CURRENT DEVELOPMENTS

STOLEN PROPERTY IN THE CONFLICT OF LAWS

To those schooled in the common law tradition it is a basic principle of the law of personal property, expressed in the maxim *Nemo Dat Quod Non Habet*, that a purchaser of goods acquires no better title to them than that of his vendor. Although there are a number of exceptions it has been widely accepted that in the clearest imaginable case where such goods are stolen from their original owner neither a purchaser from the thief nor any successor in title can resist an action for their recovery brought by the original owner or another party claiming through him.[1]

The recent decision of Slade J., on a preliminary point of law, in *Winkworth* v *Christie, Manson & Woods Ltd*, [1980] 1 All E.R. 1121, is a useful reminder that this principle is not universally accepted and in appropriate circumstances will not necessarily be applied by the English courts.

The facts as agreed by the parties to the action were that the plaintiff, Winkworth, domiciled and ordinarily resident in England, was the original owner of a large number of Japanese works of art. These were stolen in England from his lawful possession, taken to Italy, and subsequently sold there to the second defendant, Dr Paolo Dal Pozzo D'Annone, an Italian national and resident. The second defendant later delivered the art works ("the goods") to the first defendants in England for auction by Christie's on his behalf.[2] After some of the goods had been sold at auction the plaintiff became aware that they were his former property and he sought and was given undertakings by Christie's that they would part with neither the proceeds of sale nor the balance of the goods pending resolution of the evident dispute as to title between the plaintiff and the second defendant. The plaintiff thereupon issued proceedings against the defendants seeking:

1. a declaration that the goods had at all material times been the property of the plaintiff;
2. an injunction restraining Christie's from accounting to Dr Annone for the proceeds of completed sales, and from selling or parting with possession of the balance of the goods in their possession;
3. an injunction restraining Dr Annone from receiving in any way any part of the proceeds of sale, and from selling or parting with possession of any of the goods in his possession;
4. an order for the return of the goods in the defendants' possession or control, or their value; and

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[1] e.g. *Rowland* v *Divall* [1923] 2 K.B. 500; *Staffs General Guarantee Co.* v *British Wagon Co.* [1934] 2 K.B. 305; *Elwin* v *O'Regan and Maxwell* [1971] N.Z.L.R. 1124.

[2] It is not clear how much time elapsed between the theft and the eventual return of the goods to the jurisdiction, a factor which could prove material in some circumstances: see e.g. Limitation Act 1955, s.5. The action would seem to be one of the last common law suits in detinue and conversion before the Torts (Interference with Goods) Act 1977 came into force in England.

5. damages for detinue or conversion.[3]

The plaintiff's action being founded in detinue and conversion he had to establish that, at the time of the detention or conversion, he had either actual possession of the goods or the immediate right to possession of them. At the time of the second defendant's purchase in Italy the plaintiff's actual possession of the goods had already been lost by reason of the prior theft; the plaintiff could therefore only succeed if he could establish an immediate right to possession of the goods. It can scarcely be disputed that had the above facts arisen exclusively within the English jurisdiction the plaintiff would have succeeded on all five demands.[4] "In the development of our law," said Lord Denning in an oft-cited passage from *Bishopgate Motor Finance Corpn* v *Transport Brakes Ltd* [1949] 1 K.B. 332 at 336-7, "two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a better title." The clear policy of the common law has been to prefer security of title over security of transaction, the recognition of the latter being confined to a few narrow exceptions to the *Nemo Dat* principle.

Italian law, however, does not attach such fundamental importance to the protection of original title in the sale of goods, favouring instead the confirmation and protection of the property interest of the innocent purchaser. The defendant purchaser averred that "under Italian law a purchaser of movables acquires a good title notwithstanding any defect in the seller's title or in that of prior tranferors provided that (1) the purchaser is in good faith at the time of delivery, (2) the transaction is carried out in a manner which is appropriate, as regards the documentation effecting or evidencing the sale, to a transaction of the type in question rather than in some manner which is irregular as regards documentation and (3) the purchaser is not aware of any unlawful origin of the goods at the time when he acquires them". The defendant claimed that all the foregoing conditions were in fact met in his own purchase of the goods, and accordingly he had by that act acquired under Italian law a recognisable title which defeated the prior English title of the plaintiff. The accuracy of the defendant's summation of Italian law was not put in issue and it was common ground that until the sale and purchase in Italy nothing had occurred which might in any other way have destroyed the plaintiff's original right to immediate possession of the goods.

The facts thus nicely raised a conflict between the English and the Italian principles of property law as they apply to movables; at English law the title of the original owner was not defeated by that of a bona fide

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[3] The balance of the goods were in fact later sold with the plaintiff's consent and the proceedings against Christie's discontinued before the present hearing. The sales are irrelevant to the issues under consideration.

[4] As to the liability of an auctioneer for conversion see *Cochrane* v *Rymill* (1879) 40 L.T. 744, *Barker* v *Furlong* [1891] 2 Ch. 172. The plaintiff would also have been able to recover the works of art already sold from their purchasers: *Lee* v *Bayes and Robinson* (1856) 18 C.B. 599, 139 E.R. 1504 (also holding that a public auction is not a market overt); in such cases the plaintiff may have to elect which remedies to pursue: see e.g. the discussion by Goode, The Right to Trace and its Impact on Commercial Transactions, (1976) 92 L.Q.R. 360, 528 at 541-545.

purchaser without notice from a thief (directly or by derivation) whereas at Italian law it was.[5]

The present proceedings were heard solely on the preliminary point of law whether, on the basis of the agreed facts, title to the goods should be determined by the English or the Italian domestic law. (The phrase "title to" in the form of the order for trial of the preliminary issue was construed by Slade J. as meaning "the immediate right to possession of", a distinction he thought of little or no practical significance on the facts.)

Slade J. eventually decided that the issue of title fell to be determined in accordance with Italian law; that is to say, in proceedings brought in the English jurisdiction the legal significance of the events occurring in Italy (and constituting the defendant's supposed acquisition of superior title) was a matter for determination by Italian law. In the course of his decision several matters arose which warrant consideration.

The principle in Cammell v *Sewell*: The validity of a transfer of a tangible movable, and its effect on the proprietary rights of parties interested in it, is stated by Dicey and Morris[6] as governed by the law of the country where the movable is at the time of the transfer (the lex situs). Any title so acquired will be recognised as valid in the English Conflict of Laws, although the goods are later removed from the *situs*, until displaced by a new title acquired in accordance with the law of the country to which they are removed. After an uncertain beginning these principles were expressly approved by the majority of the Court of Exchequer Chamber in *Cammell* v *Sewell*,[7] adopting the formulation of Pollock C.B. in the lower court that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere".

In *Cammell* v *Sewell* a vessel carrying timber was insured with the plaintiffs was wrecked off the Norwegian coast. The master of the vessel, acting in accord with Norwegian law, sold the timber to an innocent Norwegian purchaser who subsequently shipped the timber to England and sold it in turn to the defendants. Although at English law the vessel's master would have no such authority to deal with cargo, the defendant's title was held to be unimpeachable. The Court of Exchequer Chamber was also of the opinion that a good title having been acquired in Norway, the circumstance that the timber later came into the English jurisdiction could in no way affect such title.

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[5] There is no obviously "right" or "wrong" answer to the problem of unauthorised dealings with another's property, either way an innocent party (the original owner or the unsuspecting purchaser) will suffer. An interesting comparative summary of the practice of major jurisdictions is to be found in the Appendix to the Scottish Law Commission's Memorandum No. 27 *Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer of Another's Property.*

[6] *Conflict of Laws* (9th ed.) at p.534. Rules 81, 82. See also: Cheshire & North, *Private International Law*, (10th ed.) pp.520-36: Morris, *The Conflict of Laws*, pp.307-323; Sykes & Pryles: *Australian Private International Law*, pp.373-427; Nygh, *Conflict of Laws in Australia*, (3rd ed.) pp.399-435; Lalive, *The Transfer of Chattels in the Conflict of Laws* (1955); Zaphirou, *The Transfer of Chattels in Private International Law* (1956); and, Morris, *The Transfer of Chattels in the Conflict of Laws*, 22 B.Y.L.L. 232.

[7] (1860) 5 H. & N. 728, 157 E.R. 1371. Authority for the lex situs principle can be found as early as *Inglis* v *Usherwood* (1801) 1 East 515.

This principle has been widely followed in a number of instances by courts in England, Canada, Australia and the United States. Two later cases were particularly relied upon by Slade J. as furnishing, with *Cammell* v *Sewell* itself, a clear statement of the accepted law against which the plaintiff's submissions should be reviewed. *Todd* v *Armour*,[8] a decision of the Scottish Court of Session, bore a strong resemblance to the present facts. In that case the plaintiff was the original owner of a horse which had been stolen from him in Ireland and there sold in market overt to a bona fide purchaser for value. The purchaser then took the horse to Scotland and sold it to the defendant. The plaintiff sought recovery of the horse, relying upon Scottish law under which an irremovable "vitium reale" attaches to stolen property. The approach adopted by the Court of Session, consistent with *Cammell* v *Sewell*, was that the purchaser in the Irish market overt, the lex situs of that particular transaction, thereby acquired a demonstrably *indefeasible* title at Irish law. By the conventional reasoning of derivative title the defendant therefore acquired an equally good title through the later sale. Although at least one judge of the court thought the Scottish system of irremovable "vitium reale" a more desirable approach to title problems the vendor's title had nevertheless an unassailable status before Scottish law ever became applicable to the property.

The third case considered was the English Court of Appeal's decision in *Embiricos* v *Anglo-Austrian Bank*[9] where a cheque drawn in favour of the plaintiffs, in Roumania, was the same day specially endorsed by them in favour of a London company and placed, with an accompanying letter, in an envelope addressed to that company. Before posting, the cheque was stolen by one of the plaintiff's clerks. The cheque was later presented at a bank in Vienna bearing a purported endorsement by the London company, but which was in fact a forgery. Acting in good faith and without negligence the Vienna bank cashed the cheque and then in their turn endorsed it to the defendants, a London bank. The plaintiffs failed in an action for wrongful conversion of the cheque. By Austrian law the holder of a cheque bought bona fide without gross negligence and for value was entitled to the proceeds of the cheque against all the world notwithstanding that the cheque had been previously stolen and notwithstanding that the endorsement had been forged. Both Walton J. at first instance and the Court of Appeal were of the opinion that, these conditions being met at the time the cheque was presented to them ,the Vienna bank had thereupon acquired a good indefeasible title which had been duly assigned to the defendant. It was treated as settled by the earlier decision of the Court of Appeal in *Alcock* v *Smith*[10] that the *Cammell* v *Sewell* principle applied not merely to movables but equally to negotiable instruments. At first instance Walton J.[11] supported his decision by analogy with the "indisputable" position of ordinary chattels: "So if goods are sold in Vienna so as to give a good title to them, then that title will be held to be good in England, although the goods might have been previously stolen, and although

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[8] (1882) 9 R(Ct of Sess) 901.

[9] [1905] 1 K.B. 677.

[10] [1892] 1 Ch. 238.

[11] [1904] 2 K.B. 870 at 874.

the sale in England (not being in market overt) would not have given a title".

What these authorities clearly demonstrated was: (i) a clear acceptance of the lex situs as the proper determinant of a transaction's effect upon the ownership of goods; (ii) a refusal to ascribe significance to the mere fact of presence of the goods later in a particular jurisdiction, whether the forum or not; and (iii) a disinclination to assess, by comparison with the domestic law of the forum, the merits or sufficiency of the acts accepted by the lex situs as sufficient to affect the proprietary rights in the goods.

Two proposed exceptions: In the face of the obvious similarities of fact with the above decisions and the wide affirmation of the *Cammell* v *Sewell* principle[12] the plaintiff conceded that as a *general* rule the validity of a transfer of movables as it affects title to the goods is governed by the lex situs, and that this *prima facie* rendered Italian law the relevant law to resolve the issue now before the court.

Two avenues of escape, however, from the general rule were proposed by the plaintiff in reliance upon certain particular circumstances which cumulatively gave the case a strong association with the English jurisdiction: the goods were originally in England at the time of the theft, in the ownership and lawful possession of a person domiciled in England; the plaintiff neither knew nor consented to their removal from England; the goods had been voluntarily returned to the jurisdiction; and it was an English court which was now hearing the matter. On the strength of these factors it was suggested that the *lex situs* should be treated as English, or alternatively, Italian law should not be applied as a matter of public policy.

The location of property is properly a matter for the forum to determine[13] and the plaintiff submitted that, although undoubtedly for some purposes the location of the property must be treated as Italian, as between himself and the Italian purchaser for the purpose of assessing their respective proprietary claims the location should be treated as remaining English throughout—the indisputable physical presence of the goods in Italy being no more than a "spurious connection". Counsel was unable to cite authority in support of this concept of notional *situs*, and faced of course the insuperable difficulty of several authorities, including *Cammell* v *Sewell* itself, where the goods had similarly found their way into the foreign jurisdiction without the original owner's knowledge or consent. Viewed impartially, commonsense would dictate that the later physical presence of the goods in the second defendant's juristdiction was anything but spurious to him, and entitled to as much weight as their earlier history in fixing their situs at the time of his purchase. The judge quite properly concluded that "intolerable uncertaintly in the law would result if the court were to permit the introduction of a wholly fictional English *situs*". In this area of the law enough problems exist as it is with attempts to attribute a *situs* to

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[12] The principle has been twice approved by the House of Lords: *Inglis* v *Robertson* [1898] A.C. 616 (Sc.) and *Castrique* v *Imrie* (1870) L.R. 4 H.L. 414, in which Blackburn J. remarked at p.429 that the universality of a judgment in rem over chattels may be in truth but a branch of the more general *Cammell* v *Sewell* principle. See also *Hardwick Game Farm* v *Suffolk Agricultural Poultry Assn* [1966] 1 W.L.R. 287, 330 (C.A.); aff'd [1969] 2 A.C. 31 (H.L.).

[13] *Rossano* v *Manufacturers' Life Insurance Co.* [1963] 2 Q.B. 352 at 379-380; and see Nygh, op cit, pp.404-411.

intangible property without extending these difficulties to what should be a straightforward factual enquiry in the case of tangibles.[14] Counsel appears to have resisted the temptation to suggest that the *present lex situs* of the goods at the time of trial should be relevant. The practice of the English courts ,expressly set down by the Exchequer Chamber in *Cammell* v *Sewell* and recognised by Slade J., is to limit any enquiry into the title of property to specific events supposedly effecting a change. Subsequent changes in the location of the goods cannot be permitted to qualify their effect.[15]

Unable to exclude the operation of Italian law as the *lex situs,* counsel next sought to persuade the court against applying it as a matter of policy. Public policy is one of the recognised exceptions to the application of the *lex situs,*[16] but in this sense is used to mean that the *content* of the actual rules of Italian law which would confer title upon the innocent purchaser is so repugnant to justice and morality that an English could should not lend its aid to their recognition or enforcement.[17] In *Cammell* v *Sewell* itself, Byles J. dissenting from the majority decision (but perhaps not necessarily disagreeing with the basic principle upon which they had relied) did so on the footing that the actual Norwegian rule in question was repugnant to the general maritime law of the world, a view not shared by the majority. "I think," he said, "the comity of nations would not recognise a law of this character." It was not this well-established concept of public policy upon which the plaintiff sought to rely. He proposed instead a further exception to *Cammell* v *Sewell,* founded in policy, but requiring the court to consistently apply the law of country A where goods are there stolen or unlawfully taken and subsequently removed into country B and dealt with without the owner's knowledge or consent, and then returned voluntarily to country A. The elements of this proposal bear a marked identity with the facts of the case and counsel again could produce no authority in support (nor is there direct authority against it). Such an exception would be directly contrary to the consistent policy of the English courts

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[14] c.f. Lalive, op cit., at pp.46-47: "to contend the contrary seems rather a metaphysical position than a practical and legal truth." Certain passages of their Lordships' judgments in *Hardwick Game Farm* v *Suffolk Agricultural Poultry Assn* [1969] 2 A.C. 31 suggest that in consensual transactions with a substantial English character the passing of property might be governed by English law, not the lex situs; see e.g. pp.86-87, 102, 121-122, and 128.

[15] If the foundation of the principle is that the lex situs of the goods alone should determine what property rights can exist with respect to movables it could be argued that the law of the country where the movables are from time to time should determine the presently recognised inteests in them. The present lex situs may, however, be fortuitous and of no significant connection with the facts.

[16] The others are: (i) where goods are in transit and of unknown or casual *situs* (*semble* the proper law of the transfer applies); (ii) lack of *bona fides* on the purchaser's part; (iii) peremptory statutory provisions of the forum; and (iv) general assignments of movables on bankruptcy and succession.

[17] As e.g. in *Kaufman* v *Gerson* [1903] 2 K.B. 114. Similarly in *Oppenheimer* v *Cattermole* [1976] A.C. 249: "To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all." *per* Lord Cross at 278. This is one possible interpretation of *Simpson* v *Fogo* (1863) 1 Hem & M. 195 where the court refused to recognise a proprietary decree of the Louisiana *lex situs* on account of its "perversity" in ignoring "universal" choice of law rules.

since *Cammell* v *Sewell* of referring to the *lex situs* of the goods the choice between the principle of protection of original title (security of title) and the principle of protection of purchaser's title (security of transaction). None of the components of the proposal have, taken individually, found favour[18] and such force as it might have must be drawn from their compound effect.

When so viewed the proposed exception has the appearance of a plea that a British Court should not cause a British subject to suffer by the application to him or his property of a foreign law different in content from British law. This would be the antithesis of the function of the Conflict of Laws and such an exception, such a policy, would needs have to rest on a firm and compelling footing. Three considerations were raised to support such a view: (i) if at the time of the hearing the goods are situated in the forum and not in the *lex situs* there can be no objection to a departure from the conventional rule on the grounds of the possible ineffectiveness of the decree. The relevance of this may be questiond on at least three counts. First, the onus in proposing an exception is on the plaintiff to affirmatively show some reason for not applying the general *Cammell* v *Sewell* principle: the fact that the court might equally effectively approach the matter in some different way does not assist the plaintiff in that task. Slade J. rightly attached no force to this consideration for that reason. Secondly, the proposal misconceives the nature of the concept of "effectiveness" in the Conflict of Laws. This is better seen as a discretionary factor affecting the making of the order sought and not as a factor affecting the content of the choice of law rule entitling the plaintiff to relief; only where the desired order can be shown to be potentially ineffective would the question of alternative solutions arise. It is perhaps less certain now than formerly what importance will be attached by the Courts to the principle of effectiveness. Arguably it should now be applied as an onus upon the party opposing the particular relief sought to positively establish its actual worthlessness.[19] Thirdly, the suggestion (at least as it appears in the report of proceedings) does not sufficiently take into account the particular emphasis traditionally put upon the need for the forum in disputes over title to adopt an approach consistent with the lex situs of the goods in order to maximise the international enforceability of the court's decision.[20] (ii) It was also suggested that the lack of any voluntary act on the plaintiff's part leading to the connection of the goods with the Italian jurisdiction should be treated as a relevant factor. Supported only by minor American authority[21] the plaintiff again foundered on the rock of *Cammell* v *Sewell*, and the *Embiricos* decision. While it would no doubt ill-become a party who had consented to his goods' removal to a foreign jurisdiction to later object to their being dealt with in accordance with that law, these authori-

[18] The fact the goods are stolen in England cannot be significant, English domestic law clearly contemplates that title may be lost following theft, e.g. by sale in market overt; removal from the jurisdiction without consent, and later return of the goods were rejected as immaterial in *Cammell* v *Sewell*.

[19] e.g. *Razelos* v *Razelos* (No. 2) [1970] 1 W.L.R. 392, 404-405; [1969] 3 All E.R. 929, 937.

[20] Lalive, op cit., at pp.29, 117.

[21] Beale, *Treatise on the Conflict of Laws* (1935), *Edgerly* v *Bush* (1880) 81 N.Y. 199: both subjected to criticism by Lalive, and Morris in the B.Y.I.L. article.

ties simply have not treated the manner in which the goods came into the jurisdiction as being in any way relevant—the only pertinent fact is the presence of the goods in the jurisdiction at the relevant time. (iii) In final support it was argued that the forum is justified in making an exception to *Cammell* v *Sewell* for the purpose of securing a title recognised by its own system of law. This was the only consideration which appeared to Slade J. to have any demonstrable merit. Nevertheless there is an element of circularity in the proposition: whether or not the title is recognised by the forum's "own system of law" is the issue before the court. If the expression means no more than the domestic law of the forum the proposition is then reduced to the assertion that the forum is entitled to disregard the choice of law process in order to avoid reaching a decision inconsistent with the principles of domestic law—an approach opposed to rather than in accord with the general policy of the law. To suggest that a title earlier acquired under the lex fori should have such mystical force as to thereafter prevail against all later dealings with the goods, irrespective of their situs, except for those actually countenanced by the lex fori, would make substantial inroads into the commonly understood application of the *Cammell* v *Sewell* principle to successive assignments, as well as introducing considerable uncertainty into the international business community.[22] Security of title is a double-edged concept—of equal importance to the innocent purchaser as it is to the innocent owner whose goods have been stolen. Although in the competition between security of existing title and security of title by transaction different societies may favour the one principle over the other as a matter of domestic law, "commercial convenience", said Slade J., "may be said imperatively to demand that proprietary rights to movables shall generally be determined by the *lex situs* under the rules of private international law". To do otherwise would put an intolerabe uncertainty upon the bona fide purchaser who relies upon the law of the place where the goods are situate at the time of purchase.[23] In *Cammell* v *Sewell* itself it was expressly recognised that the English law of market overt might appear harsh to a foreigner[24] but ,it was said, an English court would nonetheless expect a foreign court to apply the principle of *Cammell* v *Sewell* and recognise a title so acquired; if so, the court in this instance could scarce expect less of itself.

In the result therefore Slade J. rejected both proposed exceptions and found no reason for not applying the general principle which he thought was clearly and accurately stated in the following passage of Cheshire and North's *Private International Law*:[25] ". . . the proprietary effect of a particular assignment of movables is governed exclusively by the law of

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[22] Bearing in mind that the principle is widely applied to both chattels and negotiable instruments.

[23] ". . . the acquisition of a right in rem is something which concerns or may concern a great number of unknown strangers. As the place where a thing is situate is the natural centre of rights over it, everybody concerned with the thing may be expected to reckon with the law of such place." Wolff, *Private International Law* 2nd ed. (1950), at 520. "Business could not be carried on if that were not so" *per* Maugham J., *In re Anziani* [1930] 1 Ch. 407 at 420.

[24] As the former exceptions to Nemo Dat of "apparent possession" and distraint by a landlord might now appear to a New Zealander?

[25] 10th ed. (1979) at 527.

the country where they are situated at the time of the assignment. An owner will be divested of his title to movables if they are taken to a foreign country and there assigned in circumstances sufficient by the local law to pass a valid title to the assignee. The title recognised by the foreign *lex situs* overrides earlier and inconsistent titles no matter by what law they may have been created."

Italian Law: It is generally assumed[26] that the issue of acquisition of title to movable property is a category of choice of law to which the doctrine of *renvoi* applies, but direct authority is lacking. Lalive[27] was of the view that this must be so with *inter vivos* assignments in order to promote the efficacy of the order of the forum (i.e. its international acceptability) and for the maintenance of "security of trade" by which he meant the reasonable expectation of the parties in their reliance upon the lex situs of the goods as governing their legal rights.

The question as put to the court in *Winkworth* v *Christie, Manson & Woods Ltd* was whether English or Italian *domestic* law should be applied to determine title to the property in dispute. Slade J. contented himself with the answer that the question fell to be determined by "Italian law", admitting the possibility that evidence of Italian law might show that an Italian court would itself apply English law on the particular facts of the case, and "in this event I suppose it would be open to the plaintiff to argue that English law should, in the final result, be applied by the English court by virtue of the doctrine of *renvoi*".[28] The application of the doctrine of *renvoi* in this area had not been argued, and his comments are at best a recognition of its potential relevance. It has long been accepted that *renvoi* applies to cases of succession to movables,[29] and the approach in the American, Canadian, and Australian jurisdictions to the function of the lex situs in multiple assignment cases has been to take that enquiry beyond the domestic content of the *lex situs.*[30] It would be consistent with the objective of the basic *Cammell* v *Sewell* principle, as outlined above, that reference of a title problem to a foreign system of law should seek to apply as near as can be the solution which the foreign system would apply to the facts actually before the court.

Sale of Goods Act 1908, section 26: In reciting the exceptions to the *Cammell* v *Sewell* principle Slade J. alluded to the English equivalent of section 26 (Sale of Goods Act 1893, section 24: now repealed by the Theft Act 1968 U.K.) as a possible example of the exception of a statute

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[26] The texts referred to in note 8, supra, all support this view.

[27] op. cit. at 117.

[28] at 1136. Slade J. felt he could not answer the "domestic law" question for the further reason that Italian law might on examination prove unacceptable to the public policy of English law.

[29] e.g. *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377.

[30] see the cases listed in note [37] and *Goetschius* v *Brightman* 156 NE 660 (1927) (U.S.A.) Although the forum was also the place of the last transaction in these cases they proceed on the footing that the relevant principles of the lex situs are not automatically those applicable to comparable domestic cases.

of the forum which obliges the court to apply its own law.[31] The section provides that "Where goods have been stolen and the offender is prosecuted to conviction the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise."[32]

The suggestion is that if on the facts that occurred the thief was subsequently "prosecuted to conviction" then the court would be obliged to thereupon treat title to the goods as having revested in the original owner notwithstanding that an innocent purchaser might have otherwise acquired an indefeasible title through an intermediate dealing with the goods. The application of the section at domestic law is obscure enough;[33] sound reasons exist it is suggested for not giving the provision peremptory effect in conflictual cases. Whether the section is to have such effect is a question of statutory interpretation; the words used may, on their clear meaning, indicate that they are not confined merely to the domestic sphere.[34] The scope of S.26 in this sense is at best an open issue, and the inference to be drawn from S.60(2) of the Act is that except were expressly negatived the Act is to be read consistently with the established choice of law process.[35] Moreover such an interpretation should only be adopted to promote some particular manifest and fundamental policy of the legislation justifying the court in thus over-riding the general policy represented by the choice of law rule. Where, as here, that general policy is itself conceived of as of fundamental importance, the wording of the Act must be plain in its effect if it is to set it aside. In a broader perspective, whereas the original owner will in all probability in such cases have a measure of protection from loss by insurance, were the section to be applied in this way it would deprive the innocent purchaser of his property in the goods and probably leave him without any remedy against his predecessor in title had the purchase taken place (as in the present case) in a foreign jurisdiction which favoured security of transaction and hence would not recognise the vendor as being in any way in breach of warranty of title.

A stronger case might be made for its "international" application where, as in *Todd* v *Armour*, the goods are stolen in country A and there sold in market overt, an equivalent provision being part of the law of country A. The title so acquired by the purchaser, while generally sound, might be

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[31] a clear example of such an "over-riding" legislative provision is seen in *Razelos* v *Razelos* (No. 2), supra, where s.17 of the Married Women's Property Act 1882 (U.K.) was held to have conferred on the court a jurisdiction to make orders affecting title to matrimonial realty, which it would otherwise have lacked by reason of the general limitation in the rule in *British South Africa Co.* v *Companhia de Mocambique* [1893] A.C. 602.

[32] e.g. *Clouston* v *Bragg* [1949] N.Z.L.R. 1073; *Davey* v *Paine (Motors) Ltd.* [1954] N.Z.L.R. 1122.

[33] This aspect of s.26 is outside the scope of this note; the original owner will usually be able to rely on his title to recover stolen property without recourse to the section.

[34] e.g. as is the case with the Marriage Act 1955, s.3.

[35] "Save where expressly provided to the contrary, English rules of conflict of laws are preserved or not affected by the Sale of Goods Act 1893" *per* Slade J. at 1125.

treated as subject to a latent defect operable by the conviction in A of the thief; properly seen, however, this is no more than an application of the *Cammell* v *Sewell* principle, that the nature of the purchaser's title is determined by the lex situs of the goods.

Conclusion: The lack of favour with which the plaintiff's arguments were received indicates the depth of commitment of the common law to the principle that, primarily for reasons of commercial convenience and practical necessity, the creation or modification of proprietary interests (at least in property with identifiable form) is properly the concern of the *lex situs* of the goods. Nevertheless one may question whether one approach can satisfactorily cope with the diversity of problems of title that may arise. A simple distinction can be drawn for instance between problems about the validity of consensual transactions, where the original owner is a party to the transfer, and problems about claims to over-reaching interests. In the former the question may be merely whether in the circumstances property in the goods has yet passed to the transferee. In such cases is the contractual relationship between the parties, governed by its own proper law, to be ignored in favour of an unqualified application of the *lex situs* to the question?[36]

Claims to an over-reaching interest arise wherever the person claiming title as a prior owner in the proceedings before the court was neither a party to nor sanctioned the transaction supposedly giving rise to a better title in the later claimant, as for example where goods are sold in market overt, seized and sold by a landlord under a right of distress, or sold by a buyer or seller in possession or mercantile agent without authority. These are all examples of common law exceptions to the *Nemo Dat* doctrine readily accepted in English domestic law; of more significance in the present context is that they are examples of the conferral of paramount title on the purchaser by operation of law and not through the medium of a recognised transfer of an existing title. In the Conflict of Laws a claim to the acquisition of title under a foreign *lex situs* should be examined for the basis of the conferral, for although in paramount title situations no further enquiry might be required it does not follow that only the *lex situs* will be relevant where this is not so. Such a case would arise where the *lex situs* does not recognise the original owner's property interest and regards the purchaser in the *lex situs* as having acquired a sound derivative title from some other person whose "title" is recognised. It is arguable that in this instance the vendor's title if it arose outside the *lex situs* is not an issue for determination by the situs of the last dealing with the goods, the *lex situs* merely furnishing the principle that *if* the vendor has a recognis-

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[36] One solution would be to apply the proper law of the transaction between the parties but allow the lex situs to govern the expectations of innocent third-parties. In *Hardwick Game Farm* v *Suffolk Agricultural Producers Poultry Assn,* Diplock L. J. in the Court of Appeal ([1966] 1 All E.R. 309, 338-339) considered that irrespective of the proper law the passing of property must be determined by the lex situs; on the facts the House of Lords did not agree, see note [14] supra, cf. *In Re Craven's Estate* [1937] Ch. 423 where English law, as the law of the administration, was applied to ascertain the requirements of a valid gift *mortis causa,* but the *lex situs* of the property was applied to determine whether in fact there had been the necessary parting with control of the property.

able title that interest has properly passed to the purchaser.[37] The extent to which the English courts will relax the firm grip of the *lex situs* on title issues in such cases is uncertain, but where, as in *Winkworth* v *Christie, Manson & Woods Ltd,* the *lex situs* of the goods chooses in pursuit of its own policies to confer a paramount title upon a purchaser it appears inevitable that such title will be recognised to defeat an existing title recognised by the common law.

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THE CONTRACTUAL REMEDIES ACT 1979

A. General.

This Act, which came into force on 1 April 1980 and applies to all contracts made on or after that date, is the result of two reports of the Contracts and Commercial Law Reform Committee presented in 1967 and 1978 respectively. It is the most important and far reaching of that Committee's reforms in the field of general contract. Earlier legislation, such as the Illegal Contracts Act 1970 and the Contractual Mistakes Act 1977, cover situations which are relatively uncommon. The new Act will virtually become a practitioner's working manual, for it concerns misrepresentation and breach of contract. Allegations that one party has committed one or the other of these are at the heart of most contract disputes.

The law on misrepresentation and breach was ripe for codification. The old rules about misrepresentation were enormously complicated, and involved the courts in drawing distinctions which at times seemed to have very little to commend them as a matter of logic; they also occasionally led to unjustifiable anomalies. The law about discharge for breach was likewise a morass; the courts had over the years developed a confusing number of alternative tests, variously expressed, for determining whether one party could treat the contract as discharged because of the other's breach. It can of course be argued that in this situation, as in the case of misrepresentation, the very complexity of the law provided the courts with a well stocked armoury of equipment for arriving at the right result. There is something in this. In not many of the common law cases could one quibble with the justice of the result reached; it was rather that the route to that result was often tortuous and unnecessarily long. Occasion-

[37] The problem will arise e.g. where the lex situs does not recognise a property interest reserved under a *Romalpa* clause, credit sale, or by chattel mortgage. The problems inherent in multiple assignments and intervening changes in the situs of the goods are considered in detail by Sykes & Pryles, *Australian Private International Law* (1979) at pp.393-414. See also Morris 22 B.Y.I.L. 239. Similar problems have come before the Canadian courts, e.g. *Century Credit Corporation* v *Richard* (1962) 34 D.L.R. (2d) 291, *Price Mobile Home Centres* v *National Trailer Convoy of Canada* (1974) 44 D.L.R. (3d) 443, *Re Fuhrmann and Miller* (1977) 78 D.L.R. (3d) 284. See also *A. J. Smeman Car Sales* v *Richardson Pre-Run Cars* (1969) 63 Q.J.P.R. 150, *Taylor* v *Lovegrove* (1912) 18 A.L.R. (CN) 22. These cases recognise that a later *lex situs* may properly only derogate from an earlier title by a paramount title provision.