THE TIME FACTOR IN PRIVATE INTERNATIONAL LAW

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It has been said that Private International Law, or the Conflict of Laws, deals primarily with the application of laws in space.[1] The usual question is which of the laws of several jurisdictions that are arguably applicable extends to the transaction or occurrence. In a sense the choice may be viewed as one on a horizontal plane, the world being divided into a number of simultaneously existing sovereign states each possessing its own system of law. But the spatial question of what is the appropriate law necessarily also involves a time factor because the decision must be made as at a particular time. The spatial question, viewed as one on a horizontal plane, is also matched by a temporal question on a vertical plane.

At first sight the time factor may appear spurious for it might be thought that the court would necessarily consider the spatial question as at the date of the action. In a broad way this is true but it hides subtle distinctions. The court considers the *problem* as at the date of the action—this after all is only a logical imperative. But it does not necessarily apply the *content* of the foreign laws or the forum's choice of law rule as at that date. Nor does it necessarily localize the connecting factor contained in the forum's choice of law at that time.

Various time questions arise in Private International Law and are increasingly being studied as a coherent topic in the common law countries, a position long enjoyed in the private international law of civil law countries.[2] The most frequent time question that has arisen in the cases involves the situation where the internal law of the governing legal system, selected in accordance with the forum's choice of law rules, has changed; in other words, where there has been a change in the content of the *lex causae*. This necessitates a decision as to whether the *lex causae* will be applied as it presently exists or as it formerly existed. Take the following example. X dies intestate and domiciled in Mytannia leaving

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1 Dicey & Morris, *The Conflict of Laws* (9th ed., London, Stevens & Sons, 1973) 39 [hereafter cited as "Dicey & Morris"].

2 As far as common law literature is concerned see F. A. Mann, "The Time Element in the Conflict of Laws" (1954) 31 *B.Y.I.L.* 217; J. K. Grodecki, "Conflict of Laws in Time" (1959) 35 *B.Y.I.L.* 58; Sprio, "The Incidence of Time in the Conflict of Laws" (1960) 9 *I.C.L.Q.* 357; J. G. Castel, "Conflict of Laws in Space and Time" (1961) 39 *Can. B. Rev.* 604; J. H. C. Morris, "The Time Factor in the Conflict of Laws" (1966) 15 *I.C.L.Q.* 422 (being a draft of chapter 5 of Dicey & Morris).

movables in Victoria. Under the law of Mytannia as it existed at X's death, X's wife succeeded to all his estate. However after his death and before the proceedings in Victoria to determine entitlement to his estate, the law of Mytannia is changed to provide that a wife succeeds to half a deceased's estate, the remainder going to his children. It is clear that in a spatial sense the law of Mytannia governs succession to movables on death.[3] But a temporal question also exists—at what time must the law of Mytannia be considered—as it existed at X's death or as it exists from time to time. This is the classic instance of a conflict of laws in time necessitating a choice on the vertical as opposed to the horizontal plane. It has been argued that it, together with the time question arising from a conflictual rule of the forum, comprise the only true conflict of laws in time.[4] Whether or not this is so other time questions arise in private international law which can be conveniently considered with these two instances under an expanded rubric of the time factor. For this reason the title of this article was selected in preference to the other possibility "Conflict of Laws in Time".

As indicated above a second time question arises where the content of the conflictual role of the forum has changed as a result of legislation or judicial decision. Take for example a change to the common law rule that succession to movables on death is governed by the law of the deceased's last domicile. If legislation were to be enacted providing that succession to movables was governed by the law of the deceased's nationality there would arise the question of whether the new rule applied only to estates of persons dying after the enactment of the new rule or whether it had a retrospective operation. This facet of the time factor involving changes in the conflictual rule of the forum assumed great importance in Germany after the commencement of the German Civil Code on January 1, 1900.[5]

A third question concerns the time at which the connecting factor, contained in the forum's conflictual rule, must be localized. The problem is most obvious with regard to the so-called variable connecting factors that by their nature are not constant on the vertical or temporal plane. Of these the most noteworthy are the personal connecting factors of domicile, residence and nationality. Take by way of example the common law choice of law rule referring the validity of a will disposing of movable property to the law of domicile of the deceased. If the deceased was domiciled in different states at the time of the making of the will and at death it becomes necessary to interpret the choice of law rule to determine which domicile is selected. This is a different question to the first one discussed

[3] See E. I. Sykes & M. C. Pryles, *Australian Private International Law* (Sydney, Law Book Co., 1979) 447 [hereinafter cited as "Sykes & Pryles"].
[4] See Grodecki, op. cit. 58.
[5] See E. Rabel, *The Conflict of Laws: A Comparative Study* Vol. 4 (2nd ed., Ann Arbor, Uni. of Michigan, 1958) 505-519.

above. A "change in the *lex causae*" problem assumes that the state whose laws govern is known. It therefore is not concerned with the ascertainment of the governing state but rather with the determination of which law of that governing state applies. In contrast the third problem is concerned with ascertaining the governing state itself. This, as Grodecki says, is probably not a pure conflict of laws in time question but a hybrid spatial-temporal question.[6]

Associated with the third question, a fourth question has arisen. Once the time is known at which the connecting factor must be localized, is the court in actually localizing the connecting factor confined to looking at indicia which exist up to that time or can it look at matters which have arisen subsequently. For example take the question of whether a person was domiciled in Mytannia at the date he executed his will. The time of localizing the connecting factor (domicile) is known—the date of the execution of the will. But in ascertaining whether a domicile had been acquired in Mytannia at that time is the court confined to evidence which existed then or could regard be had to a statement of the person concerned made at a later time to the effect that from his first arrival in Mytannia he always intended to reside there?

State succession is another aspect of private international law which involves at least some time factors. However it is specialized and has considerations of its own which make it inapt for consideration here.

It remains, now, to consider the questions set out above in somewhat greater depth.

APPLICATION OF THE *LEX CAUSAE*

The first temporal question mentioned above involves situations where the content of the *lex causae*, the law governing the transaction or occurrence under the forum's choice of law rules, has changed. It then becomes necessary to determine whether the *lex causae* must be applied as it exists at a point of time prior to the litigation or as it exists from time to time. With but a few exceptions the cases support the general proposition that the *lex causae* will be applied as it exists from time to time. Cases dealing with the proper law of contract afford the clearest and most numerous illustrations. In *Jabbour* v. *Custodian of Israeli Absentee Property*[7] a policy of insurance was issued in Haifa, Palestine in November 1947. The event which made the policy monies payable occurred in January 1948. In May 1948 the British mandate over Palestine terminated and the State of Israel came into existence. Thereafter Israeli laws were passed which affected the rights of the insured under the policy. In an action in England in 1954 it was held, in so far as it was material, that the proper law of the

[6] Grodecki, op. cit. 58-59.
[7] [1954] 1 W.L.R. 139.

contract was the law of Israel and not the law of the mandated territory of Palestine as existing at the date of the termination of the mandate, nor *a fortiori*, at the date the contract was made or the policy monies became payable.

In *Merwin Pastoral Co. Pty Ltd* v. *Moolpa Pastoral Co. Pty Ltd*[8] a contract of sale was made in 1926 and was governed by New South Wales law. In 1930 the *Moratorium Act* was passed in New South Wales which affected the vendors' rights under the contract. The High Court held that the Act applied and therefore implicitly held that the governing law was that of New South Wales as it existed from time to time and not when the contract was made.

Similarly in *Trustees Executors and Agency Co. Ltd* v. *Margottini*[9] a marriage settlement was made in 1928 and was stated to be governed by English law. The wife was given a life interest but it was expressed to be subject to a restraint on anticipation. In 1949 such restraints were abolished by legislation in England whether or not contained in an instrument coming into existence prior to the Act. In proceedings in Victoria in 1960 it was held that the wife's interest was no longer subject to the restraint on anticipation. Numerous like cases abound.[10]

Beyond contracts, in other areas as well, authorities support the proposition that the court applies the *lex causae* as it exists from time to time. *Nelson* v. *Bridport*[11] affords an illustration in a case involving succession to immovables. Land in Sicily was granted to Lord Nelson in tail with a power to appoint a successor. Lord Nelson exercised this power in his will by devising the land to trustees in trust for his brother with remainder over. After Lord Nelson's death and during the lifetime of his brother a law was passed in Sicily abolishing entails and making the person lawfully in possession of such estates the absolute owner. Relying on this law the brother devised the land to his daughter, however in proceedings in England the remainderman under Lord Nelson's will also claimed it. The Court took it for granted that it had to apply the law of Sicily as it existed from time to time and not as it was at the time of Lord Nelson's death, the making of the will or at the time of the original grant.

Exactly the same principle was applied in the classic torts case of *Phillips* v. *Eyre*.[12] There the plaintiff brought an action against the defendant in England for assault and false imprisonment. The acts complained of were done in Jamaica at the instance of the defendant, who was then the Governor, to suppress a state of insurrection and riot in the

[8] (1933) 48 C.L.R. 565.
[9] [1960] V.R. 417.
[10] See e.g. *Re Chesterman's Trusts* [1923] 2 Ch. 466, 478 (C.A.); *R.* v. *International Trustee for the Protection of Bondholders A/G* [1937] A.C. 500; *Kahler* v. *Midland Bank Ltd.* [1950] A.C. 24.
[11] (1846) 8 Beav. 547; 50 E.R. 215.
[12] (1870) L.R. 6 Q.B. 1.

colony. The acts were illegal by the law of Jamaica as it existed at that time but subsequently the Jamaican legislature passed an Act of Indemnity relieving the defendant of liability. In determining whether or not the defendants acts were "not justifiable" by the *lex loci delicti* the court took into account the Act of Indemnity.

A startling illustration of the principle that a court will apply the *lex causae* as it exists from time to time is afforded by the case of *Starkowski* v. *Attorney-General*.[13] W married H1 in Austria on May 19, 1945 in a religious ceremony that did not constitute a legal marriage by the then law of Austria which, as a result of intervention by the German occupying authority, required a civil ceremony at a registry office. However in June 1945 after the cessation of the German occupation, the Austrian government promulgated a law to the effect that marriages solemnised before a minister of a recognised church between April 1, 1945 to the coming into effect of the law were to have the effect of solemnisation as soon as they were registered in a certain book in the registry office. The marriage was registered on July 18, 1949 but without W's knowledge or consent, and after she had acquired a domicile in England. The effect was that before July 18, 1949 the law of Austria would not have regarded W and H1 as legally married but after that date would have regarded them as legally married as from the date of the marriage on May 19, 1945.

There was one child of the union between W and H1. The parties separated in 1947 and W met H2 in 1947 giving birth to his child in 1949. In 1950 W married H2 in England. The question for the court was whether W's former marriage with H1 prevented the possibility of her later marriage with H2 legitimizing her second child. The House of Lords held that the Austrian marriage was valid and that the English ceremony was bigamous and void. Lord Reid stated the issue succinctly:

> "It has long been settled that the formal validity of a marriage must be determined by the law of the place where the marriage was celebrated. But if there has been retrospective legislation there, then a further question arises: are we to take the law of that place as it was when the marriage was celebrated, or are we to inquire what the law of that place now is with regard to the formal validity of that marriage?"[14]

So too choice of law provisions contained in federal statutes which make State law applicable in federal jurisdiction, such as ss. 64 and 79 of the *Judiciary Act* 1903 (Cth.) are generally treated as having an ambulatory operation so that they are capable of including legislative changes made in State law after the enactment of the federal provision.[15]

[13] [1954] A.C. 155.
[14] Ibid. 170.
[15] *Moore* v. *The Commonwealth* (1958) 99 C.L.R. 177, 182; *Downs* v. *Williams* (1971) 126 C.L.R. 61, 100; *Maguire* v. *Simpson* (1977) 18 A.L.R. 469, 488.

Are there any exceptions to the rule that the *lex causae* is applied as it exists from time to time? It is convenient to discuss the possibilities in point form.

Exception (1)

There are situations where the domestic rule of the *lex causae* which will be applied is not the current domestic rule but a rule which prevailed at some prior time. Take, for example, the *Starkowski* case. If the Austrian law of June 1945 had provided that a religious ceremony sufficed to constitute a valid marriage in the case of marriages celebrated *after* the promulgation of the law, there can be little doubt that the validity of the marriage would have been tested according to the earlier Austrian law that prevailed in May, 1945. The House of Lords sitting in 1953 would be looking to the prior Austrian domestic rule on marriage formalities not to the current domestic rule prevailing in Austria. This is not really an exception to the rule that the court applies the *lex causae* as it exists from time to time but an illustration which shows that the rule needs careful elaboration and definition. The principle is not that the court will apply the current *domestic* rule of the *lex causae* as it exists from time to time but that the court will apply the *whole content* of the *lex causae* as it exists from time to time *including its transitional or temporal rules.* Thus in the illustration posed above the court in 1953 would not only note that the prevailing domestic rule of the *lex causae* accepted as valid religious ceremonies it would also note its transitional or temporal application as it existed under the *lex causae* which confined it to marriages celebrated after June, 1945. The same transitional or temporal rule of the *lex causae* would, in 1953, apply the domestic rule as it existed prior to June, 1945 to marriages celebrated before then.

Another example will serve to further illustrate the point. Assume that a contract is made in January, 1978 for the sale of native artefacts from Papua New Guinea to a purchaser in Australia. It is agreed that the law of Papua New Guinea is the proper law of the contract. In February, 1978 a law of Papua New Guinea provides that contracts for the sale of native artefacts made after that date are invalid unless the prior approval of a governmental official is obtained. In an action to enforce the contract in Australia brought in 1979 an Australian court would hardly give effect to the February, 1978 law on the ground that it is the current or then existing law of Papua New Guinea. It is only part of the current law, another part the transitional or temporal rule included therein provides that it is not applicable to such a contract. If the statute was silent as to its transitional or temporal application it would then be a matter of statutory construction to determine whether it applied to a contract entered into before its enactment.

Exception (2)

While the weight of authority supports the general rule that a court will apply the *lex causae* as it exists from time to time including its temporal or transitional rules there is some authority the other way. The leading case against the proposition is *Lynch* v. *Provisional Government of Paraguay*.[16] There the deceased died domiciled in Paraguay leaving movable property in England. An application for probate of the will by the universal legatee was resisted on the ground of a law of Paraguay made after the deceased's death invalidating any testamentary disposition made by him. The court approved the rule in Story's Conflict of Laws that "the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death". The court interpreted this to mean that the law of Paraguay had to be applied as it existed at the deceased's death. To overcome this temporal reference to the law of domicile in the forum's choice of law rule it was ingeniously argued that the post-death law of Paraguay had a retrospective operation and invalidated the will as at the date of death. The court, however, was adamant that the choice of law rule referred to the law of domicile at the date of death and this excluded subsequent changes to that law including those purporting to have a retrospective operation.

It has been convincingly argued that the temporal reference in the succession-to-movables choice of law rule relates to and qualifies the word "domicile" not "law".[17] It was inserted in the rule to make it clear that the relevant domicile is that which the deceased had at death and not the domicile he may have possessed when the will was executed. The temporal reference, therefore, appertains to the connecting factor not the governing law and once the deceased's last domicile is ascertained its relevant law is applied as it exists from time to time.

This is not to say that the result reached in *Lynch*, as opposed to the reasoning employed, was wrong. There is little doubt that the court was correct in refusing to give effect to the post-death law of Paraguay. The law of Paraguay only purported to invalidate the will of one person, the deceased, who had been a dictator of the country. It was clearly a penal law and the court in *Lynch* expressly recognized its penal character.[18] Thus even had the law of Paraguay been applied as it existed from time to time, the invalidating law, being penal in nature, would have been denied recognition under the established conflictual rule excluding enforcement of foreign penal laws.[19]

[16] (1871) L.R. 2 P. & D. 268.
[17] Dicey & Morris, op. cit. 44.
[18] (1871) L.R. 2 P. & D. 268, 272.
[19] See e.g. *Schemmer* v. *Property Resources Ltd.* [1975] Ch. 273 and see generally Stoyles & Pryles, op. cit. 150-151.

What effect does *Lynch* have? Does it purport to deny the general rule that the *lex causae* is applied as it exists from time to time or is it merely confined to one particular aspect of private international law namely succession to movables on death or can the case be disregarded because it is wrong? The latter is the most attractive alternative but it should be noted that *Lynch* was followed in *Re Aganoor's Trusts*.[20] There a testatrix died domiciled in Padua in 1868. By her will she created a settlement which was valid by the then prevailing Austrian law. However on September 2, 1871 the Italian Civil Code came into force at Padua and by that law and as from that date such settlements were dissolved. Referring to *Lynch* Raner J. decided that "English law adopts the law of the domicile, in a case like this, as it stood at the time of the testator's death, and does not take any account of any subsequent change . . .".[21]

Lynch was referred to with approval in *Re Marshall*[22] but the case did not really involve a temporal question relating to the *lex causae*.[23] *Lynch* was also referred to in approving terms by the House of Lords in *Adams* v. *National Bank of Greece S.A.*[24] That case involved the question of liability under a guarantee of certain sterling mortgage bonds. The original guarantor was a Greek banking corporation which in 1953 by Greek legislation was amalgamated with another Greek corporation to form a new bank. The Act of amalgamation provided that the new company became the "universal successor" to the rights and obligations in general of the amalgamated companies. In *National Bank of Greece and Athens* v. *Metliss*[25] the House of Lords held that although the proper law of the contracts constituting the mortgage bonds was English, the status of the new corporation under Greek law would be recognized so that it succeeded to the rights and liabilities of the original guarantor. But a 1949 Greek moratorium which purported to protect the new bank and before it the original guarantor was not relevant as it went to contractual liability which was a matter for English law. It therefore followed that unpaid bondholders could proceed in England against the new corporation as guarantor.

In 1956 the Greek government amended its legislative decree of 1953 to provide that a company absorbing another company became the universal successor to the rights and obligations of the companies amalgamated except for the obligations to which such companies were liable whether as principal or guarantor under bonds payable in gold or foreign currency. The 1956 decree purported to retrospectively apply to the new company as from its creation in 1953. In *Adams* v. *National Bank of*

[20] (1895) 64 L.J. Ch. 521.
[21] Ibid. 523.
[22] [1957] 1 Ch. 507.
[23] See Grodecki, op. cit. 76-78 and see infra.
[24] [1961] A.C. 255.
[25] [1958] A.C. 509.

Greece S.A.[26] the House of Lords refused to apply the 1956 law so as to exonerate the new bank from liability.

In *Adams* as least two different views were offered for refusing to effectuate the 1956 Greek law. One view, represented most strongly in the opinion of Lord Reid classified the Greek law as in substance one going to contractual liability, which was a matter for English law, and not status, which was governed by Greek law. The opposing view accepted the form of the 1956 law as one of status or succession but held that its retrospective operation would not be recognized and that Greek law must be applied as it existed in 1953. Thus, said Lord Tucker,

> "the principle which your Lordships should apply in the present case is that which is to be found in the case of *Lynch* v. *Provisional Government of Paraguay*, namely, that the English courts will only recognise the laws of succession in force in the country of the deceased's domicile at the date of his death".[27]

In so far as the decision in *Adams* rests on the first view it does not compromise the rule that the *lex causae* is applied as it exists from time to time. Under the first view the 1956 Greek law went to a matter of contractual liability and was excluded not on account of any time factor but because it was not part of the *lex causae* which was English law. The second view, however, appears to squarely support the *Lynch* decision and rest upon it. But a closer analysis reveals that this is not necessarily so.

If the 1956 Greek law be classified as a matter of status or succession and therefore as part of the *lex causae* its exclusion, to come within the *Lynch* principle, must solely rest on the basis that only Greek law as it existed in 1953 was relevant. But consider the situation had the Greek law in 1953 been passed in the first instance in the form which the 1956 law purported to give it. Assume therefore that the original 1953 law had provided that the new corporation was the universal successor to the rights and obligations of the old companies except the obligations under the bonds or had provided that it was the successor to the rights of the old companies but not to any obligations at all. The Greek law could not have been excluded under the *Lynch* principle on account of any time factor. Yet clearly in the view of at least one law lord, Lord Denning, the Greek law would still not have been applied.[28] Lord Reid expressly refrained from deciding this "perhaps difficult question".[29] If the Greek law would not have been given effect to in these circumstances it follows that the true reason for its exclusion in *Adams* was not on account of any time factor but because the law was one which the English courts would not in any event recognize.

[26] [1961] A.C. 255.
[27] [1961] A.C. 255, 285.
[28] See [1961] A.C. 255, 288-289.
[29] [1961] A.C. 255, 283.

In conclusion, one thread of *Adams* which may at first sight appear to strongly support the principle in *Lynch* may not in fact do so. *Lynch*, therefore, is only directly supported by *Re Aganoor's Trusts*.[30]

Exception (3)

The acceptance of the general rule that the *lex causae* is applied as it exists from time to time does not necessarily exclude the occasional invocation of the public policy doctrine to deny effect to the foreign transitional or temporal rules in extreme cases. In particular it has been suggested that a foreign transitional rule which retrospectively applies a law to a prior act might have to be disregarded in some circumstances. Take, by way of example, the case of *Starkowski* v. *Attorney-General*, discussed above. In that case Austrian legislation retrospectively validating a marriage celebrated in Austria was recognized. Lord Reid expressly refrained from deciding whether the same result would have followed had one of the parties to the first marriage contracted a second marriage before the retrospective legislation took effect or had an English court declared the marriage invalid prior to the enactment of the retrospective legislation.[31] Another possible situation where the public policy doctrine could be invoked is where the marriage is valid when celebrated but subsequently invalidated by the *lex causae*. This type of contingency has been provided for in relation to the formal validity of wills by s. 20A(3) of the *Wills Act* 1958 (Vic.). It provides that regard may be had to retrospective legislation of the *lex causae* validating a will and therefore implicitly excludes retrospective legislation invalidating a will that was valid when executed.

Some writers think that the public policy doctrine must inevitably be called into operation in these sorts of cases[32] while others are more reluctant.[33] In truth it may be difficult to lay down general rules in advance and it may be necessary to scrutinize each case as it arises. The court must, of course, seek to ensure that justice is done but it must also strictly control the public policy non-recognition doctrine.

Exception (4)

Foreign law relevant as *datum* or *factum* and not as the *lex causae* is applied as it exists at a particular time rather than from time to time. Of course this is not a true exception to the general rule because by definition the foreign law is not relevant as the *lex causae*.

There are several instances where foreign law will be looked to as *datum* rather than as the governing law. Thus parties may in a contract

[30] (1895) 64 L.J. Ch. 521.
[31] See [1954] A.C. 155, 172.
[32] Mann, op. cit. 243.
[33] See Grodecki, op. cit. 74-76.

incorporate provisions of a foreign law as a shorthand way of setting out terms and conditions. In these circumstances it will be necessary to look to the foreign law not as the governing law but in order to determine what the incorporated terms and conditions are. The court will look to the incorporated law as it existed at the date the contract was made.[34]

Again in a tort case governed exclusively by the *lex fori* (under the exception to the general rule as espoused by Lords Wilberforce and Hodson in *Chaplin* v. *Boys*)[35] it may be necessary to consult the *lex loci delicti* as datum. Take a motor car collision involving two vehicles driven by Victorians in New Zealand. In an action for negligence in Victoria governed, let us say, exclusively by Victorian law the court may look to the law of New Zealand to determine what the speed limit was. This is a relevant fact in ascertaining whether the defendant was negligent. Of course New Zealand law will be consulted as it existed at the date of the tort and not at the date of the action.

Another instance in point is illustrated by *In re Marshall*.[36] There a testator who died domiciled in England in June 1945 by his will of April 1945 bequeathed certain legacies on the death of his wife to named cousins and if they predeceased his wife then to their children. The testator's widow died in 1955 predeceased by one of the named cousins. The question for the court was whether an adopted child of the cousin took as his child under the will. The cousin had emigrated to British Columbia and acquired a domicile there in 1912. In March 1945 he adopted the child in question. Under the law of British Columbia as it stood in 1945 an adopted child as regards matters of inheritance and succession only stood in the same position as a legitimate natural born child of the adopting parent "in regard to the legal descendants but to no other . . .". In 1953 the rights of an adopted child were extended in British Columbia and in 1956 the rights of an adopted child were equated with those of a legitimate natural born child. The court, citing *Lynch* v. *Provisional Government of Paraguay*, held that the status of the adopted child had to be ascertained in accordance with the law of British Columbia, as it stood in 1945.

The court's reliance on *Lynch* was misconceived because unlike that case *Marshall* did not involve a temporal question arising in relation to the *lex causae*. Succession to the testator's estate was governed by the law of domicile which was English law. In determining whether the adopted child took as a child under the English will the court espoused the rule of construction that "only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events

[34] *Timm* v. *Northumbrian Shipping Co. Ltd.* (1937) 58 Ll.L.R. 45.
[35] [1971] A.C. 356.
[36] [1957] 1 Ch. 507.

substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation".[37] It was thus necessary to look to the law of British Columbia as the datum upon which the English rule for ascertaining the intention of the testator depended. The law of British Columbia was not the *lex causae* it was datum which the *lex causae*, English law, considered relevant. Not surprisingly the court held that the law of British Columbia had to be considered as it existed at the date of the testator's death in 1945.

CHANGES IN THE FORUM'S CONFLICTUAL RULE

Time questions also arise as a result of changes in the private international law rules of the forum. Such changes may result from judicial decision or legislation which, in the case of the latter, either alters the prevailing common law rule or a prior statutory rule. The two main questions concern the operation of the new rule in relation to prior acts and circumstances and its relationship to the old rule.

(a) Operation of the new rule

The question here is not as to the date of the commencement of the new rule, which will be immediate in the case of judicial decision and always stated in the case of statutes, but rather whether once having commenced the new rule applies to prior acts and circumstances and thus has a type of retrospective operation. For example assume that in January 1979 the Victorian Parliament enacts legislation which commences in that month. The legislation provides that the proper law of a contract is the law of the place of contracting and no regard shall be had to any stipulation in the contract to the contrary. X and Y have concluded a contract in July 1978 in Victoria but the governing law is stated to be that of New South Wales. In an action on the contract in September 1979 brought in Victoria how is the court to ascertain the proper law of the contract? Does the legislation extend to the contract at hand, which was concluded before its enactment, or is the common law choice of law rule still applicable to contracts concluded before January, 1979? In answering this problem the situation of changes resulting from statutes and changes resulting from judicial decision will be separately considered.

(i) Statutes. Where the new rule is contained in a statute the statute will usually prescribe its operation in the sense outlined above. Thus s. 104 of the *Family Law Act* 1975 (Cth.), which deals with the recognition of foreign divorces and annulments, prescribes, in sub-s. (10) that "the preceding provisions of this section apply in relation to dissolutions and annulments effected whether by decree, legislation or otherwise, whether before or after the commencement of this Act . . .". Hence the recognition rules set out in the Act apply the decrees obtained prior to the commence-

[37] [1957] 1 Ch. 507, 523.

ment of the Act. In contrast Part IA of the *Wills Act* 1958 (Vic.), dealing with the formal validity of wills and inserted into the Act by the *Wills (Formal Validity) Act* 1964 (Vic.), is expressed, in s. 20A(4), not to apply to the will of a testator who died before the commencement of the 1964 Act.

The *Domicile Act* 1978 (Vic.), which is not yet in operation, enacts significant changes to the common law rules for ascertaining a person's domicile. It is provided in s. 4(1) that the domicile of a person at a time before the commencement of the section shall be determined as if the Act had not been enacted. Section 4(2) provides that the domicile of a person at a time after the commencement of the section shall be determined as if the Act had always been in force. The latter provision makes it clear that a person's domicile at a point of time after the commencement of the Act is not ascertained in accordance with the common law rules up to its commencement and thereafter in accordance with the statutory rules. Rather, the statutory rules are applied at the outset.

If a statute is silent as to its transitional or temporal operation the normal rules of statutory construction of the *lex fori* would apply. In Anglo-Australian law there is a rebuttable presumption that a statute is not intended to have a retrospective effect unless it is procedural or declaratory.[38] Of course this is no more than a general presumption which being rebuttable will necessitate an examination of the statute concerned to see what the particular rule should be for it. There is an immense Continental literature on this aspect of the time factor. Included are suggestions that private international law is different to other areas of local law and should not be subject to the same transitory or temporal rules. Some writers even suggest that the solution should not be found in the transitory rules of the forum but in those of the legal system to which the new conflicts rules refer.[39] It is extremely unlikely that an English or Australian court would look beyond its own transitory rules to construe a domestic conflictual principle. The local rule will be applied and it is doubtful, in view of the admittedly general and therefore flexible nature of the rule that a special approach would be adopted for conflictual statutes.

(ii) Common Law. Decisional law is retrospective in operation. This may be based on the antiquated fiction that a judge merely declares the law and does not make it but the reality is that new judicial rules are not declared to be prospective only. Dicey and Morris cite the example of *Hornett* v. *Hornett*[40] where a foreign divorce obtained in 1924 was recognized under a new judge made rule expounded in 1967 in *Indyka* v. *Indyka*.[41] The new rule expounded in 1967 was therefore retrospective in operation.

[38] Dicey & Morris, op. cit. 40.
[39] See generally Rabel, op. cit. vol. 4 pp. 505-519.
[40] [1971] P. 255.
[41] [1969] 1 A.C. 33.

The case of *Indyka* v. *Indyka* itself involved a slightly different temporal problem. In that case the House of Lords held that a foreign divorce qualified for recognition under a new rule which their Lordships propounded—the petitioner in the foreign proceedings had a real and substantial connection with the foreign country concerned. But three of their Lordships, Lord Morris of Borth-Y-Gest, Lord Pearson and Lord Pearce, also thought that the divorce qualified for recognition under the rule enunciated in *Travers* v. *Holley*.[42] In essence the rule in that case, as elaborated in *Robinson-Scott* v. *Robinson-Scott*,[43] is that a foreign divorce will be recognized if facts existed when the foreign court assumed jurisdiction which would have enabled the forum's court to assume jurisdiction in like circumstances. The foreign divorce in *Indyka* had been obtained by the wife in Czechoslovakia January 1949. At that stage the wife had been resident in Czechoslovakia for 3 years. English courts were also competent to assume jurisdiction in divorce on the basis of a wife's three years residence but the difficulty of recognizing the decree under the *Travers* v. *Holley* principle was a temporal one. Three years residence had only been introduced as a domestic jurisdictional ground in England in 1949 *after* the Czech decree had been pronounced. Latey J. at first instance refused to give the recognition rule a retrospective operation but the Court of Appeal and a majority of the House of Lords held that it could apply.

It will be observed that the temporal question in *Indyka* did not relate to the general operation of the rule in *Travers* v. *Holley* which in any event had been in operation since 1953. It related to its specific operation in regard to a particular domestic basis of jurisdiction which was one of the recognition principles adopted by the general rule.

(b) Relationship between the old and the new rules

A second question which arises is whether the new rule excludes the old rule or whether the two co-exist together. This strictly speaking is probably not a temporal question except in so far as an exclusive new rule terminates an old rule at a particular point of time. However as it relates to the relationship between the new and old rules it can be conveniently noted here.

(i) Statute. Where the new rule is contained in a statute, the statute will usually contain an express provision in point indicating whether or not the old rule is repealed.[44] Sometimes however the statute is silent with occasionally curious results.[45]

[42] [1953] P. 246.
[43] [1958] P. 71.
[44] See e.g. *Foreign Judgments Act* 1962 (Vic.) s. 9.
[45] See the discussion in Dicey & Morris, op. cit. 40-41 of s. 8(1) of the *Legitimacy Act* 1926 (U.K.).

In Australia the relationship between the old and the new rules has not been free from difficulty. Take for example the rules relating to the recognition of foreign divorces. The common law rules were largely codified in s. 95 of the *Matrimonial Causes Act* 1959 (Cth.). With its repeal, the new *Family Law Act* 1975 (Cth.) set out quite new recognition rules in s. 104. In addition to the prescribed recognition rules there set out, the common law rules were expressly saved.[46] Under the statutory rules it is quite clear that the applicant's possession of nationality in the overseas country where the decree was obtained is not by itself a sufficient basis for recognition. Nationality must be coupled with ordinary residence in the overseas country[47] or other special circumstances.[48] On the other hand Australian courts are competent to dissolve a marriage on the basis of the applicant's Australian citizenship alone without the further factors of residence etc.[49] The common law recognition rule enunciated in *Travers* v. *Holley*[50] would therefore seem to require the recognition of foreign divorces decreed on the basis of the applicant's nationality alone. This of course is implicitly inconsistent with the express wording of the new statutory rules.[51]

(ii) Common Law. Changes brought about by judicial decision may or may not be exclusive. New rules relating to the recognition of foreign decrees and judgments are usually cumulative and do not purport to impair the continued operation of old rules. On the other hand changes to choice of law rules which depart from a former approach are usually construed in an exclusive way.

LOCALIZING THE CONNECTING FACTORS

Where the connecting factor contained in the forum's private international law rule is of variable kind and can change from time to time it must be localized at a particular time. Thus if a choice of law rule refers a question to the law of a person's domicile, the domicile must be ascertained at a particular point of time because the person may have different domiciles at different times. Again, as a person may have different residences at different times, a jurisdictional rule predicating competence on residence must be localized at a particular point of time. This is purely a function of the *lex fori* because it concerns the interpretation and definition of the forum's private international law rules. Of course some connecting factors are by their very nature invariable and this aspect of the time factor can not arise in relation to them. The outstanding example, of course, is the

[46] *Family Law Act* 1975 (Cth) s. 104(5).
[47] *Family Law Act* 1975 (Cth) s. 104(3).
[48] *Family Law Act* 1975 (Cth) s. 104(3)(f).
[49] *Family Law Act* 1975 (Cth) s. 39(3).
[50] [1953] P. 246.
[51] For a fuller discussion of the problem see Sykes & Pryles, op. cit. 271-273.

situs of an immovable. However many connecting factors are variable and thus raise the time question. Examples include the domicile, nationality, residence or presence of persons or things (such as ships) and the situs of a movable.

The question of the time of localization of a connecting factor can arise in any area of private international law where a variable connecting factor is used and may concern jurisdiction, choice of law or the recognition of a foreign judgment. If the relevant private international law rule is contained in a statute the problem may be solved by reference to an express provision in the statute itself. Thus the jurisdictional bases for recognizing foreign divorces and annulments set out in s. 104(3) of the *Family Law Act* 1975 (Cth.) must exist "at the relevant date" which is defined in s. 104(1) as the date of the institution of the proceedings. On the other hand the common law rules saved by s. 104(5) are not caught by the same statutory definition and the common law temporal rule would apply. It, in any event, selects the same time—the date of the institution of the proceedings.[52]

Where there is no statutory guidance as to the time of localizing the connecting factor it is for the courts to resolve the matter. In some areas the question is unsettled and indeed is highly controversial. An instance is the rule referring the capacity to make a will to the law of the deceased's domicile. It is unclear whether this relates to domicile at the time of execution of the will or at death.[53] In this context the time question is only one facet of the more general question of what is the most appropriate conflictual rule.

Another unsettled area is that of *in personam* jurisdiction at common law. It is undoubted that a court has jurisdiction in an action *in personam* if the defendant is present in the forum.[54] But the precise time at which presence must exist in order to found jurisdiction has occasioned some argument. The two views are that the defendant must be present at the time of the issue of the writ or alternatively at the time of service. In *Laurie* v. *Carroll*[55] the High Court reviewed this temporal question at some length but did not have to express a concluded view because the defendant was not present within the jurisdiction at either time.[56]

ASCERTAINING THE CONNECTION

Once the time is known at which the connecting factor must be localized a further question arises. Is the court in localizing a connecting factor at a

[52] *Gane* v. *Gane* (1941) 58 W.N. (N.S.W.) 83.
[53] See Sykes & Pryles, op. cit. 453-454.
[54] See e.g. *H.R.H. Maharanee Baroda* v. *Wildenstein* [1972] 2 Q.B. 283 (C.A.); *Colt Industries Inc.* v. *Shaw Sarlie (No. 1)* [1966] 1 W.L.R. 440.
[55] (1958) 98 C.L.R. 310.
[56] For a fuller discussion see Sykes & Pryles, op. cit. 21; see also *Myerson* v. *Martin* [1979] 3 All E.R. 667.

particular time confined to looking at facts and circumstances which exist at that time or can subsequent facts and circumstances be taken into account. This is a discrete question which does not appear to have been noticed in any of the English writings on the time factor but it has arisen in the cases. It must be emphasised that this question while it closely relates to the last time factor discussed above is distinct from it. The time of localizing a connecting factor is *purely a question of law* involving the definition and true meaning of the forum's rule of private international law. The fourth question can only arise once the time is known and raises a temporal question of which *facts and circumstances* are relevant in ascertaining the connection at the stated time.

The question has arisen in the area of domicile. In a series of cases, English and Australian courts have held that in ascertaining the domicile of a person at a particular time, which involves determining his intention at that time, regard may be had not only to conduct and acts before and at the time but also to conduct and acts after the time.[57] However in none of these cases was reference made to *Bell* v. *Kennedy*[58] on this point. There it was held that the person concerned had not acquired a domicile of choice in Scotland at the relevant time, his wife's death, because it was uncertain whether he would purchase an estate in Scotland, England or elsewhere. But their Lordships were in no doubt that after his wife's death, when an estate was purchased in Scotland, he did acquire a Scottish domicile of choice.[59]

In truth perhaps no general rule can be laid down. If subsequent facts and circumstances appear to relate to a persons intention at the prior time then they will be relevant. Thus if the husband in *Bell* v. *Kennedy* had made a statement to a friend *after* his wife's death to the effect that from his first arrival in Scotland (prior to his wife's death) he intended to reside permanently in Scotland, this statement would be evidence of his intention on her death (unless, of course, it was deliberately self-serving). On the other hand the actual evidence in *Bell* v. *Kennedy* up to the wife's death was inconclusive. The subsequent purchase of an estate did not necessarily bear on his intention at that time but only at the time of the purchase itself. It seems therefore that the court has some discretion in looking to subsequent facts and circumstances but it should only do so with considerable caution.

This aspect of the time factor has also arisen in relation to the recognition of foreign divorces. Under the rule enunciated in *Indyka* v. *Indyka*[60]

[57] See *Hyland* v. *Hyland* (1971) 18 F.L.R. 461, 467; *Lee* v. *Commissioner of Taxation* (1964) 6 F.L.R. 285, 294; *Attorney-General* v. *Yule and Mercantile Bank of India* (1931) 145 L.T. 9, 13; *Re Grove* (1889) 40 Ch.D. 216, 242 (C.A.).
[58] (1868) L.R. 1 Sc. & Div. 307.
[59] Ibid. 312.
[60] [1969] 1 A.C. 33.

a foreign divorce will be recognized if there was a real and substantial connection between the petitioner or the respondent and the foreign jurisdiction. The time at which the connecting factor ("real and substantial connection") must *be* localized is that of the institution of the proceedings.[61] In determining whether a real and substantial connection existed at that time there are dicta to the effect that subsequent events can be taken into account.[62]

On the other hand in the area of contracts the position is probably otherwise. In ascertaining the proper law of a contract only facts and circumstances which existed at the date the contract was made can be looked to. Thus in *James Miller & Partners Ltd* v. *Whitworth Street Estates (Manchester) Ltd*[63] Lord Reid remarked:

> "It has been assumed in the course of this case that it is proper, in determining what was the proper law, to have regard to actings of the parties after their contract had been made. Of course the actings of the parties (including any words which they used) may be sufficient to show that they made a new contract. If they made no agreement originally as to the proper law, such actings may show that they made an agreement about that at a later stage. Or if they did make such an agreement originally such actings may show that they later agreed to alter it. But with regard to actings of the parties between the date of the original contract and the date of Mr Underwood's appointment I did not understand it to be argued that they were sufficient to establish any new contract, and I think they clearly were not. As I understood him, counsel sought to use those actings to show that there was an agreement when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."

Because of the consensual nature of a contract, because as Lord Reid said[64] "the question is not what the parties thought or intended but what they agreed", the localization of the connecting factor in contracts can only proceed on the basis of facts and circumstances known at the time the contract was made. In other areas such as domicile and the recognition of foreign decrees the courts have been more flexible. Yet in these areas great caution must be exercised in looking at subsequent facts and circumstances lest the time of localizing the connecting factor itself be changed. Only facts and circumstances which in some way relate back to the prior time can legitimately be regarded.

[61] *Alexander* v. *Alexander* (1969) 113 S.J. 344.
[62] *Law* v. *Gustin* [1976] Fam. 155, 160; *Welsby* v. *Welsby* [1970] 1 W.L.R. 877, 878-879.
[63] [1970] A.C. 583, 603.
[64] In the sentence immediately preceding the passage reproduced above.

CONCLUSION

A number of temporal questions arise in private international law which form a coherent topic of study in themselves. The time factor is as intriguing and subtle as any of the long exposed techniques of the subject. But unlike the traditional choice of law questions and the doctrines of renvoi and the incidental question, the time factor arises on a different plane and gives a second dimension to private international law. It is a further demonstration that a subject as old as private international law is yet full of many not fully explored problems of challenging intellectual dimensions.