nn. 36 and 28.

[20] *Dowling* v. *Hudson* (1851) 14 Beav. 423; *Cookney* v. *Anderson* (1863) 1 De G.J. & S. 365, *per* Lord Westbury, L.C. at 382.

The point becomes clearer when the rules regarding service and substituted service are considered: rules made pursuant to the inherent jurisdiction of the Court to regulate its own procedure, and not carrying statutory authority. If the established theory of jurisdiction were applicable to the Court of Chancery, service could only be made against a defendant who was present in England, and substituted service could only be ordered if the defendant were present in England at least at the time of the issue of the writ of subpoena.

The practice in Chancery was that ordinary service of the bill and writ of subpoena could be effected by serving the defendant personally, or by leaving the process at his present or (if that were not known) his last place of abode at which he resided in the preceding year.[21] The same practice applied in the equity side of the Court of Exchequer.[22] Service could be effected at the defendant's place of abode notwithstanding that he was not at that time present in England.[23] In *Birdwood* v. *Hart*[24] the Court of Exchequer held:

> This is the case of service of process, by leaving it with a servant, at the house which is the general abode of the party when in England, who occasionally goes abroad on business, and was out of the kingdom at that time. Such a service of subpoena is good, and attachment may be well founded upon it.

Substituted service was available when the defendant had no usual place of residence within England and could not be served personally. The Court of Chancery could order substituted service in such cases and in such manner as it thought fit.[25] Thus the Court could order substituted service on the defendant's agent in the jurisdiction who, though he might have no authority in the litigation, could be expected to inform the defendant of the pending proceedings.[26] Again, the validity of substituted service did not depend on the defendant being within the jurisdiction.[27] In *Hope* v. *Hope*[28] Lord Cranworth, L.C. upheld the validity of an order for substituted service on the defendant's agent in England, not because he was authorized to accept service, but because he could be expected to inform the defendant of the proceedings. His Lordship noted that the principles on which the Court of Chancery acted differed from those of a Court of Law, and held:

> The object of service is of course only to give notice to the party on which it is made, so that he may be made aware of and may be able to resist that which is sought against him . . . .

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[21] *Grant's Chancery Practice*, 1829, Vol. 1, pp. 78 *et seq.*

[22] *Tidd's Practice*, 9th ed., p. 156; *Tidd's King's Bench, Common Pleas and Exchequer of Pleas* (1837) p. 58.

[23] *Birdwood* v. *Hart* (1816) 3 Price 176; *Thomas* v. *Earl of Jersey* (1834) 2 My & K 398; *Davidson* v. *Marchioness of Hastings* (1838) 2 Keen 509.

[24] *Supra* n. 23.

[25] Improvement of Jurisdiction of Equity Act 1852, 15 & 16 Vic. C.86 s. 5, which did not alter the prevailing practice under the Court's inherent jurisdiction. *Hope* v. *Hope* (1854) 4 De G.M. & G. 328 at 341.

[26] See *Daniell's Chancery Practice*, 4th ed., Vol. 1, pp. 404 *et seq.* and cases there cited.

[27] *Davidson* v. *Marchioness of Hastings* (1838) 2 Keen 509.

[28] (1854) 4 De G.M. & G. 328.

> If, for instance, where an adult Englishman contracts for the purchase of an estate and goes out of the jurisdiction, nobody can doubt that I may decree specific performance, but of course the Court can have no control over the purchaser, if it has no means of reaching him.[29]

Thus it was not necessary in order for the Court of Chancery to have jurisdiction in the suit that the defendant be within the territorial jurisdiction of the Court. Jurisdiction was not dependent upon personal service of the subpoena embodying the Sovereign's command to appear, but on other criteria. Before discussing those criteria, it is necessary to mention the developments in connection with the service of the originating process abroad.

So far we have considered the inherent jurisdiction of the Court of Chancery, and seen that although service could only be made effectually within the territorial jurisdiction of the Court, the Court could nevertheless exercise jurisdiction over an absent defendant if he had adequate notice of the proceedings, or in exceptional cases, without such notice. But the rules governing adequacy of notice were strict and depended on service being effected within the jurisdiction, either on the defendant personally, or at his place of residence (if he had one), or pursuant to an order for substituted service. If the plaintiff could not effect service in this way, generally he could not enforce his claim against the defendant.

The Court of Chancery was given power to authorize service of the originating process outside the territorial jurisdiction earlier than were the Superior Courts of Law. By the statutes of 2 & 3 Will IV C. 33 and 4 & 5 Will IV C. 82 the Court was given jurisdiction to authorize service or substituted service throughout Great Britain (including Scotland), Ireland and the Isle of Man, in a limited class of case relating to land situate in England or Wales, or relating to money invested in Government or public stock, or shares in public companies. More importantly, by General Orders of May 1845,[30] substantially reproduced in the Consolidated Orders of 1860,[31] it was provided that where a defendant in any suit was out of the jurisdiction of the Court, the Court, on being satisfied in what place or country the defendant was or might probably be found, could order service on the defendant in such place or country, or within such limits as the Court should think fit to direct. If the defendant was duly served the Court could order that an appearance be entered for him. Both at the time the *ex parte* application for service abroad was made, and on a motion by the defendant to discharge the order for service, the Court had a discretion not to permit service to be made, or to stand, as the case might be.[32] The Court held that the Orders applied to all classes of suits.[33] Unlike the position under the *Common Law Procedure Act* 1852, the plaintiff did not have to bring his case into a particular category.

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[29] *Id.* at 342, 345-6.

[30] 33rd Order.

[31] Order X r. 7.

[32] *Maclean* v. *Dawson* (1859) 4 De G. & J. 150; *Meiklan* v. *Campbell* (1857) 24 Beav. 100.

[33] *Steele* v. *Stuart* (1863) 1 H. & M. 793; *Curtiss* v. *Grant* (1863) 9 Jur. N.S. 766; *Drummond* v. *Drummond* (1866) L.R. 2 Ch. 32; *cf. Infra* n. 40.

Probably it was because the Court of Chancery regarded service on the defendant as a matter of affording natural justice and independent of jurisdiction, that it treated the Orders as conferring such a wide power of authorizing service outside the territorial jurisdiction, and did not confine that power to specific classes of suits. In *Whitmore* v. *Ryan*[34] Sir James Wigram, V.C. said:

> The order does not give the plaintiff a right to call upon the Court in all cases to order service of the subpoena abroad, but it gives the Court power to do so in exercise of a sound discretion, according to the circumstances of the case. The material question in judicial proceedings is whether the Defendant has due notice of the proceedings, so that he may be enabled to come in and make his defence, and not whether he receives that notice at Boulogne or Dover.

The Court of Chancery distinguished between jurisdiction over the subject matter of the suit and jurisdiction over the person of the defendant. If it had jurisdiction over the subject matter of the suit it would entertain the proceedings if service were effected within the territorial jurisdiction of the Court (in one of the ways earlier described), or outside the jurisdiction if the Court in its discretion authorized such service. Thus in *Innes* v. *Mitchell*[35] Turner, L.J. said:

> That there is jurisdiction in this Court over the subject matter of the suit I have no doubt, but before the Act of Parliament in question had passed, and the Orders of 1845 were made, this Court had no jurisdiction over the persons of the Defendants, and the jurisdiction over the persons is only . . . (now) . . . to be exercised by the Court, if the Court thinks fit to exercise it.

The question of what criteria sufficed to found jurisdiction in the Court of Chancery, arose in *Cookney* v. *Anderson*.[36] There a bill was filed to compel the administration of certain trusts of a creditors' deed made in Scotland, which related to the working of a mine in Scotland. The defendant trustees were all domiciled and resident in Scotland. The plaintiff had obtained leave to serve the defendants in Scotland. The defendants did not move to discharge the order authorizing service (which would have raised the issue of the proper exercise of the discretion), nor did they apply for a stay of the proceedings. Instead they demurred to the bill for a want of jurisdiction, and their demurrer was upheld. Sir John Romilly, M.R. held:

> I think the principles which govern the jurisdiction of the Court over parties to contracts is analogous to that of the Civil Law, and which, as far as I am aware, has been adopted by all modern nations. They are described by all writers to consist of three circumstances, any one of which will give jurisdiction to the tribunals of the country to take cognizance of the matter. The first is, where the domicile of the Defendant is within the jurisdiction of the Court. The second is, where the subject matter of the dispute is situated within the juris-

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[34] (1846) 4 Hare 612 at 617.

[35] (1857) 1 De G. & J. 423 at 433.

[36] (1862) 31 Beav. 452.

diction of the Court. And the third is, where the contract in question was entered into within the jurisdiction of the Court. By the word "jurisdiction", I mean territorial jurisdiction, the topographical limits within which the compulsory process of the Court operates to compel obedience to its orders and decrees.[37]

The demurrer was upheld because none of these requisites for jurisdiction existed. His Lordship pointed to the inconvenience that would be entailed in exercising jurisdiction in that case. The contract for the administration of the trust would be governed by foreign law. As the defendants were not domiciled in England a decree could not be enforced against them by attachment, sequestration or like process, but only by proceeding on the decree as a foreign judgment in the Scottish Courts. The Courts of Scotland would provide the more convenient tribunal. His Lordship held that the Court would not entertain a dispute between foreigners on a foreign contract, to be performed in their own country.[38]

It was argued that the Consolidated Orders of 1860 which provided for the service of process on the defendants residing in Scotland conferred power on the Court to determine the dispute. That of course would be so if amenability to service was determinative of jurisdiction, the exercise of the discretion authorizing such service not being in question. However, his Lordship held that the provisions authorizing service abroad did not extend the jurisdiction of the Court, and the case would not have been different even if the defendants had been served in England.[39] Service on a defendant present in England would not be a sufficient ground of jurisdiction if the proper requisites for jurisdiction were wanting. It is true that the Court would have power over a defendant so circumstanced, but the exercise of that power, i.e. an assumption of jurisdiction over him, would be improper.[40]

An appeal was taken from this judgment to Lord Westbury, L.C.[41] who, in an elaborate judgment, held that the Consolidated Orders regulating procedure could not authorize the making of an order for service on the defendants in Scotland. Lord Westbury, L.C. stated general principles of jurisdiction which governed all countries as a matter of public international law. The jurisdiction of all civil courts was territorial and their function was to administer municipal law. By the comity of nations it was lawful for jurisdiction to be extended in two instances. First the courts could be given jurisdiction over natural born subjects who were abroad. Secondly, the courts could be given jurisdiction over absent defendants (whatever their nationality) where it was well settled by the comity of nations that the cause of action was governed by the municipal law of the forum. Examples given were questions as to the ownership of land situate in the forum; succession to or administration of property of a deceased person domiciled in the forum; and contracts made and

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[37] *Id.* at 462. Although Romilly, M.R. regarded the defendant's domicile as the relevant connection between the parties and the forum which gave the Court jurisdiction, the burden of authority in Chancery shows that the defendant's residence could also afford the relevant connection. *Matthaei* v. *Galitzin* (1874) L.R. 18 Eq. 340; *Bushby* v. *Munday* (1821) 5 Madd. 297; *Angus* v. *Angus* (1737) West 23; *cf. Carron Iron Co.* v. *MacLaren* (1855) 5 H.L. Cas. 416 *per* Lord St. Leonards at 450.

[38] (1862) 31 Beav. 452 at 466.

[39] *Id.* at 468.

[40] *Id.* at 467.

[41] (1862) 1 De G.J. & S. 365.

intended to be performed in the forum which, as the law then stood, were governed by the law of the forum as the *lex loci contractus*. The jurisdiction given to the Courts of Law by the Common Law Procedure Act 1852 and to the Court of Chancery by the statutes of 2 & 3 Will. 4 C.33 and 4 & 5 Will. 4 C.82 conformed to these principles. However, on their face the General Orders of 1845 and 1860 purported to enlarge the jurisdiction of the Court, whereas the statutes pursuant to which they were made[42] ought to be construed as merely authorizing changes in the Court's procedure in cases within its jurisdiction. The Orders should therefore be read down so as to permit service abroad only in those classes of suits which fell within the statutes of 2 & 3 Will. 4 C.33 and 4 & 5 Will. 4 C.82.

However the defendants had appeared and had not sought to set aside service, but had demurred to the jurisdiction. Lord Westbury, L.C. held that where the defendants were resident abroad at the time the proceedings were instituted and the suit did not fall into the class of case where the Court was warranted in exercising jurisdiction against foreign residents, the objections to the order for service abroad could be taken on the demurrer.[43] One might assume that when speaking of cases in which the Court was not warranted in exercising jurisdiction over defendants resident abroad, his Lordship intended to speak of cases outside the statutes of 2 and 3 Will. 4 C.33 and 4 and 5 Will. 4 C.82. However, in the same breath his Lordship spoke of the grounds for discharging an order for service or upholding a demurrer to the jurisdiction as being the residence of the defendants in Scotland, the contract and trust being made in Scotland and being governed by Scots law, and the situation of the property in Scotland.[44] These were the same grounds as those relied on by Romilly, M.R. in the Court below.

It is difficult to know what to make of this judgment. The construction of the statutes of 3 and 4 Vic. C.94 and 4 and 5 Vic. C.52 was rejected by the Court of Appeal in Chancery in *Drummond* v. *Drummond*[45] which re-affirmed that the Consolidated Orders applied to all suits and not merely to those coming within the statutes of 2 and 3 Will. 4 C.33 and 4 and 5 Will. 4 C.82. However, the actual decision in *Cookney* v. *Anderson* was not over-ruled,[46] no doubt because it is based on a wider ground than the construction of the Consolidated Orders.[47]

Lord Westbury, L.C. stated that the jurisdiction of courts is territorial. The principles of jurisdiction of the Courts of Law embody this theory in its strictest form. However Lord Westbury, L.C. was referring only to the power of a court to authorize service within its territorial jurisdiction. His Lordship did not disapprove of the Court of Chancery's practice of exercising jurisdiction against absent defendants where service could be made within the jurisdiction, for example at their place of residence. Further, he appeared to hold that the defendants, although they had not applied to set aside the order authorizing service,

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42 3 & 4 Vic. C.94; 4 & 5 Vic. C.52.

43 1 De G.J. & S. 365 at 386.

44 *Id.* at 387.

45 (1866) L.R. 2 Ch. App. 32; *cf. Supra* n. 33.

46 The headnote to *Drummond* v. *Drummond* is wrong on this point.

47 *Steele* v. *Stuart* (1863) 1 H. & M. 793.

were entitled to object to the jurisdiction because there was no connection with the forum of the parties, the cause of action, or the subject matter of the dispute.

His Lordship's statement that the legislature could authorize service abroad in cases which by the consent of nations would be governed by the municipal law of the forum is an expression of the view that cases involving foreign elements could be dealt with by rules which select the appropriate forum for their trial. This is the basis of the principles of jurisdiction in the Court of Chancery. It applied forum-selecting rules, rather than choice of law rules, to cases involving foreign elements.

There are three decisions of Malins, V.C.[48] where his Lordship rests the foundation of the Court's jurisdiction on a connection with the forum of the parties, the cause of action, or the subject matter of the suit. In *Blake* v. *Blake* Malins, V.C. upheld a plea to the jurisdiction in an action based on a contract made in France relating to land in Ireland, and made between residents of France. Service was effected outside England, but as in *Cookney* v. *Anderson*, the defendants did not move to discharge the order authorizing service, but pleaded to the jurisdiction. The question was not raised whether the Court lacked jurisdiction because the suit related to the title or right to possession of a foreign immovable. The plea to the jurisdiction was upheld:

> . . . it appeared to him that when neither party had anything to do with this country, and the subject matter was not situated here, as in the present instance, if he over-ruled this plea the Court might as well be able to interfere in the affairs of all countries.[49]

In *Matthaei* v. *Galitzin* his Lordship upheld a plea to the jurisdiction where the plaintiff sued a defendant resident abroad on a foreign contract relating to the working of lands in Russia.

> . . . it is no part of the business of this Court to settle disputes between foreigners. There must be some cause for giving jurisdiction to the tribunals of this country; either the property or the parties must be here, or there must be something to bring the subject matter within the cognizance of this Court . . . .
>
> All the cases . . . show that you cannot sue a foreigner in this country unless the parties are resident here or the property is situate in this country.[50]

In *Doss* v. *Secretary of State for India* the concept of referring a case to its natural forum emerges clearly as a factor going to the jurisdiction of the Court to entertain the suit. Earlier in *Cookney* v. *Anderson*, Romilly, M.R. and Lord Westbury, L.C. in holding that the necessary requisites for jurisdiction were lacking, stressed the inconvenience of the Court deciding that case. In *Doss* v. *Secretary of State for India* the plaintiffs sued the Secretary of State for India in respect of a debt and claimed to be entitled to a charge on the revenues of the territory of Oudh. The defendant demurred and Malins, V.C. allowed the demurrer on three

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[48] *Blake* v. *Blake* (1870) 18 W.R. 944; *Matthaei* v. *Galitzin* (1874) L.R. 18 Eq. 340; *Doss* v. *Secretary of State for India* (1875) L.R. 19 Eq. 509.

[49] *Supra* n. 48.

[50] (1874) L.R. 18 Eq. 340 at 347-8.

grounds, two of which went to the merits of the case. The third ground however was that the English Court was not the proper tribunal to hear the case. The plaintiffs were normally resident in India; the defendant, the Secretary of State for India was undoubtedly resident in England, but was also resident in India; the cause of action arose in India; and the property over which the charge was claimed was situate in India. The defendant was served in England, and it is important to note that the Court was dealing with the demurrer claiming a lack of jurisdiction, not an application for a stay. Malins, V.C. nevertheless held:

> . . . where there is a complete tribunal capable of deciding the question where the property is and where the parties are, that is the tribunal to be resorted to . . . if this is a case to be sustained at all it is in the Indian courts, and not in the courts of this country, that the suit should be brought.[51]

One might say that the decision anticipates those of the House of Lords in *Rockware Glass Limited* v. *MacShannon*[52] and *Castanho* v. *Brown and Root (UK) Limited*[53] by more than a century. That however is apt to be misleading. Those cases have liberalized the rules relating to the staying of an action where the plaintiff has invoked the Court's jurisdiction as of right. The concept of jurisdiction to which those rules are linked is based on the mere presence of the defendant in England. The concept of jurisdiction applicable in the Court of Chancery was not based on mere presence and service, but upon a sufficient connection being shown between the dispute and the forum. That connection existed if the defendant were resident or domiciled in England, the cause of action arose there, or the subject matter of the dispute was situated there.

The Court would not adjudicate upon foreign disputes not so connected with England. It was a natural refinement of this concept of jurisdiction that if it were inappropriate to decide the case in England and there was a competent tribunal to decide it in the natural foreign forum, the requisites of jurisdiction would be held to be lacking even though there was a connection with England (for example defendant's residence in England) which in other cases would suffice to found jurisdiction in the Court of Chancery. The reluctance to deal with foreign disputes produced in *Doss* v. *Secretary of State for India* a liberal doctrine of *forum conveniens* which was part of the concept of jurisdiction and which did not depend on a distinction between the existence of jurisdiction and the discretion to exercise it. On the passing of the Judicature Act 1873 the principles on which the Court of Chancery and the Courts of Law exercised jurisdiction were different. The Judicature Act 1873 did not itself resolve this difference, but it would have been manifestly inconvenient if the English Court had exercised jurisdiction on principles which varied according to whether the cause of action was legal or equitable. The problem was resolved in favour of the common law principles without discussion.

The differing principles at law and in equity raised two matters which had to be resolved in the practice of the English High Court under the

[51] (1875) L.R. 19 Eq. 509 at 535-6.

[52] [1978] A.C. 795.

[53] [1981] A.C. 557.

Judicature Act 1873. First, if a defendant was served with an originating summons while temporarily within England the Courts of Law would have jurisdiction in the suit even though there was no other connection between the parties or the cause of action and England; the Court of Chancery would not. Secondly, if the practice at common law were to apply, the High Court could only order substituted service against a defendant who was present in England at least at the date the originating writ was issued. Under the equity practice the Court, if it had jurisdiction over the cause, could order substituted service on a person within England who could be expected to notify the defendant of the proceedings, even though the defendant was abroad. Both matters were resolved in favour of the common law practice.

Since the Judicature Act 1873 it has been uniformly held that mere presence suffices to found jurisdiction.[54] None of the English cases has concerned an equitable cause of action. Nonetheless they have been decided in the belief that the principle of jurisdiction based on mere presence is a fundamental rule that applies to the entire jurisdiction of the English High Court. The same is true of other general statements of principle basing jurisdiction on the defendant's presence, such as that of the High Court of Australia in *Laurie* v. *Carroll.*[55]

The position was the same in New South Wales even before the Supreme Court Act 1970. In *Australian Assets Co. Limited* v. *Higginson*[56] the defendant was a resident of New Caledonia and was served while merely passing through Sydney. The plaintiff sought the taking of accounts and the declaration of trusts of property acquired under an agreement made in France relating to property in New Caledonia, which agreement was to be performed in New Caledonia. A. H. Simpson, J. held that the principle that jurisdiction was based on the defendant's presence in the State applied to the Supreme Court in its equitable jurisdiction. His Honour distinguished *Cookney* v. *Anderson, Blake* v. *Blake* and *Matthaei* v. *Galitzin* on the ground that in those cases service was not made within the jurisdiction. That overlooks the fact that in those cases the question of jurisdiction was treated as being separate from the service of the originating process on the defendant, so that, as in *Doss* v. *Secretary of State for India* there might be an absence of jurisdiction even though service was made within the Court's territorial jurisdiction. His Honour also held that the general statements of principle in those cases should be taken to have been over-ruled by *Ex parte Pascal; In re Myer*[57] and *Western National Bank* v. *Perez Triana & Co.*[58] As the latter cases did not concern equitable causes of action and did not consider the situation in the Court of Chancery, that is a large conclusion. But whatever criticisms might be levelled at the reasoning, the result of the case is clear. The principles of jurisdiction in the Court of Chancery did not

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[54] *Ex parte Pascal; In re Myer* [1876] 1 Ch. D. 509; *Western National Bank* v. *Perez Triana & Co.* [1891] 1 Ch. D. 304; *Colt Industries Inc.* v. *Sarlie* [1966] 1 W.L.R. 440; *Maharanee of Baroda* v. *Wildenstein* [1972] 2 Q.B. 883.

[55] (1958) 98 C.L.R. 310 at 323; *cf. John Russell & Co. Limited* v. *Cayzer Irvine & Co. Limited* [1916] A.C. 298 at 302; *Turner & Sons Limited* v. *Ripstein* [1944] A.C. 298 at 302.

[56] (1897) 18 L.R. (N.S.W.) Eq. 189.

[57] *Supra* n. 54.

[58] *Ibid.*

apply to New South Wales before the Supreme Court Act 1970 and *a fortiori* do not apply now.

In England the principles of jurisdiction set out in *Cookney* v. *Anderson* died with the abolition of the Court of Chancery by the Judicature Act 1873. Accordingly after the Judicature Act 1873 cases which had no connection with England save that the defendant was served there were stayed as oppressive or vexatious,[59] whereas before the Judicature Act 1873 the cases would have been dealt with by the Court of Chancery as raising a question of jurisdiction. So on one occasion *Cookney* v. *Anderson* was treated as a case on the Court's discretion to stay proceedings.[60]

The common law principles of jurisdiction also govern the availability of orders for substituted service. The English decisions on the point have been exhaustively discussed by the High Court of Australia in *Laurie* v. *Carroll*.[61] The High Court disapproved of the only decision[62] which might support the continued application of the practice of the Court of Chancery in relation to substituted service. The High Court held that the practice of the Court of Chancery described in *Hope* v. *Hope*[63] had been superseded.[64]

It need not now be a matter for regret that the common law principles of jurisdiction have prevailed. The principles for staying an action where New South Wales is not the natural forum have been liberalized and this mitigates the arbitrary nature of the common law rule.

It is of historical interest that the Court of Chancery developed its own principles of jurisdiction which were more selective than the principles applied in the Courts of Law. The common law principles of jurisdiction are too often assumed always to have been applicable to all the Courts at Westminster.

But what is more important is why the Court of Chancery assumed a more selective jurisdiction. The Court of Chancery was reluctant to apply choice of law rules to a dispute. Generally where a defendant was within its jurisdiction, the Court, acting *in personam*, would bind the defendant to its own notions of conscionable conduct. A defendant could not reasonably be expected to conform to the principles of English equity if his connection with England were as tenuous as mere presence at the time of service. It seems that instead of applying choice of law rules to a dispute the Court insisted that there be a sufficient connection between the parties or the cause of action and England. This is illustrated by the cases on the jurisdiction to enforce personal equities over foreign immovables under the doctrine of *Penn* v. *Lord Baltimore*.[65]

Choice of Law

With that background we should look again at the decisions which are the foundation of the rule that equity acts not only *in personam* but by its own rules regardless of the foreign element in the case.

[59] *Egbert* v. *Short* [1907] 2 Ch. 205; *In re Norton's Settlement* [1908] 1 Ch. 471.
[60] *Per* Wright, J., *Companhia de Mocambique* v. *British South Africa Co.* [1892] 2 Q.B. 358 at 367.
[61] (1958) 98 C.L.R. 310.
[62] *Watt* v. *Burnett* (1878) 3 Q.B.D. 183, 363.
[63] *Supra* n. 28.
[64] (1958) 98 C.L.R. 310 at 327.
[65] (1750) 1 Ves. Snr. 444.

> . . . the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effects of such contracts might be in the country where the lands are situated, or of the manner in which the courts of such countries might deal with such equities.[66]
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> . . . the only distinction is that this Court cannot act upon the land directly but acts upon the conscience of the person living here. . . . Those cases clearly show that in regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England.[67]

It is not hard to see the jurisdictional framework in which the Court decided that the equities fell to be determined by English law.

Apart from the developments discussed below the Court of Chancery did not consider which system of law was most closely connected to the dealings between the parties which gave rise to the personal equity. Save that the Court would not order to be done what was prohibited by the *lex situs*[68] the Court applied English law.

However English law was not applied as the *lex fori* in all cases. In cases where the equity arose from contract the courts frequently but not uniformly ordered the specific performance of contracts according to English law as the proper law of the contract. In *British South Africa Co.* v. *De Beers Consolidated Mines Limited*[69] the Court of Appeal found that the proper law of a contract to mortgage land in Southern Rhodesia was English law. It held that an exclusive licence given to the mortgagee to work the land which extended beyond the duration of the mortgage was a clog on the equity of redemption. The decision was followed in *In re Smith; Lawrence* v. *Kitson*[70] where the Court enforced an equitable mortgage over land in the West Indies although that was not a form of security recognized by the *lex situs*. It was held that the agreement to execute a legal mortgage was governed by English law, and, being capable of specific performance, it took effect as an equitable mortgage personally binding on the mortgagor. The same approach was taken in *Ex p. Holthausen; In re Scheibler*[71] where an equitable mortgage was enforced because the contract to give the mortgage was capable of being specifically enforced under its proper law. These decisions have been subjected to criticism by the text writers for enforcing rights in respect to foreign land otherwise than in accordance with the *lex situs*. That criticism is misguided. The decisions should rather be applauded for enforcing the rights between the parties, including their rights to have their contracts specifically enforced, by the proper law of their contract.

There are as many cases in which contracts dealing with foreign land have been enforced because they are specifically enforceable under English law where English law has been applied as *lex fori* without any enquiries

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[66] *Re Courtenay; ex p. Pollard* (1840) Mont & Ch. 239 at 251.
[67] *Lord Cranstown* v. *Johnston* (1796) 3 Ves. 170 at 182.
[68] *Norris* v. *Chambres* (1861) 3 De G.F. & J. 583 at 584-5.
[69] [1910] 2 Ch. 502. The decision was reversed in the House of Lords on a different point.
[70] [1916] 2 Ch. 206.
[71] [1874] L.R. 9 Ch. 722.

as to whether it is the proper law for contract. (Re *The Anchor Line (Henderson Brothers) Limited*;[72] *Duder* v. *Amsterdamsch Trustees Kantoor*;[73] *Richard West & Partners* v. *Dick*;[74] *Ward* v. *Coffin.*[75]) In *Duder* v. *Amsterdamsch Trustees Kantoor* a trustee for debenture holders had borrowed money from the plaintiff which was purportedly secured by a charge on the assets comprised in the debenture trustee. The charge was void by Brazilian law for non compliance with certain formalities. The defendant had no assets or place of business within England and was served outside the jurisdiction pursuant to Order 11 of the English Rules. Byrne, J. held that if the first defendant were resident in England there was no question but that the English Court acting on its own rules and administering equities between the parties would enforce the charge personally against it, notwithstanding that by the *lex situs* no interest had been created in the land. His Lordship held that as the case was a proper one for service outside the jurisdiction under Order 11 the court had jurisdiction over the trustee and notwithstanding that the trustee was not resident in England the charge could be enforced personally against it. There was no finding that the contract to create the charge was governed by English law. Instead having concluded that the Court had jurisdiction there was an automatic application of English law as *lex fori.*

It is of course the writer's submission that the earlier cases which stipulated that principles of equity will be administered in accordance with the *lex fori* have to be read in the light of the jurisdictional principles which the courts had in mind and that as those principles have changed the authorities have to be reconsidered. As the matter presently stands there is some authority to justify the enforcement of personal equities arising out of a contract in accordance with the proper law of the contract. It is submitted that the question as to whether equity would decree specific performance of a contract should depend upon whether the contract is specifically enforceable under its proper law. For example, in *Ex parte Holthausen re. Scheibler*[76] James, L.J. held that he did not have to decide whether the proper law of a contract to mortgage land was English law or German law for under either the defendant would be compelled to perform the contract.

It is convenient here to deal with one objection: namely that the availability of specific performance is a question of the appropriate remedy for breach of contract which should be determined by the *lex fori* and not a question of substance to be determined by the *lex causae.* The authority which from time to time is cited for the proposition that all questions concerning the grant of equitable remedies are to be determined by the *lex fori* as they are not matters of substance, is *Baschet* v. *London Illustrated Standard Company.*[77] There the plaintiff obtained an injunction against the publication in England of pictures protected by French copyright although this was not a remedy available under French law. However, the plaintiff's cause of action arose under the United

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[72] [1937] Ch. 483.
[73] [1902] 2 Ch. 132.
[74] [1969] 2 Ch. 424.
[75] (1972) 27 D.L.R. 58.
[76] *Supra* n. 71.
[77] [1900] 1 Ch. 73; *cf. Boys* v. *Chaplin* [1971] A.C. 356 *per* Lord Pearson at 394.

Kingdom Fine Arts Copyright Act 1862 and the International Copyright Act 1886 which gave a cause of action in English law for breach of foreign copyright. Kekewich J. was no doubt correct in holding that the remedies to which the plaintiff was entitled in England were not limited to those obtainable in France. But the case had little to do with the conflict of laws. The *lex causae* was English law.

In *Phrantzes* v. *Argenti*[78] Lord Parker, C.J. said that the court would enforce foreign rights of a kind not known to English law if the machinery by the way of remedies were available to carry the right into effect without changing its character. There is no reason why the available remedies should not include equitable remedies.

In contract and tort questions of remoteness of damage and head of damage are determined by the *lex causae* as matters of substance. A fortiori whether a contract is specifically enforceable or whether a plaintiff is restricted to a claim for damages should be a question of substance, although particular questions on the grant of that remedy may be a matter for the *lex fori* such as whether the relief should be refused for discretionary reasons.

There is much less authority to determine the choice of law for equities which arise outside of a contract. The cases which have applied the doctrine in *Penn* v. *Lord Baltimore* and which have been applied by way of analogy in *National Commercial Bank* v. *Wimborne* and *US Surgical Corporation* v. *Hospital Products International Pty. Limited* have been cases concerning personal equities with respect to foreign lands; equities in most cases arising from contracts for sale or contracts to grant a mortgage. Save that they contain statements of a general principle as to the basis upon which equity acts, there is little reason to apply these authorities to determine, for example, whether the existence of a fiduciary obligation between a manufacturer and distributor is to be judged by New South Wales or New York law.

In *Chase Manhattan Bank* v. *Israel-British Bank (London) Limited*[79] the question was whether the plaintiff bank could trace moneys paid by it under a mistake of fact into the assets of the defendant bank. The money was paid in New York to a second bank for the account of the defendant. It was common ground at the trial that the effect of the mistaken payment should be determined by New York law unless the right to trace through a constructive trust of the defendant's assets was properly characterized as a remedy, rather than a substantive right, which should be determined by English law as the *lex fori.* The proposition that the effect of the mistaken payment should in the first instance be determined by New York law as the *lex causae* was presumably derived from the rule which is now rule 170 in the 10th edition of *Dicey & Morris, The Conflict of Laws.* The learned authors say that the obligation to restore the benefit of an enrichment obtained at another's expense is governed by the proper law of the obligation, which, if arising otherwise than in connection with a contract or a transaction involving an immovable is, semble, the law of the country where the enrichment occurs. The authors comment that "English law as the *lex fori* must, on general principles, decide whether

[78] [1960] 2 Q.B. 19.
[79] [1981] Ch. 105.

a claim is to be characterized as the assertion of a right to recover an unjust enrichment, and especially whether it is 'personal' or 'real', e.g. an attempt to 'follow' property".[80] There is no discussion in *Dicey & Morris* as to whether the equitable principles which arise in restitution cases deserve separate consideration. Nor did Goulding, J. contemplate that the right to trace in equity might be governed by English law as the *lex fori* as all equities are governed by the *lex fori*. His Lordship found that the equitable remedy of tracing was available under both New York and English law and accordingly found that there was no conflict of laws to be resolved. His Lordship went on to hold however that by New York law the defendant became a trustee for the plaintiff of the sum paid by mistake and the plaintiff's beneficial interest arose by a rule which by New York law is characterized as substantive.

This case is clearly authority against the general proposition that if the defendant is subject to the Court's jurisdiction the equities arising from a transaction to which he is a party as ascertained by the *lex fori* and the equitable remedies provided by that law will be applied to him.

For the sake of completeness two other cases should be mentioned. In *Razelos* v. *Razelos (No. 2)*[81] the defendant had purchased land in Greece in his own name using monies belonging to his wife which he had obtained through fraud and with threats. At the time of these events the parties were domiciled and resident in Greece. The monies obtained from the wife were held in Germany, Switzerland and the United States. Uninstructed by authority it would seem inappropriate that the parties rights in respect of the land in Greece should be determined by English law. It is not easy to follow the judgment of Baker, J. At one point his Lordship said that he would have applied Greek law to determine whether a gift of land from the wife to the husband was voidable for fraud or duress. His Lordship then said however that Greek law was not relevant because the wife had not given the land to her husband. Rather the husband had purchased the land with monies owned by his wife which he had obtained from her fraudulently. It seems that English law was applied as the *lex fori* to hold that in those circumstances the land was held on a resulting trust. Whether this was the position under Greek law or even whether there was any evidence of Greek law on the question is not apparent.

An older case which touches on the question is *Cood* v. *Cood.*[82] There Romilly, M.R. found that a residuary beneficiary of a deceased estate was estopped by his acquiescence from requiring the administrator to account for his share of the estate. The estate was situated in Chile and the administrator resided there. The beneficiary had acted in such a way as to make the administrator believe that there was an agreement between them which would relieve the administrator from the obligation to account and he had been allowed to act on that assumption for 17 years. His Lordship found that there was no such agreement, but had there been it would have been governed by English law and by English law there was an estoppel by acquiescence. It seems that the purpose of the finding that English law would have governed the contract if it had been made was

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[80] See *Dicey & Morris, The Conflict of Laws*, 10th ed. at 922.
[81] [1970] 1 W.L.R. 392.
[82] (1863) 33 L.J. Ch. 273.

that it showed that the entirety of the relations between the parties was more closely connected with England than with Chile and it was therefore appropriate to apply an estoppel according to English law.

Moving to the area of trusts, the High Court has said the law governing a voluntary settlement is the proper law of the trust to be determined in the same way as the proper law of a contract is determined.[83]

The rules of the conflict of laws relating to trusts generally are analyzed in *Jacobs, Law of Trusts in Australia* (4th ed.) and are beyond the scope of this article. Curiously enough the rules have developed quite separately. It is never suggested that the validity of express trusts or the powers of trustees are governed by the *lex fori*. The learned authors of *Jacobs* summarize the position as being that express implied and resulting trusts of movables are governed by their proper law; the accountability of a trustee of movables who abuses his office is determined by the law of the seat of the administration of the trust; and a constructive trust of movables arising from contractual relations between the parties will be governed by the proper law of the contract, or if arising from a fiduciary relationship will be governed by the proper law of that relationship. The learned authors consider that the essential validity of a trust of an immovable (where the trust property does not also include movable property), be it express implied resulting or constructive, will be governed by the *lex situs* of the trust property; and that its construction and administration will depend on the governing law intended by the settlor provided that the result is not one forbidden by the *lex situs*.[84]

The proposition that a constructive trust of movables arising from a fiduciary relationship will be governed by the proper law of that relationship must now be questionable in the light of *US Surgical Corporation* v. *Hospital Products International Pty. Limited.* For the reasons given in this article it is however a proposition which should command assent.

The proposition that trusts of immovable property will be governed by the *lex situs* of the trust property requires qualification. The general principle that all questions relating to land are governed by the *lex situs* covers only the question of what proprietary interests, if any, the trustee and beneficiary have in the land. However, the personal rights between trustee and beneficiary would not, even on the state of current authorities, necessarily be determined by that law. A constructive trust arising from a contract to sell foreign land would, on the authorities, either be determined by the proper law of contract or be determined by the *lex fori*. This is as it should be. Assume for example that New South Wales domiciliaries and residents A and B agree in New South Wales that A will purchase in his own name land situated abroad and will hold it on trust for B. Even if the *lex situs* treats A as the absolute owner of the land and does not recognize that B has any beneficial interest in it, B may nevertheless in New South Wales restrain A from dealing with the land or its proceeds of sale in breach of trust. These personal rights against the trustee do not cease to exist merely because the *lex situs* does not know the

[83] *Augustus* v. *Permanent Trustee Co. (Canberra) Limited* (1971) 124 C.L.R. 245; *cf. Duke of Marlborough* v. *Attorney-General* [1945] Ch. 78.

[84] At pp. 584-591.

institution of trust. The situation should be the same if B relies not on an express trust but on an implied, resulting or constructive trust. In each case the court would enforce the personal equity of the beneficiary against the trustee in the exercise of its jurisdiction under the doctrine of *Penn* v. *Lord Baltimore.* It does not follow though that the personal equities between the trustee and beneficiaries should be enforced according to New South Wales law if the circumstance giving rise to the trust are not sufficiently connected with New South Wales. If in the example given above A and B were domiciled and resident where the land was situated and their agreement was made there, their personal rights should be governed by that foreign law.

Conclusion

The picture of equity's use of choice of law rules is fragmented. There is a solid line of authority dealing with the enforcement in equity of contracts and personal rights in respect to foreign land. Most cases lay down the rule that equity applies its own rules in administering such personal equities. The rule was made when the Court of Chancery only exercised jurisdiction if the proceedings had a sufficient connection with England. There is every reason not to apply those principles when deciding, for example, what law determines the existence of a fiduciary relationship. There has in any event been a retreat in some cases from the application of the *lex fori* with respect to equities arising from contract. In cases such as *British South Africa Co.* v. *De Beers Consolidated Mines Limited* the law of the forum was applied to enforce equities arising from contracts over foreign land but it was applied because it was the proper law of the contract. Equity never adopted the principle that the *lex fori* was the governing law when it concerned itself with the validity of and administration of express trusts. There has been a further retreat from the automatic application of the *lex fori* in *Chase Manhattan Bank* v. *Israel-British Bank (London) Limited.*

It remains true that equity must act in personam on the conscience of the defendant, but a defendant is entitled and often obliged to adapt his behaviour to the rules of law of the country with which his dealings or relationship is most closely connected. Equity cannot properly enforce matters of conscience if it ignores a foreign law to which the parties were subject. Upon it being recognized that the older principles were developed in a different jurisdictional framework it is open to the courts to enforce personal equities not by the *lex fori* but by that country or system of law with which the relevant transaction relationship or conduct of the parties has its closest and most real connection. That does not mean that the rules can be worked out by applying a simple formula. If, for example, the parties are most closely connected with a civil law system it will not make sense to ask if a trust arises under the foreign law. What one may do is ask what rights and remedies are available under foreign law and how they may be given effect to by equitable rights and remedies. But it is in the nature of equity that third parties' rights often intervene. It may be easy enough to accommodate the rights of a plaintiff under foreign law to say, for example, that the defendant holds certain of his property on trust for the plaintiff. But if a third party has acquired an interest in or

otherwise dealt with movable property[85] what law governs his rights and liabilities? The *lex fori*? The proper law of the transaction to which he was a party? The *lex situs* of the property? Does one characterize the right under foreign law to see if it confers an immediate proprietary interest or is more akin to a mere equity? These are hard questions. What can be said though is that if rule 170 of *Dicey & Morris* is right, which it was assumed to be in *Chase Manhattan Bank* v. *Israel-British Bank (London) Limited*, they are questions which should already be exercising our minds. They are no harder than the questions posed at the beginning of this article.

[85] The Court will not decide questions of priorities over foreign immovables where there is no privity of obligation between plaintiff and defendant but only the assertion of competing proprietary interests. *Norris* v. *Chambres* (1861) 29 Beav. 246, 3 De G.F. & J. 583; In re *Hawthorne* (1883) 23 Ch. D. 743; *Deschamps* v. *Miller* [1908] 1 Ch. 856; *cf. Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.* [1892] 2 Ch. 303.