

WEDNESDAY 25 NOVEMBER 2009

Present

Bowness, L (Chairman)
Burnett, L
Kerr of Kinlochard, L
Maclennan of Rogart, L
Renton of Mount Harry, L
Rosser, L
Tomlinson, L
Wedderburn of Charlton, L
Wright of Richmond, L

Witness: **Professor Paul Matthews**, King's College, London, gave evidence.

Q1 Chairman: Professor Matthews, good afternoon. Thank you very much indeed for coming to help us with this inquiry. Can I just cover some formalities first of all? You do have in front of you a list of interests of Members of this Sub-Committee as they appear in the Register of Interests. This session is going to be on the record, it is webcast live and it will be accessible via the Parliamentary website. You will receive a transcript of what is said during the session and you will have an opportunity to go through it and it will be put in the public record in a printed form and also on the website. Perhaps when you come to make the opening statement, which I understand you have agreed to make to assist us, at the start of our inquiry you would be kind enough for the record to state your name and official title, and equally for the record I should declare straight away the only relevant interests that I have are as a practising solicitor and notary public.

Professor Matthews: Thank you very much. I am very glad to have the opportunity to give you such comments as I have on the questions which you may ask. I am, first of all, a practising solicitor, a consultant with the firm of Withers, which has a very extensive practice in relation to succession matters, particularly international. I am a part-time professor at

King's College, London, where I teach property and trusts, and in particular I teach courses in the LLM on international comparative trusts, property and inheritance law. As far as I know, they are the first courses of their kind in the world. In addition to that, I do sit part-time as a Deputy Master in the Chancery Division of the High Court and I am also the part-time Coroner for the City of London, though that has not very much to do with the law of succession. I wonder if I could begin the short statement which I was asked to prepare and give by giving you the context in which these questions arise, an international context, before looking at the domestic position. This draft regulation is of a quite different order to other draft regulations in the private international law area, because of the nature of the subject matter. Previous regulations dealing with private international law issues such as Brussels I, Regulation 44/2001, have shied away from anything to do with succession. The reason for that is because it is much more complicated and much more difficult to deal with at a private international law level than some other things such as, say, contract disputes. Contracts are much the same everywhere. There are different rules in every different jurisdiction, but they do much the same things in much the same way. Succession is very different because it relates to the transfer of property rights on death and property rights are a much more complex form of right than any contractual rights may be. Contract rights concern only the people involved in the contract. Property rights, however, extend wider to cover third parties. Third parties may be bound, so the state has an interest in taking care of the relationship in a way which it does not have to where the contracting parties agree. In addition, the state will run systems for registration of property rights so that people can know about them, and so on. More than that, land is a particularly important form of property. It has a special place in the hearts of all people. People have to be somewhere; they have to live somewhere. There is a territorial aspect to it, not only domestically – an Englishman's home is his castle, and all that – but also internationally. The notion of a nation state will depend on the place where it is.

All that is well known and obvious. What is less well known is that the legal systems which deal with property rights are extraordinarily different from one another. They fall into different groups. The most well-known distinction is between common law systems and civil law systems, but there are other groups as well and it is as well not to forget that they exist. One, for example, is the so-called “mixed systems” which have features of both common law and civil law, and good examples in the European Union are Scotland and Cyprus. In addition to that, there is another group of legal systems often referred to as the Nordic legal systems, Scandinavian if you like, except that Denmark and Iceland are both Nordic but not Scandinavian, and they have characteristics which are neither common law nor civil law and they must be taken into account too. Coming back to the distinction between common law and civil law, it is important to realise that it is very difficult for property lawyers from those two types of system even to talk to each other, to have a dialogue without getting into problematic situations. This is because there are fundamental building blocks which you use to speak, to discuss and to define what you are doing, which are actually different. We do not use the same building blocks. For example, the notion of property in the civil law systems is rather physical. You look at something and say, “That is my thing.” In the common law world, at any rate dealing with land, you do not own *a thing* or *a piece of land*, you own a *bundle of rights* in relation to the thing. You own an *estate* or an *interest*. In other words, the civil lawyers look at it in a rather physical way, the idea of property, but the common lawyers in a metaphysical way, and that has profound implications for any discussion of succession law. Secondly, we have the idea that in the civil law systems it is better that everybody should pay a lot more for their conveyancing to be done because a notary is involved in the interests of the whole community by way of the principle of preventative justice in order to get the terms so certain that there can never thereafter be any dispute, so as to cut down the risk of litigation and litigation costs later. The common law is the opposite, *caveat emptor*, let

the buyer beware. So we have a fundamental cultural shift there, about what we want the system to do and how we want it to be done. In the civil law systems the important thing is to have publicity of third party rights so that creditors cannot be misled into giving credit to people who are not as well off as they seem, so that everybody knows what it is they are getting. In the civil law the notion of succession itself includes, in large part, gifts made during the lifetime of the deceased, whereas in the common law world the notion of succession resolutely excludes any such idea. Everything you do during your life is done with by the time you are dead and at that point and that point only the notion of succession kicks in. In the common law world there is far greater freedom of testation than there is in the civil law world. There is so-called forced heirship in the civil law world by which portions of the assets available are to be left to particular relatives, close relatives, and the share of the property available which can be left to persons other than the so-called forced heirs may be only a quarter or a third, or whatever. In addition to that, there are other important differences. The role of the notary, as I have already mentioned. A notary is someone who is involved in giving publicity to transactions. They play a much larger role in succession than any notaries do in our system in the common law world. In addition to that, there is a very important distinction in terminological and substantive terms between the way we describe the property available for distribution by way of succession in the common law world, where we talk about the *estate* of a deceased person, and in the civil law world, where we talk about the *patrimony* of a deceased person. “Patrimony” is often thought to mean the same as “estate”; it is sometimes even used as a translation device, but it is not correct. “Patrimony” is a quite different concept. “Estate” is simply a snapshot of the position at the time of your death. You simply say that at the time of your death you have these assets and these liabilities, you take one from the other and that is the balance. The notion of “patrimony”, however, is much better described, perhaps, as an empty bag which you carry around with you during the

whole of your life and into this bag you put everything of economic value. Every asset you acquire and every liability which you incur goes into the bag. Not only do we talk about the patrimony of those assets and liabilities which you have at the moment, it also includes every asset and every liability which you will obtain in the future. So it is not a snapshot at all, it is looking forwards as well as backwards. It is actually looking at the whole of your economic personality. The patrimony is an expression of economic personality and on death that patrimony is to be transmitted intact to the next generation so that the economic personality continues. Now, you can see already that it is going to be very difficult to have any kind of sensible dialogue between common lawyers and civil lawyers, and I have not even taken into account the mixed systems or the Nordic systems, which have their own interesting characteristics. Just one practical point that flows from this patrimony idea. The Romans had a word for it. If the debts outweighed the assets the Roman heir would receive what was called the *damnosa hereditas*, the cursed inheritance, because he was personally liable to pay the debts of the deceased. In theory that is still the law in the civil law countries, although most of them have introduced in modern times mechanisms by which the heirs can weigh up the balance before they actually accept the inheritance and decide whether it is worth accepting. That is not a position that can ever happen in the common law system, where it is simply a net balance. And also the administration is carried on by the personal representatives, so that they are interposed between the death of the deceased and the time of the receipt by the beneficiaries of any property. If there is a balance in their favour, they get it; if there is nothing left or worse, there are debts still outstanding, they get nothing but they are not liable to pay the debts. So that is the international context into which this draft regulation fits. Can I now turn very, very briefly just to describe in a few words what happens under English law? The English law position is relatively straightforward. A person dies and immediately upon the death, unlike the civil law systems (where the property vests directly

and immediately in the heirs), the property vests on death in a personal representative. The personal representative is called the executor if there is a will appointing a person as executor and otherwise is called the administrator. The administrator, of course, not having been appointed by the will, is appointed by the court. There is, of course a gap between the date of death and the date when the court appoints the administrator and in that interim period the gap is filled by the public trustee by statute but without any duties to perform; it is simply a holding operation. Once the personal representatives have been appointed, either by proving the will and obtaining a draft of probate or by obtaining letters of administration from the court, they have the powers and they will embark upon the exercise of gathering in the assets of the deceased and then deciding in what order and how far to pay the debts, and so on. There is, however, one very important debt which they will already have paid even before they receive the grant of probate and letters of administration and that is the Inheritance Tax bill. The Inheritance Tax bill is paid by the executors or administrators at the time when they have prepared the documents for the grant of probate or letters of administration but before they have actually received the grant because the tax law is so organised that before the court can actually pass the grant it has to have clearance from the Inland Revenue that it is satisfied that the Inheritance Tax due has been paid or accounted for. Perhaps it is payable by instalments in some cases, and so on. The consequence is that the Inheritance Tax aspect of death is dealt with right at the beginning. It is incredibly cheap and efficient because nobody can get started on the administration until that has been dealt with. Not so, necessarily, in other European legal systems and I will perhaps come back to that question a bit later on. The administration, of course, as I say, is two ways really. One is to gather in assets, the other is to pay them out, to pay the liabilities that are outstanding. If there is a balance left, then that balance will be distributed to the persons entitled to it. It may consist of specific assets given by will which will not be taken and sold to meet the debts of the estate unless it is absolutely

necessary. Generally speaking, you will start by looking at the cash available in order to meet the debts and only sell assets if you have not got enough cash to meet the debts. The assets that are remaining, therefore, are distributed to the persons entitled by way of an assent or sometimes by another form of vesting document. That is how it works in principle and of course in a very, very high proportion of all cases there is no need for any international features or factors to come into play at all. In a small minority of cases there are international features which require a different treatment. In those cases the rules of private international law come into play. Now, a given legal system consists in broad terms of three things. It consists of domestic substantive rules of law, it consists of procedural rules which you operate in order to vindicate the substantive legal rules in the courts, and it consists of private international law rules. The private international law rules are basically like the procedural rules. They are not substantive, they are ancillary in the sense that they tell you where you look to find the substantive rules. I will give you an example. Suppose a person dies, maybe a British national but dies domiciled in France. That means that they have their permanent home in France, they intend to die there. They have got a house in France, but they have also got some assets in the United Kingdom. What it is important to do is to work out which system of substantive law rules – the French rules or the English rules, or indeed some other rules – is going to determine how the succession works and who benefits. So you look for what is known as a *choice of law rule*, and the choice of law rule in English private international law depends on what kind of property you are talking about. If it is immovable property, which in broad terms means “land”, then the choice of law rule that is applicable is the law of the place where the land is. It is dead simple and very easy to operate. Everybody knows where the land is, and that is the legal system that governs it. So the succession to the French house will be governed by French law. On the other hand, where the property concerned is moveable property, that means anything which is not land, so it includes a yacht,

it includes paintings, it includes furniture, it includes cash, it includes motorcars, shares in companies, and so on, all of that according to the English private international law rule, the succession to that kind of property is governed by the law of the deceased's domicile at death. At his death he was domiciled in France, that was his permanent home, and therefore you will look to the law of France for that succession. In that case the two rules coincide, but they do so in quite different ways. Suppose he had also got some land in England. That would not be governed by French law because the *situs* of the English land would be in England and therefore the succession would be governed by English law. That is known as a schismatic system because the rule for moveable and immovable property is different. There is a schism between the two major kinds of property, moveable and immovable. I should also say there is no choice for a British national in making his provisions for his succession on his death in the English private international law rules. There is no provision for him making any kind of decision as to which law he would like to govern. There is a rule for moveable property and a rule for immovable property, and that is it. Of course, he could change his residence and his domicile, and so on, and buy land in different places but that is something which flows from the nature of the thing that he has got or the place where he is. It is not a choice he makes in a document like a will. French law is equally schismatic. The rules of private international law in France on this point are actually quite similar. Immovable property is governed by the law of the place where the land is. Moveable property is governed essentially by the law of the place where he has his habitual residence, which is not quite such a tough test to satisfy as is domicile, although confusingly enough the French word "*domicile*" tends to mean much the same as habitual residence and that just gets in the way of people understanding what is happening.¹ There is, therefore, a rule for moveable property and a rule for immovable property. Like English law, there is no choice that can be exercised by the deceased. German

¹ *Note by witness*: It might have been clearer if I had said "The test for movable property in French law is the law of the (French) *domicile*, but (French) *domicile* means something closer to habitual residence".

law, on the other hand, is Unitarian. German law says there will be one law which governs the succession to both moveable and immovable property and it is the law of the nationality. So it does not look at the place where the property is and it does not look at where you are living, it looks at what nationality you are. This causes a minor difficulty in relation to British nationals because, of course, in the United Kingdom there are in fact three quite different systems of law. In fact if you want to include all the others who call themselves British nationals, such as those who actually come from Jersey and Guernsey and the Isle of Man, you have actually got six legal systems to deal with. So German law has to accept that in fact you cannot just look at the nationality because there is not a relevant law of the nationality. You have to look at where they actually come from within the state, which as got a multiple of legal systems. But what it does say in German law, curiously enough, is that the deceased actually has the option to select German law, if he wishes, for immovable property situated in Germany. That is not a very interesting or very important degree of discretion or choice given to the deceased, but it is at least an element of choice which is given by German law. If you go to Switzerland you can actually enjoy an even greater degree of discretion because under Swiss private international law the deceased person is able to choose his national law for the succession to his property. So actually it is a very similar rule in Swiss law to the one which is being proposed in this draft regulation. So that is the private international law background. I should just say this: the connecting factors that are generally used to decide which law should govern the succession can be rules which are not completely certain, such as habitual residence or domicile. They have grey areas at the edges where you are not quite sure, "After five years am I habitually resident in this new place? Am I domiciled in this place that I have just moved to?" and so on. Because you are not sure about that, it means that there is a slight lack of certainty at the edges as to whether or not a particular law will govern your succession. Nationality is easier in the sense that you either are a British national

or you are not and it is relatively easy to decide that question. It causes problems when you have more than one nationality, of course, as well as when you are national of a country that has got more than one system. Paradoxically, the schismatic systems like France and England score more highly on certainty in relation to immovable property because the choice of law rule in relation to immovable property in both France and England is the law of the place where the land is and there usually is no doubt about where a piece of land actually is. I know there are a few villages on the borders of Germany and Switzerland that cannot tell whether they are in one country or the other, but on the whole there are not too many difficulties in that. What are the major problems then in relation to the current system? The major problem is, is there a problem, or rather how big is the problem? We do not actually know how big the problem is. We know anecdotally because lawyers who deal with international succession law say, "Oh, I had this case and there was a big problem with X, Y, Z," but of course we do not know how many cases cause problems and how many cases are totally straightforward. We know in fact very little about statistics in this area because nobody collects them, but it is undeniably true, whatever the proportion that is of the whole number of successions in the country, that whenever you have a cross-border succession you do have more complexity because you have to go through the private international law exercises of working out what the applicable law is and what mechanisms there are for dealing with the property and for resolving conflicts between the different jurisdictions. So you will need foreign legal advice. That costs money and it takes time. It may be you will have to take proceedings in a foreign country. That, too, costs money, takes time and is uncertain in its result, in many cases at any rate. There is also an unfortunate aspect of private international law in the succession area which does not affect many other areas of private international law and that is a doctrine which was invented by academic commentators called the doctrine of *renvoi*. Now, any lawyer who knows anything about this area, when you mention the doctrine of *renvoi* their

faces turn ashen and they usually grasp at whatever text books they have to hand and say, “Just run that past me again. What is *renvoi*?” *Renvoi* is a curious doctrine by which lawyers in this area are not very clear. When they say that their choice of law rule says you look to the law of the place where the land is, or you look to the law of the place where the deceased was habitually resident, there is an imprecision in saying that. When you say, “We look to the law of anywhere,” do you mean the whole law including the private international law rules of that country or do you mean just the domestic substantive rules of law relating to succession? Because if you mean the domestic substantive rules, that is dead easy, you just go straight for them. Unfortunately, the doctrine of *renvoi* says that is the one thing you do not look for. You actually look either for what the private international law rules tell you or, in one version of the *renvoi* theory, you look for what the foreign court would do if it was answering the question which you have got in front of you in your own court. It is sometimes called the foreign court theory. The trouble is that people cannot agree on which is the better way to approach this, so you get inconsistent decisions, you get inconsistent approaches in different countries. So how do you resolve the question of *renvoi*? The draft regulation very sensibly says, “There will be no *renvoi*. We will look simply to the substantive provisions of whichever law it is we are looking at. We will look at their succession rules, their domestic rules. We will not look at any private international law rules.” So the problems which we have at the moment are delay, cost, confusion, the need sometimes to take legal proceedings, but we do not know how often those are problems as a proportion of the whole and the danger is always that we bring in regulation which not only solves or tries to solve the problems in those cases but creates difficulties for everybody else in all the other cases which at the moment do not have any. What are the broad principles behind the proposal? Well, I have just explained one of them, which is to try and reduce the amount of confusion, delay and cost by saying, “There will be a single applicable law which applies to the whole succession,

which will be selected in exactly the same way in every EU Member State.” That is a nice, simple, straightforward approach. If you cannot have uniform substantive rules of succession – and it is accepted by everybody that you could not possibly do that – the next best thing is at least to have uniform private international law rules, which means that in theory at least you should have the same answer being given as to which law governs and how it governs no matter in which EU Member State the question arose, no matter in which EU State there was property in somebody’s succession. The purity of that approach is, I am afraid, somewhat lessened by the draft regulation itself but that is the approach which is being taken. I wonder, my Lord Chairman, whether I might stop there?

Chairman: Thank you very much indeed. I am sure we have all found that very, very helpful indeed. Before we go on to the questions, are there any questions which Members have not covered by questions which we are going to be asking later on arising out of Professor Matthews’s introduction?

Q2 Lord Renton of Mount Harry: Could I possibly ask, my Lord Chairman, why *renvoi*? Why is it called the law of *renvoi*? Where does that come from?

Professor Matthews: *renvoi* is a French word meaning “reference on” or “reference to”.

Q3 Lord MacLennan of Rogart: Two quick questions, if I may, arising from what you said. I was not quite clear, at the very end of your remarks, whether you were saying that the system of single law would apply in a way that treated immovable and moveable property differently, because in some countries at present it is one. That is the first question. The second question is, in considering this should we bear in mind that Scotland might have different interests and should we seek to take evidence on that?

Professor Matthews: As to the first question, the answer is that the approach taken by this regulation is to apply a unitarian approach. No more schismatic systems, everybody has a

single choice of law rule. As I said a moment ago, the purity of that is diminished by some of the provisions actually in the regulation, which will mean that there is still a schismatic approach in some cases, but the general approach is a unitarian one. So there would be one choice of law rule which applied to both moveable and immoveable property in principle. As to the second question, I am not at all qualified in Scottish law, although I am aware of at least some of the significant differences between the Scottish law of succession and the English law of succession. On a number of quite important points of the sort I mentioned at the beginning, distinguishing between common law and civil law, Scotland is in fact on the common law side of the fence. I said it was a mixed system because it has characteristics of both sides, but it is right to say that there are areas, for example in relation to forced heirship, where it is very similar to the civil law systems, but on the question of claw-back, which we will come on to, Scotland is on the side of England because there is no claw-back in Scottish law, as I understand it. So it may be that there are some elements on which evidence might be usefully taken in relation to Scottish law, but I am afraid I am not qualified to give you a definitive view on that.

Q4 Lord Wedderburn of Charlton: This does not really follow from the questions, I think, but could I ask you a general question about the regulation? It is prompted really by your saying “domicile in English law”. I have a faint memory of Kurt Lipstein trying to teach me what “domicile” was about and meant and it is far from clear sometimes. Similarly, I wondered about the rock on which the regulation seems to be built, namely “habitual residence”. Do you think there might be further reference or guidance in the regulation as to the meanings and limits of that phrase?

Professor Matthews: The short answer to your second question is, yes. In relation to domicile, the meaning I usually give to my students is to say that it is your permanent home,

in the sense of the place you are most closely connected with and intend to govern your affairs.

Q5 Lord Wright of Richmond: Professor Matthews, I think the complexity of the situation, as you very helpfully described it, certainly explains to me why someone thought that a regulation was necessary, but can I just ask you a question which you might want to answer perhaps later on. With your understanding of the situation and your understanding of the regulation, do you think that the British Government should opt in or not?

Professor Matthews: At this stage, no. It seems to me that there is nothing to be gained of any real value by opting in at this stage. There is plenty to be gained by not sitting on the sidelines but joining in the negotiations and seeing what results, perhaps having a shopping list of things that would have to be put right before it would be in the interests of the United Kingdom to opt in.

Q6 Lord Wright of Richmond: But with presumably considerably less chance of getting our way?

Professor Matthews: I am not sure about that. I am not a politician of any kind, let alone a European politician and others will know better than I how these things work, but it seems to me your negotiating position is going to be a lot better, if you have not signed up irrevocably at the beginning, to get your way on the things that matter to you. The fact is that most of the other European Member States would quite like the United Kingdom to sign up to this because there are so many of their nationals who have got property in this country and therefore they have a great interest in trying to get us bound by common rules. Otherwise, if we are outside, there is the risk that all the good that they think they are doing is going to be undone because all these people have got their houses in the country here and claw-back, and

so on, will be of no effect. So we do have a negotiating position, but I think it is strengthened by not opting in at this stage.

Q7 Lord Burnett: I am very grateful to you. Two things. You talked about a shopping list a minute ago. Could you provide us with one in the next week or so, so that we can have a quick look at it? That is the first question. The second question is – I think you were talking about the regulations seeking to provide a common approach to private international law by each Member States. Could you just be a little more clear about that, just as far as wills and succession are concerned?

Professor Matthews: The idea of the regulation is to replace the existing rules of private international law in the area of succession in each Member State by the provisions of this regulation so that you end up with common or uniform rules of private international law in this area.

Q8 Lord Burnett: What effect will that have on matters other than wills and succession?

Professor Matthews: That is an extraordinarily good question, if I may say so. It seems to me, as I said at the beginning of my remarks – and this may be a part which you were not present for, Lord Burnett – the law relating to property and relating to succession goes much deeper into the legal system than contract law, for example, because it is so much easier to make common rules of private international law in relation to contracts. Land and succession rules tell you an immense amount about the society in which you find them. They constitute in many ways the most distinguishing features of any given legal system. They are in a very real sense part of the legal DNA, the national identity of a system. What is happening here is that a European regulation is going right to the heart of the DNA, not just of this country but of every European country, and is replacing some of the genes in the system and is saying, “We are not going to have that gene any more, we are going to have this one.” If the gene

that is being put into the regulation is actually not very different from the one you have already got you may not mind too much. If it is quite different – and I have pointed out that there is a significant number of areas where things are very different indeed so that you cannot even talk to each other from the beginning – then you might begin to mind because you do not know what the effect is going to be on other areas. It is going to weaken the structure. It is going to provide bridges into other areas and you may find in 20, 30, 40, 50 years' time that you have unforeseen side-effects leading to other things that might happen which would not have happened if you had not accepted this entry into your DNA at this stage. So I cannot answer the question, all I can say is that it is a very good question and I wish I knew the answer.

Lord Burnett: Could I add a supplementary then, my Lord Chairman?

Chairman: Yes, then we really should move on to the rest of the questions.

Q9 Lord Burnett: The supplementary is: who do you think can answer that question? Is there an eminent land lawyer or an eminent contract lawyer? I am not asking for an individual's name, but who else should we be looking for to answer that question? Will it affect the forms of trust? Will that affect debentures and City instruments, and so forth and so on? The way the City is run, money is raised for industry, and so forth, and all sorts of things, it depends often on our trust law.

Professor Matthews: Certainly as far as trusts are concerned, I suppose I am probably in as good a position as anybody would be because it is also one of my main research and teaching interests. So far as the City is concerned, I have thought quite a lot about this. There are undoubtedly potentially detrimental effects on the City and it may be better if I deal with that when it comes to claw-back because it is in that area that most of those points arise. As to whether there is anyone, a land lawyer, or someone who would be eminently capable of

answering the question, I do not think it is a question that is easily capable of answer by anybody, however eminent.

Q10 Chairman: Thank you. Can I just ask you two quick questions. You said we do not know the size of the problem. You probably know that the Commission has said it thinks there are 450,000 successions with a cross-border dimension?

Professor Matthews: Yes. It is a mystery to me as to where they got that figure from.

Q11 Chairman: I was going to say, you do not attach much credibility to that figure?

Professor Matthews: No. For example, we know, because there are statistics, that there are about 500,000 deaths in England and Wales every year. Indeed, I know that because I am a coroner as well, but that is another story! We also know that there are about 280/290,000 grants per annum of either probate or letters of administration. We have very little way of knowing, without actually looking at the IHT 200s and the probates and the wills, and so on, and possibly the accounts produced in every single case (which of course the Government does not normally see) to the beneficiaries. We cannot tell where the property is and whether it is a cross-border case at all. There is no official body that collects such statistics and I do not think it is true that there is such a body in any other Member State. Could I just add to that that what the European Commission seems to have done is to first of all estimate the number of cross-border successions and then to say, "We estimate that in a certain proportion of them there will be a problem." Again, there is absolutely no empirical evidence that that is the right number at all. You just cannot know. All we have is the anecdotal evidence of those who practise in this area saying, "Occasionally there is a problem."

Q12 Chairman: When you were answering Lord Burnett's question you talked about the proposals going to the heart of the DNA, as it were. Would I be right in assuming that you

would not agree with the Commission's assertion that the regulation does not effectively replace national laws on succession of property, because they have said quite clearly: "This initiative is aimed neither at replacing nor harmonising succession law, property law, family law, in the Member States."

Professor Matthews: The way I would answer that question is to say this: as I have said before, there are basically three types of rules in a legal system, domestic substantive rules, procedural rules and private international law rules. There is no doubt that this operates to replace the private international law rules, so that is clearly going to change. It does operate in significant ways to change some of the procedural rules. The question is, does it do anything to the substantive domestic rules? The answer is, almost nothing. So in that sense, in a very strict and narrow sense of the first of those three categories of sets of rules, they are right, but not otherwise.

Q13 Chairman: Thank you. We understand that the provisions on applicable law are the ones which are central to the proposal. Could you perhaps tell us about this choice of "habitual residence"? Can you outline the sort of test that you will have to apply? Is it the right test, and indeed have they got the scope of their rules on applicable law correct? We have looked at 19(2) and the things to which it does not apply. Are there things which in your view should be added to or taken away from that list, and indeed should there be a public policy exception to the applicable law rules?

Professor Matthews: I think the problem with "habitual residence" is that at the moment in the draft it is entirely undefined. I am sure that was deliberate because the meetings of the experts advising the Commission, of whom I was one, did discuss various draft wordings for "habitual residence". None was considered to be sufficiently satisfactory. I have no doubt that it is overall considered by the Commission that to go for any particular definition would lead to some Member States being against the proposal, whereas if it is left entirely undefined

everybody can take away from it what they like and they can assume that it means what they think it means, and the result is a political fudge. I make no bones for suggesting that that is the way forward because it is much easier to obtain what appears to be an agreement in that way. It was extraordinarily difficult to produce a form of words which everybody liked and you will undoubtedly offend somebody whatever you do. At the same time, leaving it entirely undefined means that you have got no certainty at all about what the test is. The words “habitual residence” appear in a number of different contexts in EU legislation. For example, tax, social security, jurisdiction on divorce, the proper law of a contract, various aspects of the insolvency regulation, depend on the use of this phrase. In some of them it is defined and in some of them it is not, and in a European Court decision some years ago the court actually said that the meaning of “habitual residence” in such-and-such a particular Directive depended on the aims and purposes of the particular piece of legislation and it therefore could not be applied blindly wherever you found those words in a different piece of legislation. So until the European Court of Justice actually resolves the question of what it means, it will remain uncertain. You even have this at the moment. In a case called *Nessa* in 1999 the House of Lords held that some people who came to this country and who wanted to claim, I think, social security, were held not to have become habitually resident when they arrived, whereas in *Marinos v. Marinos* last year, or two years ago, the High Court held for the purposes of the divorce jurisdiction that a lady became habitually resident on the day she arrived. So it is perfectly obvious that the contexts are different and my point, I think, would be this in relation to succession: all of the other contexts in which “habitual residence” is used are directed at something to do with the actor, the person concerned, in the short-term, but this use of “habitual residence”, although it is describing something about the deceased, actually has the effect for the purpose of distributing the estate or the succession of the deceased, which will affect lots of other people, the heirs and the creditors – and you must not

forget the creditors, who may be in different jurisdictions – and may be, especially if trusts are concerned, over several generations. So the whole thrust of the use of “habitual residence” in this draft regulation to choose an applicable law is completely different from the context in which you see it elsewhere. So my view would be that unless you can get some kind of definition of what you mean, this is a recipe for litigation and uncertainty until the litigation is resolved by the European Court of Justice.

Q14 Lord MacLennan of Rogart: Is it any more uncertain than the existing use of the word “domicile”? Having also sat at the feet of Kurt Lipstein, I remain unclear about that. It seems to me that “domicile” does not necessarily mean “habitual residence”, as I think you perhaps might have implied. It can mean things such as the possession of a lair in a Scottish churchyard in which you intend to be buried and might set at nought the fact that you had a residence south of the border?

Professor Matthews: Yes, I think you are quite right to say that “domicile” can be also uncertain. I have two points, though, which I think can be put in relation to that. The first is that even if it has areas of uncertainty, there is a lot of case law already on what it means. A lot of factual situations have been dealt with and therefore advisors do have some ground to stand on when actually saying, “Are you or are you not domiciled?” even if there are grey margins. The second thing is that here we are not talking about a concept which is peculiar to the common law systems and applies inside one type of legal system, we are talking about a definition which has to mean, *ex hypothesi*, the same in every single one of the EU Member States, and that is a completely different bag of tricks.

Q15 Lord Burnett: I thought, Professor Matthews, you defined “domiciled” to your students as a permanent home, not habitual residence?

Professor Matthews: I did, yes.

Lord Burnett: That is a concept I understand, “domicile”, and am familiar with, my Lord Chairman, and I do not find it as confusing as some of my colleagues on the Committee because there has been so much litigation about it and it is relatively clear. Of course, there is still uncertainty.

Q16 Chairman: Is it that clear? I thought that if you spent 40 years serving the Raj with an intention to return home you remained domiciled here?

Professor Matthews: That is clear. The point is, is it certain or is it uncertain? It may be capricious, but it is nonetheless certain.

Q17 Chairman: But it did not mean the same as “habitual residence”.

Professor Matthews: Certainly that is right. If I gave the impression that it did mean the same as “habitual residence” of course that is not correct.

Q18 Lord Wright of Richmond: I think also, Professor Matthews told us it is not the same as “*domicile*”?

Professor Matthews: That is right, “*domicile*” in French law is rather closer to “habitual residence”.

Q19 Chairman: I am conscious of the time, Professor Matthews, and I know we would like to try and cover all the other questions we have got here. How far do you think it is practical and what considerations should you take into account when trying to give testators the freedom to choose the applicable law?

Professor Matthews: I would start from the position that if you are keen on mutual respect for each other’s legal systems – and the rules on enforcement of foreign judgments and that kind of thing demonstrate that, I think – then I would start from the position of saying that it must be reasonable for you to pick any EU Member State’s law, if you want, to govern your

succession. Now, some may think that is a bit too liberal. I am sure that some of the civil law states would think that. If that is going too far, then I would say any EU Member State's law with which you have some reasonable connection, and we can obviously work a bit on what a "reasonable connection" might be – you were born there, your parents come from there, you have got property there, you have got this, you have got that. There is a number of ways in which you can look at that, but I would start by saying, yes, give people lots of choice. If they think a particular legal system suits them, why should they not choose it? The trouble is, of course, every time you make that kind of pro-liberal suggestion you get the people who are saying, "Yes, but people will only do it and choose a system to avoid the forced heirship obligations, solidarity between the generations, claw-back," and so on. So you have got a rock and a hard place really.

Q20 Chairman: Quite! Would you extend that choice to situations like the UK with multiple jurisdictions?

Professor Matthews: Yes. I see no particular reason for not doing so.

Q21 Lord Maclennan of Rogart: Would it be possible, as the regulation is drafted, for citizens of the EU to opt into the regulation individually?

Professor Matthews: I am not sure I follow the question.

Q22 Lord Maclennan of Rogart: If they had a choice of opting into national law, could they also opt into the European regulation?

Professor Matthews: No, the regulation applies when it applies and there is no choice to say, "This regulation applies to me," when otherwise it would not have applied to me.

Q23 Lord Maclennan of Rogart: So they could opt into Greek law but not into European law?

Professor Matthews: Oh, I see what you mean. I am so sorry. No, there is no such thing as European law as such. Although this is an instrument of European law, it effectively becomes the national law in the area of private international law rules in the area of succession and therefore when you talk about Greek law you get these rules because these rules will be part of Greek law. But you cannot opt into European law because there is no such concept so far as the private international law is concerned. Private international law is part of individual legal systems, not of some pan-European.

Q24 Lord Kerr of Kinlochard: Can I pick up on that? I understand the point which has just been made. Does it apply to the Certificate of Succession? Supposing there was nothing else on the table but a proposal for a Certificate of Succession. It would be freestanding, would it not? You would not need to harmonise the practice across Europe?

Professor Matthews: It would depend upon the way in which the European Certificate of Succession was to be treated when it is received by the target country. If you are simply saying, “This is a matter of evidence which you can take into account in operating your own succession procedures,” I entirely agree with you. If, on the other hand, you say, “And it shall be conclusive as to the matters stated in it and you cannot change that in any way or challenge it,” then that could have a very significant impact on the domestic system.

Q25 Lord Kerr of Kinlochard: It seems to be a sort of optional add-on to the regulation at the moment?

Professor Matthews: Oh, yes, it was certainly something which came along at the end, so to speak. It was not, if you like, part of the mainstream features of the regulation.

Q26 Lord Kerr of Kinlochard: In itself it does not seem to me to raise the sorts of problems we are discussing?

Professor Matthews: It actually raises a whole host of different problems, but that is another story.

Q27 Chairman: It may be another story, and we hope to get to it, but if we start another story perhaps we could deal with this question of the Certificate of Succession. Do you think there are benefits there? You said it would have a huge impact. I think the Committee, when we discussed this before, saw it as a useful aid to practitioners, that they would have something which confirmed the authority of the people who were trying to deal with assets in this country or another country. Can you elaborate a bit about the problems?

Professor Matthews: Yes. At an evidential level, if it was simply a question of an extra piece of evidence it would, I think, be useful in providing information, for example, to personal representatives about who they can deal with in another country, who are the people who are going to receive benefits under the intestacy rules of Bulgaria, for example. You can see the importance of that. It would save costs on legal advice and maybe on proceedings as well. It would not in itself, of course, affect the personal representative system. That could stay exactly or pretty much as it is now, although it would, perhaps, have an impact on who became a personal representative because one of the interesting features of this draft regulation is that the scope of the applicable law is to govern various aspects of the administration of the estate, which is not currently the law in this country. In this country private international law rules say that administration is governed essentially by the law of the forum, that is English law rather than the foreign law. The difficulties, I think, stem from the fact that the European Certificate of Succession is drafted on the basis of certain assumptions about the legal system which is going to use it. The first of the assumptions is that the property law in that system is as simple as in the traditional civil law system, in particular that the primary position for an owner is to be the absolute owner *of a thing* and not to be, for example, the owner of a *bundle of rights or interest or estate* in the thing, because that means

that you can have a box which says “Owner” and then a name. There is a limited number of lesser rights than ownership and you can make provision for them, but in the common law systems you cannot do that because people can have a multiplicity of different estates and interests and to be able to identify them, much less to put boxes on the form, would actually be quite a task. The second thing is that typically in the civil law systems there is a limited number of heirs. That is just not the case in the common law with anything other than the simplest form of will. You would have a trust, let us say, which gave life interests over here, which gave interests in the remainder over here, which gave legacies over there, and so on, and when you say, “Who are the heirs?” you say, “Well, what do you mean by ‘heir’? I can describe all the people who have got some financial interest,” and there is a long list of them, maybe a page or two. That is not what they are contemplating in this certificate. They are thinking you are going to say, “Oh, the widow and the two children,” full stop. So that is the second thing. The third assumption that is being made is that the property rights are to be directly transmitted to the heirs and do not go through a personal representative system. The significance of that is that they think they can get these certificates issued within a few weeks of the death. Now, you cannot in all but the simplest of cases get a probate as quickly as a couple of weeks. It is just not possible. In complex cases it may be a year, it may be a couple of years even. Those are the worst cases. In ordinary cases you would think six to eight months, perhaps.² The fourth assumption which is made is that in every legal system there are standard and well-known procedures which are the same in every case for dealing with the administration of the estate. Of course, that may be true in England insofar as intestate successions are concerned, but where testate succession is concerned the rules of the administration are those that are set out in the will and the powers that are given are those that

² *Note by witness:* I should make clear that I am not just referring to the time taken by the Probate Registry to process the application. I am thinking of the preparation by the executors of the necessary documents, including research into the deceased’s estate, liabilities etc. the submission of the HMRC documents and finally the processing of the application by the Registry.

are set out in the will. What you would end up with as far as England is concerned would be a certificate which said, "This is the personal representative and for the powers and the beneficiaries and the heirs, and so on, please see the attached will," which is exactly what we have got at the moment. Those are the assumptions upon which this system is based. It is plainly not going to be possible for it to be operated, therefore, out of England towards Europe in that way. What happens when it comes in the other way? The problem is, okay, that's fine, it's going to give us the information that may help us, but any inaccurate statement in that certificate is actually going to be, under the current draft, very hard to change or to remove because you have to go back to the issuing authority. If now there is a dispute, it goes in front of a judge in England, who says, "Well, the evidence is this, the evidence is that, and I have got the certificate of inheritance, which is evidence, and I am going to take it into account, but I can see there is a mistake in that because the evidence from the other people satisfies me that this chap wasn't habitually resident in France, he was habitually resident in Luxembourg." But in the future that cannot happen. It has to go back to France, or to Luxembourg, or wherever, in order for proceedings to be taken there in order to get that right. In the meantime, you have to proceed on the basis, because it has not been altered, that the mistaken view that is stated there, that he was habitually resident in France, is accurate and therefore you are proceeding to apply French law, which you know at the end of the day will probably turn out not to be the case. So you are spending all your money to no useful purpose. It seems to me that if you just left it at an evidential level it would be quite useful, but the problem arises when you make it, in a sense, definitive and difficult to change without going back to base. Is that an answer to your question?

Lord Kerr of Kinlochard: A rather depressing one, but yes.

Q28 Chairman: Perhaps we should go on to the question of claw-back. Perhaps you would like to tell us your interpretation of claw-back and what impact it would have?

Professor Matthews: Yes. Start from the position that there are, in broad terms, two possibilities. You can either say to people, “You can do what you like with your property on your death,” freedom of testation, or you can say, “You can’t do exactly what you like with your property on your death, you have got to leave some to certain people,” or all of it for that matter. That second position we call “forced heirship”. English law, certainly since about the end of the 15th century, has not had any forced heirship worth speaking of. There were some tiny remnants which were abolished in the 19th century. Therefore, the cultural expectation in England has long been one of freedom of testation. In the 20th century, some 70 years ago, legislation was passed to provide the judge with a discretion to re-make a will which did not make adequate provision for a family and dependents. That is now governed by a statute of 1975, but that actually operates in a relatively small number of cases, and the practitioners know how to deal with it and know how to advise their clients in relation to it. So in cultural terms you still have a situation or expectation of freedom of testation. In the civil law countries it is the opposite: you expect that property will descend to certain close relatives. There is a huge difference in principle between the Latin systems and the Germanic systems in that until comparatively recently spouses, widows and widowers, did not count for this purpose in the Latin systems whereas they did in the Germanic ones. That is something, it is said, to do with the practices of Germanic tribes at the time of the Roman Empire. We do not need to go there! My point in mentioning it at all is simply to say that you must not assume that all civil law systems are the same, because they are not, they have very different rules in some areas. At all events, it means that certain relatives have indefeasible rights once the person has died. In Scottish law there is such a rule, only in relation to moveable property, not in relation to immoveable property. However, the rule in itself would be useless and easily avoided – well, not useless but easily avoided – if you did not make some provision for what happens if people try to give away their property during their lifetime to people who

would not get it on their death. So let us suppose that I want to give all my money to Battersea Dogs Home and not to my children. During my lifetime, perhaps not long before I die, I make over my house, I make over my shares, and so on, to Battersea Dogs Home. Freedom of testation. It does not matter where there is freedom of testation. If this was Scotland, for example, that would also be the end of it because at the time of my death the forced heirship rules will bite only on what I actually have then, and I do not have the house, I do not have the shares any more. So in many civil law countries, but not Scotland and not, incidentally, the Islamic systems either, there are *secondary* rules which are designed to protect the rights of the close heirs under the forced heirship rules and these secondary rules are generally referred to colloquially as “claw-back”. What they do is they look at not only what was left at death but they look at what the deceased gave away during his life, for two purposes: one, in order to decide what notionally the patrimony at death consisted of (i.e. it did not consist simply of what he left but also of what he gave away during his life) you calculate the rights of the beneficiaries, the heirs, based on the notionally enlarged patrimony, and then you try to satisfy the claim of the heir out of the assets left at death. If they are not enough, you need to go after the assets that went out during life. You need to claw them back and the civil law countries that have claw-back rules do it in different ways; they do not all do it in the same way. Sometimes they allow the heirs to make a personal claim for compensation, effectively, against the person who received the asset during the lifetime. Sometimes they say, “Oh, you can actually get the asset back from the donee.” Sometimes they say, “You can not only get the asset back but you can get it back not only from the donee but from anybody in whose hands it now is,” and even in some cases free of any encumbrance which has been created in the meantime. That takes you a long, long way. There is another feature which you need to bear in mind and that is that not all of the civil law countries operate the protection to the same degree. Some of them, such as Austria, will only take into

account gifts made in the last two years of the deceased's life. Some, like Germany, take into account a longer period, ten years. Some, like France, take into account gifts made during the whole of somebody's life if, of course, you have got the evidence to show what they were. There was a famous case which went to the Cour de Cassation in the 1990s in France where the gifts which were successfully upset by this means had been made in 1953.

Q29 Lord Burnett: Could I just at this stage ask the question: what about the position of a bona fide purchaser of a value without notice of the asset? Are there jurisdictions where that individual, that person, whether it is a company or individual, can have a gift ten years, five years, or whatever, effectively revoked? Does he have to be put into the position he would have been in had he not purchased the asset?

Professor Matthews: In general terms, the test of a *bona fide* purchaser for value is not one which you find in the civil law. You generally find some other mechanism for adjusting the rights in that kind of difficult situation. For example, in Austria it is comparatively simple. You wait two years after it is given to you and then you know that it cannot be brought into account, it cannot be clawed back.

Q30 Lord Burnett: The asset itself?

Professor Matthews: Yes, and looking at it in terms of what you have actually got, as I have said, there are different systems which make different kinds of claims possible for the heirs. Sometimes you can only claim the value from the donee and not the thing itself, so anybody who has got the thing is safe, although if they are the original donee they may have to pay the value.

Q31 Lord Burnett: What about if they do not have the money?

Professor Matthews: If they do not have the money, they do not have the money.

Q32 Lord Burnett: It cannot be traced?

Professor Matthews: In general terms there is not what the civilians would call “real subrogation”, what we would call tracing. Generally, you are not allowed to do that, but in some rare cases you can. The problem is that there are cases in some of the systems where a person who is in perfect good faith may even have bought it.

Q33 Lord Burnett: A purchase from a donee?

Professor Matthews: Exactly. He has purchased it from a donee. He may or may not have known that this was a donee from somebody during life. He may not have known the history of the thing and in some systems the asset can be effectively clawed back. That is not true of all systems, but it does sometimes happen. It depends upon which law we are talking about. That will mean, incidentally, of course, that if you are a lawyer advising a donee who happens to be English and the donee is saying, “Is it safe for me to hang onto this?” you are going to have to get advice from any relevant EU legal system in order to be absolutely 100 per cent sure. One point further I should add to the layer of complexity, which you can already see here, is that the time at which you judge which law applies and therefore which claw-back system you are concerned about is the law which applies at the time of the death of the deceased, which may not be in any way the same as one which you could have imagined at the time of the given having been made. In other words, a British national, domiciled, resident, entirely connected with England, let us say, gives away property, being unmarried and without children. Forty years later he dies, having moved to France, become domiciled there, maybe even acquired French nationality, it does not matter, having bought property, and so on, having acquired a wife, having acquired children, and dies. The forced heirship claims and the claw-back claims will apply so far as French law is concerned to the gifts made while he was in England, before he was married, before he had any children before anybody knew that there was even any possibility of that. This kind of example was put to

the Commission during the experts' meetings and the answer you get back is something like, "Well, it's important from the point of view of social solidarity." All right, that is a political question, but also under this regulation the deceased will have the option, he can opt for his national law, which let us assume in this case is English. That is absolutely true, but first of all he has got to be satisfied that he is within the scope of the regulation at all because he has become habitually resident, which is an uncertain quantity. Secondly, he has got to actually make the choice in a will or other testamentary document. Thirdly, he must not change his nationality after he has done that, because if he changes his nationality his choice goes out of the window. It seems to me that even with all of those points taken into account, the answer is that it misses the point entirely because it is not the donor that you need to be worried about, it is the donee who wants to know, and he has no way of guaranteeing that the choice made by the donor will ever be effective because it is entirely within the control of the donor whether he becomes a French national or whether he revokes his will, or whatever he does. So the risk is going to be there in relation to everything that anybody does.

Q34 Chairman: Can we just move on quickly to this Article 22, the special succession regimes? In fact, given the exceptions listed there, do they actually undermine what it is trying to do in any event?

Professor Matthews: Yes, they do. They essentially bring back schismatic systems because they are saying the law of the *situs* rules where any of these special systems applies. These are all special pleading. Different systems say, "Yes, but we have got this particular problem with the ancestral homelands of X, Y, Z, and there are special rules which apply to those," and so on. Most of these special rules are attacked by the EU when you join the Union, but some of them are still left.

Q35 Chairman: The question of the collection of tax. You have talked about the process as it currently stands with us and creditors. Is there anything you want to add to that of the impact this proposal might have on taxation and creditors?

Professor Matthews: Yes. There is a provision in Article 21(2)(b) which is designed to deal with this particular problem. It is, however, ineptly worded so far as the UK is concerned because it refers to provisions for the collection of tax before the final distribution to the beneficiaries, whereas in the UK the tax legislation collects it at the point before you even get the grant of probate. You cannot get the grant of probate until you have paid the tax. Whether it could be construed or amended so as to more precisely correspond with what happens, I do not know.

Q36 Chairman: Thank you. About land and shares, which again we have talked about, are there any special points you want to raise?

Professor Matthews: There is a very big problem here. One of the spectres, if you like, that haunted the discussions of the experts was what do you do about the French usufruct over English land or the English trust over French land? The question was, how far are these foreign legal concepts to be allowed to create interests or rights over land outside their own legal system, because there are all kinds of interested parties like the Land Registry, and so on, who have something to say about that. The way in which the draft regulation deals with this is by purporting to exclude from the scope of the regulation all such questions. The way, however, it is done is, I think, not effective because what it says in Article 1(3) is: “The following shall be excluded from the scope of this Regulation ... (j) the nature of rights in rem relating to property and publicising these rights.” That only says, as I understand it, that the regulation does not require any Member State to introduce foreign or different ideas into their own *domestic* rules of law. It does not mean to say that foreign concepts cannot govern the land or other property inside your country if the applicable law for the succession in which

that property is contained is the foreign law. I will give you an example from the existing law. As I have already told you, the choice of law rule for land and succession is always the place of the land, so there can never be a case under the present system where a French usufruct could govern English land. It cannot happen. But it is possible, for example, for a person to die domiciled in France and have *moveable* property in England, let us say a valuable painting, and in his will the deceased has actually given the painting to one person, A, but has given a usufruct in the painting to B, so that B can actually hang it in his house for the rest of his life and then when he dies A will get it in full ownership and can do what he likes with it. If the painting is in England that will nevertheless be enforced in principle by the English courts. If A and B were having a row about the possession of the painting before the English courts, the English courts would say, "Well, the applicable law for the succession was French law. French law allows the creation of usufructs. It is created over this moveable property, therefore, A, you must allow B to enjoy the property and take possession of it for the rest of his life." It seems to me that if that is possible at present the question is, does this provision 1(3)(j) take that away? Does it row backwards so that that is no longer possible? To my mind it is not doing that at all. It is simply saying that the domestic law of England does not have to change to introduce the concept of the French usufruct. Therefore, since 1(3)(j) does not distinguish between moveable and immovable property but applies equally to both, it seems to me that the effect of this regulation will be that, since for the first time the applicable law for the succession to land can be foreign law, it means that you now have the possibility of a French usufruct applying to English land. At the same time, it is clear from 1(3)(j) that there is no requirement to change the Land Registry rules so that anybody will know about it, because it says you do not have to do anything about changing the publicising of the rights. So we have actually got the worst of all possible worlds. On the other hand, you could say, if you wanted to be entrepreneurial, that it means the French will have to

accept trusts on their land. I do not know whether they have worked that out. I should, my Lord Chairman, also say this: in the explanatory memorandum it seems to me that what the Commission is saying about this provision is unsupportable. They say this prevents the situation I have just described from happening. I do not think it does.

Q37 Chairman: Thank you. Can we go on quickly to jurisdiction conferring on the courts of a Member State the residual jurisdiction to deal with the succession of those who die habitually resident in a third country and combine that with a limited facility for the transfer of jurisdiction? What is the implication for that? Does it bring about people going around forum-shopping, looking for the best courts?

Professor Matthews: Can I start one step back and just say that the main provision in the regulation is for the courts of the country where the deceased has his habitual residence to take jurisdiction? What is curious is that although that is the same as the applicable law, in the case of applicable law you have the choice to go for the law of your nationality. You do not have that freedom in the case of jurisdiction, which could lead you to the case where you have moved to France, you have become habitually resident in France but you are a Brit, so you want in this case, let us say, English law to govern. So you make the choice of English law in your will and therefore the French courts will have jurisdiction but have to decide all the questions by reference to English law. That is not actually going to make things easier, it is actually going to make things more difficult because there are certain types of a dispute which can arise on succession, a proprietary estoppel claim, for example, or a constructive trust claim. Can you imagine a French judge trying to decide a question of that sort? I mean, it is just not fair. The judge has got no experience of that. He is not used to the exercise of discretion anyway because the French Court forbids judges to exercise discretion. It says, "You apply the law and that is it." So I think the main provision on jurisdiction is defective to start with. This provision, the residual jurisdiction, kicks in at the point where you have got a

person who does not have habitual residence in a Member State and therefore you cannot apply the primary rule, but there is some other reason why an EU state should be involved, either because property is here or because he used to be. In fact, it is because property is in the Member State that the question arises. Then there is a kind of lexical ordering of connecting factors which say which court should have jurisdiction and it seems to me that you can argue about what that order should be, whether it should be in the order which it is now, but I do not see anything wrong in principle with the idea of having an order which applies in a case where somebody is habitually resident outside the European Union.

Q38 Chairman: Lastly, we are talking about the recognition and enforcement of decisions and authentic instruments. This Committee has generally been supportive of measures which have supported mutual recognition, but what are the policy and technical and practical problems in connection with the recognition and enforcement of these things, as you see it, in this connection?

Professor Matthews: In relation to the mutual recognition and enforcement of judgments, I do not have anything particular to say. It seems to me – and I am a litigator by experience – that that is a positive thing. What I feel rather more doubtful about is whether it is appropriate in any way to apply it in the case of authentic instruments. At the beginning there is a real problem about the definition of “authentic instruments” because no UK notary’s acts in relation to succession are ever likely to qualify as authentic instruments for this purpose, so it is actually a one-way street. It is not a level playing field at all. There is that aspect to it, but more than that, the problem is that in the succession area what you are dealing with is not a dispute or an agreement between two people as between themselves in some kind of contractual context. What you are dealing with is the allocation of rights in relation to property between heirs and creditors who may not know of each other’s existence. So anything that happens in front of the notary is being done in a context of people doing a deal,

not people having a row. It is not litigation. Notaries are not judges. They do not have natural justice concepts and things like that. So you get in a notarial act from somewhere in southern Europe which says that the ownership of this piece of land in Scunthorpe is now different from what it was and you say to yourself, “Well, hang on! What notice was given to the people who have interests in this?” The answer is, none, and the only way in which you can challenge an authentic instrument which would otherwise have direct effect is to take proceedings in the place where it was made. You cannot challenge it in proceedings in the target country. So I think you have got very severe problems in justifying, as things stand, the wholesale recognition and enforcement of authentic instruments in relation to succession. This is not like the Brussels I position, for example, where you can also have enforcement of authentic instruments, but that is in the context usually of contracts where you have got people involved and they have made a deal and for some reason it has not gone through, or something else has gone wrong. This is a case, as I said, where the people who have interests may not even know of the hearing before the notary and the fact that the notary is proposing to do anything at all, let alone challenge it, and so on.

Q39 Lord MacLennan of Rogart: I wonder if I might ask what I would describe as a layman’s question? Is it your view, Professor Matthews, that this exercise has really no point, by which I mean the attempt to produce a regulation which may simplify for the man in the street his understanding of what is going to be the consequence of his death? Is it your view that the complexity of the law is such that there are bound to be anomalies and difficult matters for the courts in all the countries of the Union?

Professor Matthews: Yes. You are substituting one set of complications for an existing set of complications.

Q40 Lord MacLennan of Rogart: Yes, but it does not feel that that is the objective behind the regulation. The objective is simplification or clarification. Is that actually an unreasonable goal, in your view, or is it not an attainable goal because of the existing complexities?

Professor Matthews: I do not think it is an unreasonable goal. I think it is at present attainable only with great difficulty and with more resources and more discussion about how to resolve the problems. I think this would have been a better regulation if it had concentrated on a more limited range of matters, for example the applicable law question. I think with a bit of goodwill we could have produced something which was likely to work and resolve that difficult question. We could, perhaps, have added on to that something about jurisdiction and judgments, but as for the rest I would have said it is biting off more than we can reasonably chew, digest and absorb.

Q41 Lord Renton of Mount Harry: If I may follow on from Lord MacLennan, again as an absolute non-expert in this field. Where you started, the difference between civil law and common law, is that not always likely to make this an impossibility to solve?

Professor Matthews: I would like to think it is not an impossibility. I agree that it is extremely difficult and that is why I think you should only deal with one bit at a time, and once you have solved the first bit and the most important bit, the applicable law question, move on, if you like, to consider whether you can do something about the next point. But I do think that trying to do everything at once has left us with what I am afraid to say is a second-rate draft which bristles with difficulties at every turn. It is not helped by the fact that the translation is defective. The original is French. The translation is – well, you know what a translation should be. It should be both idiomatic and accurate, and this is neither.

Chairman: There is one last question I would like to ask you. Are there any other questions from any of my colleagues?

Q42 Lord Burnett: Just one. On a lighter note, my Lord Chairman, I wonder whether the case involving the celebrated and allegedly very gifted actor, Errol Flynn is still good law. He was born, was he, in Tasmania or on the high seas?

Professor Matthews: Tasmania, I think.

Q43 Lord Burnett: He was, and did he claim that he did not have a domicile? Is my memory correct?

Professor Matthews: Well, he was dead by the time it mattered, but he certainly spent the last few years of his life living on a boat around the Caribbean and the Mediterranean. His father had been born, I think, in London and he lived his life in very many different parts of the world including California and Jamaica, where he had houses, and at his death there was a very big question as to where he died domiciled, which was resolved by Mr Justice Megarry, in a rather erudite and long judgment.

Q44 Chairman: The question I was going to ask you was this, and you have already kindly given us your opinion about whether the Government should opt in or not: we are also charged with having to answer the question as to whether or not this proposal offends against the principle of subsidiarity. Is that a matter on which you would be prepared to express a view? In fact, I suppose it is relatively simple from our point of view. Whether you agree with what is proposed or not is irrelevant. Is what is proposed achievable, other than by action at a European level?

Professor Matthews: I think if you are going to have a uniform set of private international law rules you cannot easily do this at a national level. You can, of course, embark upon a series of bilateral negotiations, and there has been a little bit of that in the past in relation to jurisdiction and judgments, but to be effective it has to be done at the European level.

Q45 Lord Wedderburn of Charlton: Most of what you have said today is in effect a case against opting in and about, at least from our point of view, the difficulty of negotiations thereafter? That is the way my mind reacts to what you have said. Is that perverse?

Professor Matthews: No, it is not perverse. I think the safer course is not to opt in at this stage, to see where you get to in terms of the negotiation and if you think you have gone far enough to justify it then opting in at that stage; but if not, then not opting in.

Chairman: Thank you very much. Professor Matthews, can I, on behalf of the Committee, thank you very much indeed for your presentation in answering the questions. It is a difficult subject and I think it is fair to say that you have fascinated us and kept our interest and informed the Committee and we are really very grateful indeed. I am sure we know a lot more about it than we did when we started. Thank you so much.