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Article : EU study on the international law of succession - critique of EU Europe's deployment of UK Report

25th September, 2015.

This is a critique of the application by continental lawyers of the United Kingdom Report insofar as it appeared to omit one important detail which therefore appears not to have been drawn to the attention of the institutions attempting to assimilate English law into the European Succession Regulation 650/2012.

Whilst a true and valid distinction is made in the Report between territorial jurisdiction and the empowerment jurisdiction, on which I will not comment here, the omission is simple to define. It may simply not have been an issue contemplated in the questionnaire forming the skeleton for the reply.

The law of England and Wales relating to the succession to foreign land / immovables

Prior to the Land Transfer Act 1897, otherwise referred to as the Real Representatives Law, there was no transfer to an executorship or appointment of a personal representative over English or foreign land. The common law functioned precisely on the basis inherited from the Normans, no doubt, that *le mort saisit le vif*, a concept referred to by the authors ot the Report. It required an act of positive law, that is statute, to change that position. That statute was known at the time as the Real Representative Act, but its statutory title is the Land Transfer Act 1897. In relation to land the Act only introduced the concept of a representative - executor of a will or personal representative - in relation to land in England and Wales, not to land in Scotland or then Ireland and certainly not beyond the realm.

This means, without fear of contradiction, that there is no such thing as an English executorship over land outside England and Wales. Simply put, the law of England and Wales does not require one and has not legislated for one to be able to function outside the effective territorial supervision of the English Courts.

I am surprised that certain solicitors of the now Supreme Court practiced in for example, child protection issues abroad are not aware of these matters of elementary jurisdictional limitations, and imagine some private international law mechanism is capable of extend these limitations without either the engagement of the English Courts themselves or for that mater by Statute.

Foreign land passes directly to the heirs and legatees as a matter of English law, not of renvoi. There is therefore no need for any foreign administration to invoke a *renvoi* back to English law

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involved as some notaries in France in complete ignorance are now pretending; ably assisted into that black hole by EU_Europe. Let us remain within the light of the law applicable and outside that mystical PIL singularity.

This position was clearly stated in Dicey in his comment on Rule 75 in the Second Edition to his Digest of the Law of England with Reference to the Conflict of Laws of 1908 at page 347:

"All the property of the deceased, whether it consist of immovables or of movables {i.e., of land, goods, or choses in action), which at the time of his death is locally situate* in England, passes to the English administrator, and this even though the property is not reduced into possession. Foreign lands or immovables, on the other hand, do not pass under the English grant (6)."*

Footnote 6 reads :

" This seems to follow from the Land Transfer Act, 1897, s. 1, taken together with the rules as to the incidence of probate duty, and the rules as to the jurisdiction of the Ecclesiastical Court, on which the incidence to probate duty originally depended. (See pp. 312-314, ante.) See Attorney -General v. Dimond (1831), I Cr. & J. 356, 370, judgment of Lyndhurst, C. B. "

It is clear, the English law in relation to foreign movables was that no executorship or representative was required. That has not been "repealed" or changed. Dicey is clear on that point. The legal position has not changed

I also cite a learned commentary by Amhurst Tyssen, a Barrister of the Inner Temple, at the time, on the Land Transfer Act 1897, which brings the issue or territorial application back to its Principal Act, the Land Transfer Act 1875 at page 14:

"There is no clause in the Act expressly limiting its effect territorially; but the Act begins with a recital, 'Whereas it is expedient to establish a real representative and to amend the Land Transfer Act 1875, in this Act referred to as the Principal Act". And section 26 runs :"This Act may be cited as the Land Transfer Act 1897, and shall be construed as one with the Principal Act". Now, in the second section of the Land Transfer Act 1875, we read, "This Act shall not extend to Scotland or Ireland". We therefore conclude that the Land Transfer Act 1897, also does not apply to either Scotland or Ireland."

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That logic remains one of authority and substance. By any reasoning it certainly did not and still does not apply outside the United Kingdom which at that time included England and Wales, Scotland and Ireland, prior to the latter's independence as to Eire.

In other words, it is a necessary conclusion that the old rule that *le mort saisit le vif* over immovable wherever situate, was not repealed by the 1897 legislation in relation to foreign immovables. It is only the law relating to realty, in other terms imovables, in England and Wales which is modified by the positive law enactments between 1897 and 1925. The Authors make no mention of that in their assessment of the territorial jurisdiction of the Courts within England and Wales, which is unfortunate. It is possible that the wording of the Questionnaire did not enable them to consider this point appropriate.

A copy of the 1897 Act and a summary of it can be found in a work by a certain Amherst Tyssen , of the Inner Temple, Barrister: "The Real Representative Law 1897 being Part I of the Land Transfer Act 1897 and a discussion on administration thereafter". Page 14 refers to the issue of territoriality in particular, and to the territorial restrictions on its Principal Act, the Land Transfer Act of 1875. to which the LTA 1897 is subject.

What is manifest is that the common law of England and Wales as to the devolution of realty on death prior the 1897 Act was in effect *le mort saisit le vif*.

What is more, whilst the 1897 Act did not have an express territorial limitation, left to later enactments consolidating it, it is clear from the language and terminology used, and the reference to the Land Transfer Act 1875, which did contain such a limitation, that the aim was to repeal and amend the law relating to the direct succession to land within the actual territorial jurisdiction of the English Courts and no further. The 1987 replaced the overall common law concept of *le mort saisit le vif* over land wherever situated, by specific administration but only limited to realty, land and Chattels real situated in England and Wales. That was subject to the limited territorial jurisdiction of the English Courts. The only manner in which an English court under the common law can extend its jurisdiction over assets outside its jurisdiction is by a covert and extremely difficult recourse to its inherent maritime jurisdiction enabling an English court to take jurisdiction over movable assets lost at sea. That has to be used in front of a Chancery Master when addressing the assets of a British child domiciled and resident abroad, at the request of a competent foreign "*juge des enfants*" seeking to ascertain the application of the law of the child's nationality. That that jurisdiction would defeat any logical attempt at analysis by a continental notary is entirely understandable

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I doubt whether there is any serious hope of invention of a continental concept of a Chattel Real, to which the English Parliament could be taken to have directed its attention, even in Scotland and Ireland, in its positivist enactment at its section 1 (a) nor for that matter the concept of real estate as defined at s.1(4) of the 1897 Act. However, given the inventiveness of certain academics attempting to create a Platonic cave of flickering private international forms, one cannot be certain that there will be any coherent understanding that each jurisdiction has its own fire, and will see the scope of its jurisdiction from a different perspective. That will lead to multiple sources of "forms" on the ceiling of the European cavern.

Those seeking to check this should read the unrepealed s.58 (3) of the Administration of Estates Act 1925 which limits the extent and therefore the application of the English Probate Court's jurisdiction over land to England and Wales. The Court would never have attempted to adjudicate the transfer of foreign land anyway - as an aside, any one who has had to deploy the Admiralty jurisdiction over foreign objects lost at sea outside the five mile limit in a hearing to enable and English Chancery master to consider adjudicating over a non resident English child's assets in France will be more than aware of this limitation on the English judicial function.

The structure of the English legislation as to the administration of estates, as distinct from successions whether by will or on intestacy can only be correctly understood and implemented from this jurisdictional viewpoint: unless it is sought to put new wine into that particular wineskin, with the inevitable consequences which that would entail.

The berating of his Chancery Colleagues by a Middle Templar Charles Dickens in Bleak House by reference to the hypothetical case of Jarndyce v Jarndyce should prompt the memory of those past times where debtors strove valiantly in the absence of a sealed debt to recover moneys owed by the deceased from his heirs and legatees. Why? Because prior to 1897, English realty - land/immovable - passed directly to the heirs or legatees who were not responsible for the debts of the deceased owner. Perhaps a degree in English literature might be of assistance to lawyers even in this age of digitalised "enlightenment". The fog in which Dickens depicted the Court of Chancery to be sitting in Lincoln's Inn prior to 1897 appears now to have emigrated to Calais and beyond under a particular form of EU anti-matter known as the freedom of ambulation of maladminstration and circumlocution.

What is the conclusion?

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Through incomplete communication of scholarship and learning, an opportunity to render the lives of British residents and nationals in Europe simpler has been lost through an incomplete analysis of the law, and if I dare say so, through mere force of habit. I am sure that there was no impetus from the solicitors involved to endeavour to recover jurisdictional ground beyond Calais lost to the English professions in the reign of Queen Mary!

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